IT'S 3 A.M.: DO YOU KNOW WHAT YOUR STAFF JUST POSTED? SOCIAL MEDIA ETHICS PITFALLS FOR APPELLATE LAWYERS AND JUDGES

John G. Browning*

Appellate lawyers, judges, and the staff who work for them live and work in an increasingly wired world. More than 72% of adult Americans use social media to connect with one another, engage with news content, share information, and entertain themselves.[1] Facebook remains the most popular platform, with over 2.3 billion users worldwide, but sites like Instagram, Snapchat, Twitter, YouTube, and LinkedIn are also hugely popular.[2] The amount of content generated or shared on social media platforms is staggering: Twitter alone processes more than one billion tweets every forty-eight hours, and in 2020 there were 7,000 tweets about just TV or movies every minute.[3] Given social media's popularity and the sheer volume of content posted on various social media platforms, the potential for using social media in ways that violate the ethical obligations of lawyers and judges looms large. Lawyers from nearly all practice areas have tweeted, snapchatted, posted, and instagrammed their way into disciplinary proceedings, judicially imposed sanctions, and the unemploy-

* John G. Browning is a former Justice on Texas's Fifth Court of Appeals, a partner at Spencer Fane LLP, and Visiting Associate Professor at Faulkner University's Thomas Goode Jones School of Law. He is the author of several books and numerous articles on social media and the law.

1. *Demographics of Social Media Users and Adoption in the United States*, PEW RES. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media/.

2. *Id.*

3. Christina Newberry, *36 Twitter Stats All Marketers Need to Know in 2021*, HOOTSUITE (Feb. 3, 2021), https://blog.hootsuite.com/twitter-statistics/.

ment ranks.[4] And yes, these include even lawyers and judges from the comparatively staid, even monastic confines of the appellate world.

This article examines the ethical risks for appellate lawyers and judges in using social media. While reviewing the record in an underlying case and engaging in legal research may not be typical paths to online ignominy, breaching confidentiality by discussing certain aspects of a case on social media platforms is a very real danger. An equally significant but often overlooked area of responsibility regarding social media stems from appellate judges' and lawyers' obligation to ensure that their non-lawyer staff adhere to applicable standards of conduct. In recent years, being the "digital brother's keeper" of one's non-lawyer staff has assumed increasing importance, as the country's polarized political climate, pandemic-induced anxiety, and remote working environments have created a perfect storm for ethical risks and reputational damage for lawyers and their firms as well as for judges and their courts. As this article demonstrates, while judicial ethics authorities are beginning to provide guidance on this subject and courts are adopting social media policies for their staffs, much work remains to be done.

I. THE SINS OF OTHERS

Before examining the ethical risks for appellate lawyers and judges for their own conduct on social media, we begin with a look at the ethical dangers arising from non-lawyer staff members' use of such platforms. American Bar Association (ABA) Model Rule of Professional Conduct 5.3 provides that both partners and lawyers with direct supervisory authority over non-lawyers must make "reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."[5] Rule 5.3(c) mandates that a

4. *See infra* Part II.

5. MODEL RULES OF PROF'L CONDUCT r. 5.3 (AM. BAR ASS'N 2020).

lawyer shall be responsible for conduct of a non-lawyer employee that would be a violation of the Rules if engaged in by a lawyer, if the lawyer orders or ratifies the conduct involved, or if the lawyer is a partner or someone with comparable managerial authority and the lawyer "knows of the conduct at the time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."[6] For judges, Canon 1.2 of the ABA Model Code of Judicial Conduct states that "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[7] Canon 2.12(A) stipulates that "[a] judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code."[8] Among those obligations, ones that loom large in the age of Facebook and Twitter include Canon 2.10 and Canon 3.5.[9] Canon 2.10 admonishes judges not to make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a pending or impending matter. Canon 2.10(C) states that a judge "shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making in paragraphs (A) and (B)."[10]

A. Lawyers, Their Non-lawyer Staff, and Social Media

In a profession in which maintaining confidentiality is paramount, and in which one's online reputation

6. *Id.* at r. 5.3(c).

7. MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS'N 2020).

8. *Id.* at r. 2.12(A) (Supervisory Duties).

9. *Id.* at r. 2.10; *id.* at r. 3.5 ("A judge shall not intentionally disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties.").

10. *Id.* at r. 2.10(C).

matters more than ever before,[11] the need to know what one's non-lawyer staff may be posting on social media is mission critical. Consider, for example, some recent cautionary tales. In early May 2020, lawyers at Dallas-based Thompson & Knight learned that the firm's document services manager, Kevin Bain, had made disturbing comments on Facebook related to his anger at retail businesses requiring shoppers to wear face masks during the pandemic. Referring to a local grocery store's policy, Bain posted that any business insisting that he wear a mask "will get told to kiss my Corona ass and will lose my business forever."[12] Following a series of threatening comments involving his handgun proficiency, Bain went on to say, "They have reached the limit. I have more power than they do . . . they just don't know it yet."[13]

Thompson & Knight reacted swiftly to their employee's social media outburst, firing Bain for the "threatening and offensive" post.[14] The firm also released a statement, saying, "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."[15]

And if a staff member posting threatening comments online is not troubling enough for lawyers, how about online conduct that threatens and "outs" witnesses or informants as "snitches," exposing them to intimi-

11. *See, e.g.*, John G. Browning, *The Digital Detractor: A New Ethical Trap for Lawyers*, 77 TEX. B.J. 611, 611–15 (2014). In 2019, 34% of consumers relied upon online search engines or resources like a lawyer's website or social media presence to find a lawyer, surpassing the 32% who relied on referrals from family or friends. *Methods Used By Consumers in the United States to Find a Lawyer in 2019*, STATISTA (Nov. 4, 2020), https://www.statista.com/statistics/940903/how-consumers-find-a-lawyer-united-states/.

12. Aebra Coe, *Thompson & Knight Fires Manager for COVID-19 Mask Post*, LAW360 (May 9, 2020, 6:41 PM), https://www.law360.com/articles/1272075/thompson-knight-fires-manager-for-covid-19-mask-post.

13. *Id.*

14. *Id.*

15. *Id.*

dation, reprisals, or even death? That was the case with Tawanna Hilliard, a paralegal working at the U.S. Attorney's Office in New Jersey.[16] In August 2019, Hilliard was indicted on witness tampering, obstruction of justice, and conspiracy charges in Brooklyn federal court.[17] The paralegal allegedly used her position and official work computer at the United States Attorney's Office to help her son Tyquan, a member of the Bronx 5-9 Brims branch of the notorious Bloods street gang who was serving a ten-year prison sentence for robbery.[18] According to federal authorities, in 2016, Ms. Hilliard, a nine-year employee, used her work computer to help her son's gang find cooperating witnesses, as well as to obtain the personal information of a rival gang member whom she thought was "trying to jam [her] son up."[19] And in 2018, during the then-pending robbery case against her son, Hilliard allegedly posted a video on YouTube showing a post-arrest statement given by her son's co-defendant about the robbery in order to prove he was "snitching."[20] She allegedly titled the video "NYC Brim Gang Member Snitching Pt. 1," and the video's circulation led to the witness and his family receiving death threats from fellow Bloods gang members.[21]

That video clip had been obtained by the U.S. Attorney's Office as discovery material in Tyquan Hilliard's case.[22] A search of the paralegal's home led to video interviews with the co-defendant and another

16. Debra Cassens Weiss, *Former Paralegal at U.S. Attorney's Office Accused of Using Prosecutor Info to Expose Informants*, ABA J. (Aug. 16, 2019, 2:29 PM), https://www.abajournal.com/news/article/former-paralegal-at-us-attorneys-office-is-accused-of-using-prosecutor-info-to-expose-informants.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*; Antonia Noori Farzan, *A Gang Member's Mother Worked in the U.S. Attorney's Office. Now She's Accused of Outing "Snitches,"* WASH. POST (Aug. 14, 2019), https://www.washingtonpost.com/nation/2019/08/14/tawanna-hilliard-paralegal-snitches-bloods-gang/.

22. Farzan, *supra* note 21.

accomplice being found on Hilliard's computer.[23] Investigators also recovered text messages from Ms. Hilliard in which she complained that the co-defendant was "giving up murders, victims, shooters, and all" and that her son "has no line of defense because his co-d told everything."[24] Hilliard pleaded not guilty and was ordered to wear an ankle monitor, stay off social media, and refrain from contact with her son and other gang members.[25] Hilliard's son had allegedly sent letters to the FBI and a senior Assistant U.S. Attorney in the Eastern District of New York threatening to upload more video clips of his co-defendant's statement in an attempt to put him in danger.[26]

B. Courthouse Staff and Social Media

Of course, lawyers are not the only ones who must be wary when it comes to the online behavior of their staff. Judges—including appellate judges—must be as well. In June 2020, the Stanislaus County (California) Superior Court was compelled to launch an internal investigation after a political tweet was posted to the court's official Twitter account.[27] The post was a retweet of a tweet originally made by One America News personality Alex Salvi, regarding a news item about a protester being injured during the removal of a Confederate statue in Portsmouth, Virginia.[28] The retweet attributed to the court's account featured the comment, "Some like their Karma instantly. I'll take mine in November. #Trump2020."[29] The court's account also in-

23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. Sabra Stafford, *Stanislaus County Court Investigating Political Comments on Official Twitter Account*, CERES COURIER (June 17, 2020, 9:31 AM), https://www.cerescourier.com/news/local/stanislaus-county-court-investigating-political-comments-official-twitter-account/.
28. *Id.*
29. *Id.*

cluded a "like" of a retweet by Fox News host Jeanine Pirro as well.[30]

The court reacted quickly by deleting the post and posting an apology, along with a terse statement that the official account had been "compromised."[31] The following day, the court's Twitter account displayed a more detailed tweet, reading "Yesterday's tweet about race and partisan politics was unauthorized and completely contrary to the Court's mission to provide equal access to justice and serve the needs of our community with integrity, quality, and fairness. The Court sincerely apologizes for the post."[32] Later, the court's executive officer provided a statement indicating that an unnamed employee was responsible for the political tweet, and that an internal personnel investigation was ongoing.[33] The statement promised "appropriate action consistent with its personnel rules and applicable laws," and added that as a preventative measure, the court "imposed additional restrictions on access to its social media accounts."[34]

Rogue court employees are hardly a West Coast phenomenon. In June 2020, intrepid journalists at the *New York Law Journal* discovered and reported on a series of racist and offensive Facebook posts by Sergeant Terri Pinto Napolitano, a state court officer assigned to a Brooklyn courthouse.[35] The posts in question showed former President Barack Obama hanging from a noose, under a headline that read "The True American Dream."[36] Another post depicted former Secretary of State Hillary Clinton on her way to a gallows with a caption stating "It's Not Over 'Til the Fat Lady

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Jason Grant, *Brooklyn Criminal Court Officer is Fired Over "Vile, Racist" Facebook Posts*, NEW YORK L.J. (Dec. 23, 2020, 11:36 AM), https://www.law.com/newyorklawjournal/2020/12/23/brooklyn-criminal-court-officer-is-fired-over-vile-racist-facebook-post/?slreturn=20210527133652.

36. *Id.*

Swings."[37] The law journal's revelations ignited a media firestorm, and amid the uproar, Napolitano was suspended and had her service weapon taken away.[38]

As the media attention increased, a demonstration was held at the Kings County Supreme Court building.[39] Protesters from the Brooklyn Anti-Violence Coalition condemned Napolitano and called for her to be fired.[40] Her own union, the New York State Court Officers Association, joined in the condemnation.[41] It issued a statement, calling her conduct

> abhorrent, by anyone, at any time, and under any circumstances. But at this critical moment in our history—when our nation is reeling from the death of George Floyd and its aftermath—it is a sickening and unpardonable offense against every colleague in our court system, as well as the vast and diverse public that we serve.[42]

New York State Chief Judge Janet DiFiore also reacted, circulating a memo to court personnel calling the post "vile," "racist," and "abhorrent . . . at any time."[43] Following an internal investigation and a disciplinary hearing, Napolitano was terminated on December 23, 2020.[44]

Appellate courts are hardly immune to the problem of staffers who are unable to resist the siren song of social media. Arguably the most high-profile example comes from Texas's highest criminal court, the Court of Criminal Appeals.[45] In May 2018, Olga Zuniga—a for-

37. *Id.*

38. *Brooklyn Court Officer Fired Six Months After Racist Posts Caused a Storm*, BROOKLYN DAILY EAGLE (Dec. 27, 2020), https://brooklyneagle.com/articles/2020/12/27/brooklyn-court-officer-fired-six-months-after-racist-posts-caused-a-storm.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Emma Platoff, *Lawsuit Claims One of Texas' Top Republican Judges Fired His Secretary for Supporting Democrats on Social Media*, TEX. TRIB.

mer secretary to Court of Criminal Appeals Judge Kevin Yeary—filed a federal lawsuit complaining that she had been fired from her job because of Facebook posts in which she criticized President Trump and other Republican politicians while praising Democratic politicians.[46] According to the lawsuit, Zuniga had worked as a career legal secretary in state government, including at the Texas Attorney General's Office, and had been an executive assistant at the Court of Criminal Appeals since 2003.[47] Zuniga alleged Judge Yeary "counseled" her in November 2016 about her Facebook posts critical of Republican figures.[48] Judge Yeary's periodic reviews of her Facebook activity continued throughout 2017, with Judge Yeary expressing "disapproval" of her politically charged posts.[49] Ultimately, according to Zuniga's lawsuit, after again disapproving of posts Zuniga had made in September 2017 critical of stances taken by both Governor Gregg Abbott and Lieutenant Governor Dan Patrick on immigration-related issues, Judge Yeary terminated her on October 11, 2017.[50]

Judge Yeary and the Court of Criminal Appeals responded with two motions to dismiss.[51] In both motions, among other arguments, the defense pointed out numerous examples of Zuniga's Facebook posts associating herself with the court, its activities, and its personnel, as well as posts containing lewd content, to demonstrate her use of Facebook while at work on her

(May 23, 2018, 11:00 AM), https://www.texastribune.org/2018/05/23/lawsuit-claims-republican-judge-fired-secretary-social-media-posts-sup/.

46. Plaintiff's Original Complaint at 5, Zuniga v. Yeary, 2020 WL 572724 (W.D. Tex. filed May 22, 2018) (No. 1:18-CV-00434-RP); *see also* Platoff, *supra* note 45.

47. *See* Plaintiff's Original Complaint, *supra* note 46, at 3.

48. *Id.* at 4.

49. *Id.* at 4–5.

50. *Id.* at 5.

51. Defendant's Second Motion to Dismiss, Zuniga v. Yeary, 2020 WL 572724 (W.D. Tex. filed March 28, 2019) (No. 1:18CV-00434-RP); Defendant's Motion to Dismiss, Zuniga v. Yeary, U.S. Dist. LEXIS 18768 (W.D. Tex. filed July 30, 2018) (No. 1:18CV-00434-RP).

official state computer.[52] The motions also argued that dismissal was warranted based on the fact that, as someone employed in a judge's chambers, Zuniga was an employee with access to confidential information, and one whose job functions required trust and loyalty.[53] Moreover, Zuniga's online comments suggesting that partisan elected judges could not be trusted if they belonged to a certain political party undermined the court's interest in maintaining authority and credibility given that Texas elects judges in partisan elections.[54] In addition, the motions to dismiss argued that, as Zuniga herself admitted, there were other factors leading to her termination, such as attendance problems, inaccurate leave reporting, the failure to complete assignments, and other job performance issues unrelated to any dispute over the plaintiff's political views.[55] The second motion to dismiss (filed after Zuniga amended her complaint) argued that Zuniga had failed to state a valid First Amendment claim because her posts were so disruptive and hostile to Judge Yeary and the Court of Criminal Appeals that her free speech rights as a private citizen were outweighed by the state's interest in her effective performance as a public employee.[56] Attached to the motion to dismiss were screenshots of Zuniga's posts as well as Judge Yeary's statement to the Texas Workforce Commission discussing his reasons for terminating Zuniga, including her "indecent and offensive" Facebook posts.[57]

Because the exhibits relied upon by the defense were disputed by the plaintiff, and because this was a Rule 12(b)(6) motion rather than a summary judgment,

52. Defendant's Second Motion to Dismiss, *supra* note 51, at 3–6; Defendant's Motion to Dismiss, *supra* note 51, at 3–6.

53. Defendant's Second Motion to Dismiss, *supra* note 51, at 13–15; Defendant's Motion to Dismiss, *supra* note 51, at 10–13.

54. Defendant's Second Motion to Dismiss, *supra* note 51, at 16–17; Defendant's Motion to Dismiss, *supra* note 51, at 16–18.

55. Defendant's Second Motion to Dismiss, *supra* note 51, at 11–12; Defendant's Motion to Dismiss, *supra* note 51, at 10.

56. Defendant's Second Motion to Dismiss, *supra* note 51, at 8–9, 18.

57. *Id.* at 3–6; Defendant's Motion to Dismiss, *supra* note 51, at 3–6.

the court granted Zuniga's motion to strike the exhibits and recommended denial of the motion to dismiss itself—while specifically indicating that the defense could re-file as a motion for summary judgment.[58] The defendants appealed this ruling, and perhaps Zuniga and her attorney sensed a victory that would be short-lived. On September 11, 2020, the parties entered into a joint stipulation of dismissal with prejudice, and the appeal before the Fifth Circuit was withdrawn; each side bore its own court costs and attorney's fees.[59]

II. ETHICAL PITFALLS FOR APPELLATE LAWYERS AND JUDGES

Of course, it is not just the online activity of staff members that presents ethical concerns. The ethical dangers of social media for lawyers transcend practice boundaries and have been well documented.[60] Lawyers have gotten into trouble for misrepresenting who they are on social media, contacting parties represented by counsel via social media, spoliating social media evidence, and a wide range of other conduct on social media.[61] Appellate lawyers and judges may be lulled into a false sense of security about their own social media risks, since they usually have no reason to investigate a case or litigant on social media like a trial attorney, or to research the social media posts of prospective jurors. However, as the following two cautionary tales demonstrate, any online comments about a pending proceed-

58. Zuniga v. Yeary, No. 1:18-CV-434-RP, 2020 WL 572724, at *4 (W.D. Tex. Feb. 5, 2020) (Austin, Mag. J.).

59. Joint Stipulation of Dismissal with Prejudice, Zuniga v. Yeary, 2020 WL 572724 (W.D. Tex. filed Sept. 11, 2020) (No. 1:18-CV-434-RP).

60. *See generally* JAN JACOBOWITZ & JOHN G. BROWNING, LEGAL ETHICS AND SOCIAL MEDIA: A PRACTITIONER'S HANDBOOK (2017).

61. *See, e.g.*, John G. Browning, *Keep Your "Friends" Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media*, 3 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 1 (2013); John G. Browning, *The New Duty of Digital Competence: Being Ethical and Competent in the Age of Facebook and Twitter*, 44 DAYTON L. REV. 2 (Spring 2019); Agnieszka McPeak, *Social Media Snooping and Its Ethical Bounds*, 46 ARIZ. ST. L.J. 845 (2014).

ing or ones that negatively impact a justice's integrity or impartiality can be damaging.

A. An Appellate Staff Attorney Takes Heat for Her Tweets

In 2010, Sarah Peterson Herr was a newly minted graduate of Washburn University School of Law in Kansas when she started her first job at the Kansas Court of Appeals as a judicial assistant to Judge Christel Marquardt.[62] About a year later, she was promoted to research attorney, the position she held on November 15, 2012.[63] When she reported for work that day, Herr noticed that there was an unusual amount of security.[64] She soon learned the reason why: that day, the Kansas Supreme Court would host an attorney disciplinary proceeding against former Kansas Attorney General Phill Kline.[65] While serving as attorney general, Kline attracted controversy over the use of his office to investigate and prosecute abortion providers such as Planned Parenthood.[66]

The high-profile atmosphere prompted Herr's first tweet of the day: "Holy balls, There are literally fifteen cops here for the Phil [*sic*] Kline case today. Thus I actually wore my badge."[67] The panel hearing Kline's disciplinary case consisted of two judges from the Kansas Supreme Court, Judge Green and Judge Arnold-Burger from the Kansas Court of Appeals, and three district

62. In re Sarah A. Peterson Herr, Kansas Disciplinary Case No. DA12007, at *2 (decided Jan. 13, 2014).

63. *Id.* at *3.

64. *Id.*

65. *Id.*

66. In 2013, Kline's law license was indefinitely suspended by the Kansas Supreme Court, which found he had violated a number of professional conduct rules, including providing false testimony. Tony Rizzo, *Phill Kline is Indefinitely Suspended from Practicing Law*, KAN. CITY STAR (Nov. 11, 2020, 10:16 am), https://www.kansascity.com/news/local/article329802/Phill-Kline-is-indefinitely-suspended-from-practicing-law.html.

67. In re Sarah A. Peterson Herr, Kansas Disciplinary Case. No. DA12007 at *3.

court judges.[68] Herr decided to view the oral arguments using the computer in her office, where she also proceeded to live-tweet the proceedings, sending out a series of tweets that included the following:

- "You can watch that naughty naughty boy, Mr. Kilein [*sic*], live! live.kscourts.org/live.php"[69]
- "Why is Phil Klein [*sic*] smiling? There is nothing to smile about douchebag."[70]
- "ARE YOU FREAKING KIDDING ME. WHERE ARE THE VICTIMS? ALL THE PEOPLE WITH THE RECORDS WHO WERE STOLEN."[71]
- "You don't think a sealed document is meant to be confidential. BURN."[72]
- "I predict that he will be disbarred for a period not less than 7 years."[73]
- "I might be a little feisty today."[74]

With that last note, about whether she might be too "feisty,"[75] Herr may have made her most salient observation. While she did not associate her tweets with her job, at least some of Herr's Twitter followers were aware of her position with the Court of Appeals, and now everyone also knew her opinion of Phill Kline—including her accusation that Kline's "witch hunt" helped lead to a doctor's murder.[76] A journalist with the Associated Press learned of Herr's tweets and contacted the Kansas Judicial Center's public information officer the next day for comment.[77] That officer quickly met with the court's personnel director, who immediately

68. *Id.*
69. *Id.* at *4.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *See id.*
76. *Id.*
77. *Id.* at *5.

called Herr and instructed her to cease tweeting.[78] Shortly thereafter, a meeting was held with the personnel director, public information officer, and Judge Stephen Hill, acting Chief for the Court of Appeals.[79] Herr's supervising judge (who was traveling out of state) contacted her by phone and advised her she was being placed on leave and would be escorted out of the building.[80]

Shortly before surrendering her badge and key and taking this "walk of shame" out of the building, Herr deleted her tweets and "possibly" deleted the internet search history on her work computer.[81] But the damage had already been done. Later that day, Herr issued an "apology statement" in which she stated, in part:

> 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 . . . I apologize that because the comments were made on Twitter—and thus public—that they were perceived as a reflection on the Kansas courts.[82]

The following Monday, Herr was terminated.[83] Within days, she was referred to the Kansas bar's disciplinary body by the clerk of the appellate courts (Herr also self-reported).[84] Kline's counsel filed a motion to stay his own disciplinary proceedings pending a decision on the "communications of support staff."[85]

For over seven months, Herr was unemployed.[86] She eventually found temporary employment doing document review at a Kansas City-area law firm.[87] Fol-

78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at *6.
83. *Id.*
84. *Id.* at *6–7.
85. *Id.* at *7.
86. *Id.*
87. *Id.*

lowing a December 2013 disciplinary hearing into her conduct, the hearing panel concluded that Herr had engaged in professional misconduct.[88] Specifically, the panel felt that she had violated Kansas Rule of Professional Conduct 8.4(c) regarding engaging in conduct "involving dishonesty, fraud, deceit, or misrepresentation" and Kansas Rule of Professional Conduct 8.4(e), stating or implying "an ability to influence improperly a government agency or official," for one of her tweets in which she predicted that Kline would be disbarred for seven years.[89] According to the panel, such a prediction not only misrepresented the law, Herr "had no legal or factual basis on which to base such a prediction," and her speculation "implied a degree of influence which she did not possess."[90]

The hearing panel also found that Herr's tweeted prediction of seven years' disbarment was "prejudicial to the administration of justice" and thus violated Kansas Rule of Professional Conduct 8.4 (l).[91] As the panel pointed out, not only did the statement prejudice Kline's pending disciplinary proceeding and prompt his attorney to call for an investigation into potential bias against Kline at the Kansas Judicial Center, the tweets' overall tone "revealed a disrespect for a litigant before the appellate courts as well as a disrespect for the Supreme Court panel hearing the case."[92] Aggravating the situation, the panel also noted, was the fact that Herr's conduct "occurred in the course of her employment in the Judicial Center on court time," and that her "position gave her a unique platform from which to speak."[93]

Finding mitigating circumstances,[94] the hearing panel recommended an informal admonition—the light-

88. *Id.*

89. *Id.* at *7–8.

90. *Id.*

91. *Id.* at *8.

92. *Id.*

93. *Id.*

94. Herr's lack of a prior disciplinary history, her public apology and self-reporting, and her lack of law practice experience were seen as mitigating factors. *Id.* at *8–9.

est penalty that could be imposed.[95] And while the sanction itself may have been lenient, the damage had already been done to Herr's professional reputation and enshrined her as a cautionary tale for the digital age. If the irony of a lawyer tweeting with relish about the disciplinary woes of another only to wind up facing disciplinary action herself is not enough of an object lesson, consider this. At the time of her ill-considered tweets, Herr's Twitter profile picture was a photo of herself with her forefinger pressed to her lips in a "hush" gesture.[96] If only she had taken her own advice.

B. An Appellate Justice and "TMI" on Facebook

From loose lips that can sink judicial ships, we move on to the perils of oversharing on social media—this time not by an appellate lawyer, but by an appellate judge.[97] In November 2017, Ohio Supreme Court Justice Bill O'Neill was also a Democratic candidate for governor of Ohio.[98] On the national landscape, U.S. Senator Al Franken of Minnesota was embroiled in a highly publicized scandal involving his alleged sexual misconduct with radio host Leeann Tweeden during a

95. *Id.*; Debra Cassens Weiss, *Tweeting Lawyer Gets Lightest Sanction for Disbarment Prediction During AG's Ethics Hearing*, ABA J. (Jan. 15, 2014), http://www.abajournal.com/news/article/tweeting_lawyer_gets_lightest_recommended_sanction_for_disbarment_predictio. And contrary to Herr's own tweeted prediction, in October 2013, Phill Kline was indefinitely suspended from the practice of law by the Kansas Supreme Court, a sentence that would allow Kline to apply for reinstatement within three years. *See generally* Debra Cassens Weiss, *Tweeting Lawyer Gets Lightest Sanction for Disbarment Prediction During AG's Ethics Hearing*, ABA J. (Jan. 15, 2014), http://www.abajournal.com/news/article/tweeting_lawyer_gets_lightest_recommended_sanction_for_disbarment_predictio.

96. James Nye, *"Nothing to smile about, d***che bag": Female attorney suspended for tweeting abuse at abortion row DA*, DAILY MAIL (Nov. 21, 2012), https://www.dailymail.co.uk/news/article-2236408/Female-attorney-suspended-tweeting-abuse-abortion-row-DA.html.

97. *See, e.g.*, *Ohio Supreme Court Judge Bill O'Neill Brags of Sex Conquests*, BBC NEWS (Nov. 17, 2017), https://www.bbc.com/news/world-us-canada-42032731.

98. *Id.*

2006 USO tour.[99] Inexplicably, Justice O'Neill felt compelled to weigh in on what he described as the "national feeding frenzy about sexual indiscretions" with a "too much information" Facebook post about his own sexual history.[100] Saying it was "time to speak up on behalf of all heterosexual males" and expressing that he would "save my opponents some research time," Justice O'Neill posted the following:

> In the last fifty years I was sexually intimate with approximately 50 very attractive females. It ranged from a gorgeous personal secretary to Senator Bob Taft (senior) who was my first true love and we made passionate love in the hayloft at her parents [*sic*] barn in Gallipolis and ended with a drop dead gorgeous red head who was a senior advisor to Peter Lewis at Progressive Insurance in Cleveland.[101]

Justice O'Neill's Facebook post led to an immediate backlash, including from his own party.[102] He had already been widely criticized for his refusal to resign from the Supreme Court while openly proclaiming his candidacy for governor.[103] In response to these critics, Justice O'Neill had cited the "about 99 cases pending before the Court," and said that "[t]o simply walk away from those matters would be grossly unfair to the litigants, and a violation of my oath of office."[104] Ohio Democratic Party Chairman David Pepper called Justice O'Neill's Facebook remarks "terrible," adding that they "both dehumanize women and do nothing but trivialize this important conversation, which is actually about harassment and abuse, not encounters between

99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *See* Lindsey Bever & Marwa Eltagouri, *Ohio Governor Candidate Apologizes for Boasting of Sexual History with "50 Very Attractive Females,"* WASH. POST (Nov. 18, 2017), https://www.washingtonpost.com/news/politics/wp/2017/11/17/ohio-governor-candidate-boasts-of-sexual-history-with-approximately-50-very-attractive-females/.
104. *Id.*

consenting adults."[105] In addition to the bipartisan condemnation and calls for his resignation, Justice O'Neill's own campaign spokesman Chris Clevenger, himself a victim of sexual assault, condemned the comments, calling them "both disturbing and misguided" before quitting the O'Neill campaign.[106] The reaction from Justice O'Neill's colleagues on the Supreme Court was equally telling. Ohio Chief Justice Maureen O'Connor stated "No words can convey my shock. This gross disrespect for women shakes the public's confidence in the integrity of the judiciary."[107]

Justice O'Neill deleted his post but posted new comments on Facebook, at first lambasting his critics.[108] In one post, he said "As an aside for all you sanctimonious judges who are demanding my resignation, hear this. I was a civil rights lawyer actively prosecuting sexual harassment cases on behalf of the Attorney General's Office before Anita Hill and before you were born. Lighten up folks."[109] Justice O'Neill later posted a "sorry/not sorry" Facebook post, saying "If I offended anyone, particularly the wonderful women in my life, I apologize. But if I have helped elevate the discussion on the serious issue of sexual assault, as opposed to personal indiscretions, to a new level . . . I make no apologies."[110]

Within twenty-four hours of his non-apology "apology," Justice O'Neill returned to Facebook, this time in more contrite fashion.[111] Saying that, "There comes a time in everyone's life when you have to admit when you were wrong," Justice O'Neill apologized to all "who have been hurt by my insensitive remarks," and acknowledged that "I have damaged the national debate on the very real subject of sexual harassment, abuse

105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*

and unfortunately rape."[112] Justice O'Neill also deleted his original Facebook post, later telling one interviewer that the viral reaction on social media took him by surprise.[113] "[T]his went a lot larger than I ever anticipated," he said.[114] "I became a villain overnight. I saw that."[115] Although he resigned his Supreme Court bench shortly after the firestorm of controversy over his Facebook post, Justice O'Neill remained in the Ohio gubernatorial race.[116] He would go on to finish a distant fourth in the Democratic gubernatorial primary.[117]

III. ETHICAL CONSIDERATIONS IN COMMENTING ONLINE ABOUT A CASE

Like attorneys in virtually every other area of practice, appellate lawyers can benefit from the use of online platforms to ask questions of colleagues, share tips on written and oral advocacy, compare notes on judicial decision making, and even engage in lively debate over everything from typography to the virtues of the Oxford comma. The best known example for the appellate bar is #AppellateTwitter.[118] Launched in 2016, this national online community for appellate specialists provides members with a chance to discuss everything from mandamus strategies, legal research tools, amicus brief rules in given jurisdictions, dealing with "benchslaps," and even job opportunities.[119] Given the

112. Seth A. Richardson, *After Another Apology, Bill O'Neill Says Those Wishing to Return His Donations Should Refund Him*, CLEVELAND.COM (Nov. 19, 2017), https://www.cleveland.com/open/2017/11/after_apology_bill_oneill_says.html.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Ohio Governor Primary Election Results*, N.Y TIMES (May 9, 2018, 5:35 PM), https://www.nytimes.com/elections/results/ohio-governor-primary-election.

117. *Id.*

118. *See* Richard Acello, *#AppellateTwitter Lawyers Chat, Help One Another and Even Develop Business*, ABA J. (July 1, 2019, 1:30 AM), http://www.abajournal.com/magazine/article/appellate-twitter-lawyers.

119. *Id.*

often isolated nature of appellate work, members of #AppellateTwitter frequently point to the benefits of obtaining feedback tips and mentoring from being a part of this online community.[120]

But discussing one's cases online carries certain risks, particularly if a lawyer is not careful about confidential information. In a recent Formal Ethics Opinion, the ABA adopted a particularly conservative approach.[121] In 2018's Formal Opinion 480, entitled "Confidentiality Obligations for Lawyer Blogging and Other Public Commentary," the Committee imposed a heightened duty of confidentiality for lawyers who communicate publicly on the internet, holding that lawyers may not reveal information relating to a representation, *including information contained in a public record*, unless authorized by a provision of the Model Rules.[122] In other words, for lawyers considering commenting about their cases in blogs, tweets, Facebook posts, listservs, podcasts, and of course more traditional avenues of communication, the ABA views confidentiality as so fundamental to the lawyer–client relationship that it will apply even to information that may be publicly available and easily obtained.[123] While this opinion acknowledges that new online platforms provide "a way to share knowledge, opinions, experiences, and views," it nevertheless points out that while "technological advances have altered how lawyers communicate, and therefore may raise unexpected practical questions, they do not alter lawyers' fundamental ethical obligations when engaging in public commentary."[124]

Does this admittedly conservative approach by the ABA mean that appellate lawyers may not discuss even matters that are public record when engaging in online communications about their cases? A recent opinion from the Texas Professional Ethics Committee may

120. *Id.* The author can attest to the benefits of #AppellateTwitter.
121. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 480 (2018).
122. *Id.* at 1 (emphasis added).
123. *See id.*
124. *Id.* at 1–2.

yield valuable insight.[125] In Opinion No. 683, issued in March 2019, the Committee considered the question of whether a lawyer violates the Disciplinary Rules of Professional Conduct by making statements to the media about a case pending on appeal in which the lawyer criticizes the opponent's litigation tactics and reiterates the misconduct alleged in the underlying lawsuit.[126]

Under the facts of the case at issue, the plaintiffs had lost their trade secrets misappropriation case at the trial court level via summary judgment.[127] They then successfully appealed to the appellate court and got the judgment reversed—only to then see the defendants file a petition for review with the Texas Supreme Court in hopes of reinstating the summary judgment.[128] While the case was pending before the Supreme Court, plaintiff's counsel made statements in the media characterizing the defense litigation strategy as "delay at all costs so their conduct is never brought before a jury."[129] The lawyers went on to state that the defendants "brazenly stole trade secrets worth millions of dollars from my clients and are now just as brazenly trying to take this case away from a Texas jury."[130]

The Professional Ethics Committee opinion began its analysis with a discussion of Rule 3.07 of the Texas Disciplinary Rules of Professional Conduct, prohibiting lawyers' extrajudicial statements "that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicatory proceeding."[131] Having set out the Rule, the opinion then goes on to differentiate between statements that ordinarily violate it—such as statements referring to the character, credi-

125. Tex. State Bar Prof'l Ethics Comm., Op. No. 683 (2019).
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*

bility, or reputation of a party—and statements that usually would not violate the Rule, such as statements about the general nature of the claims or defenses, or information that is contained in a public record.[132] The opinion then discusses the determining factor in the fact pattern before it, the timing of the statements.[133] Observing that the likelihood of material prejudice is highest where there is a trial by jury involved, the Committee concluded that since the lawyer's comments were made during the pendency of an appeal, the statements "do not have a substantial likelihood of materially prejudicing an adjudicatory proceeding."[134] Accordingly, appellate lawyers—in Texas at least—who refrain from online commentary discussing client confidential information likely have little cause for concern about violating the rules of professional conduct, given the appellate posture of the case and the diminished chance of materially prejudicing the outcome of the case.[135] However, given ABA Formal Opinion 480, appellate practitioners are well advised to exercise discretion and to consult their own jurisdiction's ethics rules for guidance before engaging in online commentary that goes beyond innocuous "Working frantically on my brief to meet looming deadline"-type posts.

IV. ADDRESSING THE PROBLEM OF COURT STAFF'S MISUSE OF SOCIAL MEDIA

So, what can appellate judges and lawyers do to mitigate the ethical risks posed by staff members' misuse of social media? A critical first step is education—both for the judges and lawyers about the stakes involved and the importance of knowing what their staff members might be engaging in online, and education for the staff members in the form of a robust social me-

132. *Id.*
133. *Id.*
134. *Id.*
135. *See id.*

dia or internet usage policy. Fortunately for courts, there is some guidance available.

In October 2020, the California Supreme Court Committee on Judicial Ethics Opinions (CJEO) issued its CJEO Oral Advice Summary 2020-037, entitled "Judicial Obligations Relating to Social Media Comments by Appellate Court Staff."[136] In this opinion, the Committee mandates not only vigilance on the part of an appellate justice regarding staff members' online conduct, but action as well when that justice becomes aware of posts or comments that violate judicial canons.[137] The Committee calls for the justice to "immediately take steps to remedy the ethical violation, including at a minimum requiring the staff member to take all reasonable steps to have the post taken down and removed from the public domain."[138]

The opinion begins by taking note of the realities of life and work in the digital age, observing that social media "has taken the place of both the proverbial office water cooler and the town square."[139] Appellate court staff, the Committee explains, are no different from other members of the general public, and it should come as no surprise that their posts will frequently refer to their employment at the court.[140] And while acknowledging that court employees are not prohibited from posting comments about the courts or their employment generally, the Committee reminds justices that, these same employees "are required to keep confidential the decision making process of a court with respect to any pending matter," and that the canons "constrain the content of any such comment."[141]

136. Cal. Sup. Ct. Comm. On Jud. Ethics Ops., CJEO Oral Advice Summary 2020-0037 (2020), https://www.judicialethicsopinions.ca.gov/wp-content/uploads/CJEO-Oral-Advice-Summary-2020-037.pdf.

137. *Id.* at 2.

138. *Id.*

139. *Id.*

140. *Id.* at 2–3.

141. *Id.*

In particular, the Committee points to California's Canon 3B(9) and 3C(3).[142] Canon 3B(9) provides that

> A judge shall not make any public comment about a pending or impending proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of staff and court personnel subject to the judge's direction and control.[143]

Canon 3C(3) states that

> A judge shall require staff and court personnel under the judge's direction and control to observe appropriate standards of conduct and to refrain from (a) manifesting bias, prejudice, or harassment based upon race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (b) sexual harassment in the performance of their official duties.[144]

The opinion goes on to note that appellate justices face discipline if they fail to exercise such "reasonable control and direction" over their staff—and cites at least California example.[145] But what action must a justice take? At a minimum, the Committee cautions the justices to "instruct the staff member to take all reasonable steps to delete or to have removed from public view any improper comment that violates the canons and then follow up with the staff member to ensure that they have done so."[146] Practically speaking, however, given the viral nature of the internet, a controversial post or tweet can live on and be further disseminated

142. *Id.*

143. CAL. CODE OF JUD. ETHICS Canon 3B(9) (Cal. Sup. Ct. 2020).

144. CAL. CODE OF JUD. ETHICS Canon 3C(3) (Cal. Sup. Ct. 2020).

145. CJEO Oral Advice Summary 2020-0037, *supra* note 136, at 3 (citing *Public Admonishment of Commissioner Mark Kliszewski* (a 2017 judicial disciplinary proceeding in which the commissioner's failure to take corrective action to halt court staff from making inappropriate comments was held to have violated Canons 3B(4) and 3C(3)).

146. *Id.*

thanks to a screenshot being preserved by an original recipient or other third party, and subsequent deletion or other efforts at obscuring the post will consequently be futile. In that event, the opinion states, the justice "may need to instruct the staff member to correct or repudiate the comment on social media, particularly if the comment is demeaning or offensive, or otherwise undermines the dignity of the court."[147]

Despite this advice, it is not until the opinion's last sentence that a vital protective measure is mentioned, in the form of "[a]ppropriate training."[148] Such vaguely described training, the Committee opines, will "assist appellate court staff in understanding the vital role that they play in maintaining public confidence in the integrity of the judicial system as well as the importance of maintaining confidentiality and impartiality and of upholding the dignity of the court in their postings to social media."[149] Educating court staff about the pitfalls of social media and how their online conduct can adversely impact the court's mission and integrity should be a priority in the digital age, especially if we are to require appellate justices to serve as their "digital brother's keeper." Implementing a social media or internet usage policy—and making sure court staff understand it and the reasons for it—are critical to making sure appellate judges can comply with their ethical obligations regarding the supervision of court staff.

An excellent example of such a policy that balances the First Amendment freedoms of current and prospective court employees with the courts' legitimate interest in protecting the integrity and efficiency of their work is the one adopted by the Supreme Court of Texas.[150] A

147. *Id.*

148. *Id.*

149. *Id.*

150. *Policy on Public Comment and Social Media Policy*, SUP. CT. TEX. (copy on file with author). As to the subject of court staff members' rights to freedom of expression, there is a robust body of U.S. Supreme Court jurisprudence on the limitations that may be placed on the First Amendment rights of public employees. *See, e.g.*, Pickering v. Bd. of Ed., 391 U.S. 563 (1968); Garcetti v.

model for appellate courts everywhere, this policy reminds court staffers that "social media is a public place."[151] It spells out that no court employee, without court authorization, may comment publicly on:

- the Court's handling or decision of a case or administrative matter;
- any case that is or may come before the Court;
- any matter in such a way as to reasonably suggest that the Court or its staff is inclined to any view of a case that is or may likely come before the Court;
- any matter in such a way that could reasonably be expected to generate controversy or disruption within the Court or its staff, impede their general performance or operation, or adversely affect working relationships necessary for their proper functioning;
- any matter in such a way that could reasonably be expected to cast the Court in an unfavorable light, or subject it to criticism, or impair its relations with the other Branches of Government;
- any matter in such a way as to reasonably suggest that the person speaks as a Court employee rather than as a private citizen.[152]

Another judicial ethics advisory opinion was issued in 2020 addressing the conduct of judicial law clerks and externs on social media, particularly insofar as it related to the judicial obligation to supervise. Prompted by "recent events concerning systematic racial inequalities," Colorado Judicial Ethics Advisory Board Opinion 2020-02 took a different perspective.[153] Instead of the danger of online comments by judges or their staff about pending or impending proceedings, Opinion 2020-

Ceballos, 547 U.S. 410 (2006). However, an extensive discussion of this topic is beyond the scope of this article.

151. *Policy on Public Comment and Social Media Policy*, *supra* note 150, at 1.

152. *Id.* at 1–2.

153. C.J.E.A.B. Ad. Op. 2020-02.

02 focused on the extent to which judges, law clerks, and externs may participate in protest demonstrations and may use social media posts "[to condemn] racism and to express general support for various reforms being discussed in the public arena."[154] While acknowledging that judicial clerks and externs are not subject to the Code of Judicial Conduct's jurisdiction, the opinion reminds us that judges, in their supervisory capacity, "remain responsible for ensuring that their staff and others subject to the judge's direction act in a manner consistent with the Code."[155] Because the behavior of a law clerk or extern may be imputed to the judge for whom he or she works, trial and appellate judges must require staff under their direction and control to act as a judge would under the Code.[156]

Colorado's Board placed particular emphasis on Rule 2.12 of the Colorado Code of Judicial Conduct, which provides that "[a] judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code."[157] Colorado's Rule is identical to Rule 2.12 of the Model Code of Judicial Conduct.[158] That Rule was reworded to reflect a more rigorous standard—that court staff members act in a manner consistent with *all* of a judge's ethical obligations and not just what had been previously enumerated in Canon 3C(2).[159] As the Report's Explanation of Changes to the Model Code indicated, this more rigorous standard was intended to reflect the critical place occupied by judicial staff in the justice system: "not only in terms of their relevance to the administration of justice but also in terms of their relevance to preserving public confidence in the system as a whole."[160]

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154. *Id.*
155. *Id.*
156. *Id.*
157. *See id.* at 1; COLO. CODE OF JUD. CONDUCT r. 2.12 (Colo. Sup. Ct. 2010).
158. C.J.E.A.B. Ad. Op. 2020-02 at 2.
159. *See id.*
160. *Id.*

Because of this critical role, with court staff essentially viewed by the public as an extension of their judge, Colorado's Board made it clear that higher expectations are at work here.[161] A judge's responsibility for the conduct of her staff is not just limited to when such staff members are acting at the judge's direction or control, or even during working hours only.[162] In the current climate of polarized political discourse and heightened attention to racial justice issues, this takes on new urgency. Colorado Judicial Ethics Advisory Board Opinion 2020-02 observes that while a number of state supreme courts around the country have issued statements concerning racial inequality, there is a dramatic difference between permissible statements like that and participation in protest marches and rallies (such as Black Lives Matter protests or a "March for Science" gathering) or using social media to express support for or to protest current political issues.[163] And whether one attributes it to a more casual regard for social media or a misplaced sense of anonymity online, judges posting about politically or socially controversial matters on social media platforms is a growing problem.[164]

As the Colorado opinion notes, the use of social media by judges to speak out on current political issues raises a number of ethical concerns, including avoiding impropriety in all conduct; not lending the prestige of judicial office; not engaging in prohibited political activity; not detracting from the dignity of the court; and avoiding association with issues that might come before the court.[165] For that reason, the opinion warns judges to "not make political or divisive statements" themselves.[166] And because of Rule 2.12's mandate, judges must counsel their law clerks, externs, and other staff

161. *Id.*

162. *Id.*

163. *Id.* at 5–7.

164. *See, e.g.*, Cynthia Gray, *Social Media Posts by Judges on Controversial Issues*, 43 JUD. CONDUCT RPTR., NAT'L CTR. ST. CTS. 2 (Spring 2021).

165. C.J.E.A.B. Ad. Op. 2020-02 at 6.

166. *Id.* at 7.

against making comments "that are divisive and venture into the political sphere," regardless of whether those comments are "made in person, in writing, [or] on social media."[167]

V. BEST PRACTICES FOR APPELLATE LAWYERS AND JUDGES

In an age in which a breach of confidentiality or an ethical violation is only a mouse click away, what can appellate lawyers and judges do to minimize the risk of such lapses by themselves or their staff? Certainly, a good first step is the adoption of a robust social media or internet usage policy, along the lines of the Supreme Court of Texas social media policy. A policy that reminds nonlawyer staff of the court's overriding interest in safeguarding the integrity of its operations, while delineating the kind of online conduct that can detract from that goal, is absolutely critical. Such a policy should express this in as accessible a manner as possible for nonlawyers—in plain English, free of jargon and ideally with an illustrative example or hypothetical for the reader to consider.

In addition to a well-written and effective social media policy itself, education about the policy and the reasons for it is a must. Implementing such a policy should be accompanied by in-person or virtual training that goes over the policy's key provisions, the rationale for them, and provides an opportunity for staff members' questions. Merely providing notice of the social media policy or having an HR coordinator request an electronic acknowledgement of its receipt is not enough. Ideally, the adoption of a policy and the offering of explanatory training would be harmonized; for example, for a number of years, the author has given such ethics and social media training sessions for the Supreme Court of Texas and other appellate courts. In the cases of state supreme courts and other appellate courts that

167. *Id.*

welcome new law clerks annually, it is advisable to offer annual "refresher" sessions in light of this expected turnover.

However, an appellate court can implement the best social media policy in the world, but efforts at oversight of the online conduct of court staff will still face one significant obstacle—the technological competency of the judges themselves. As legal scholars have noted, while thirty-nine states have adopted changes to their respective versions of ABA Model Rule of Professional Conduct 1.1 to require lawyers to keep abreast of the benefits and risks associated with relevant technology as part of their duty to provide competent representations, no such counterpart requirement exists for judges.[168] The absence of such an ethical obligation—at a time when the judiciary has had to contend with not only new sources of electronic evidence, a dizzying array of data privacy considerations, e-discovery matters, ransomware attacks, and remote hearings and trials during the COVID-19 pandemic—is shocking. As the author has pointed out, the lack of tech-savvy judges has contributed to the number of judges facing disciplinary action over their own social media conduct.[169]

VI. CONCLUSION

In a previous issue of this *Journal*, Justice Stephen Dillard of the Georgia Court of Appeals and Chief Justice Mary McCormack called for judges (including appellate judges) to be more active on social media as an invaluable means of public engagement and education, transparency, and increasing the public's confidence in

168. *See, e.g.*, John G. Browning, *Should Judges Have a Duty of Tech Competence?*, 10 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 176, 179 (2020); Marla N. Greenstein, *Judges Must Keep Up with Technology: It's Not Just for Lawyers*, JUDGES' J., Nov. 1, 2014.

169. Browning, *supra* note 168, at 180–91.

the judiciary.[170] The author not only agrees, but has advocated for the same objective together with Justices McCormack and Dillard at the 2020 annual Wisconsin Judicial Conference and in the author's own previous writings, both individually and with other members of the appellate bench.[171] At the same time, however, the incredible reach and blinding speed of our modern digital environment, as well as the ethical obligations of the legal profession and the judiciary, render it necessary for appellate lawyers and judges to be mindful of not only their own online personas, but of the social media behavior of their staff.

Courts have acknowledged social media platforms' status as our digital town hall, just as lawyers have mined these digital treasure troves for their cases. But appellate lawyers and judges must remember that when it comes to their own conduct on social media as well as that of the staff members they are charged with supervising, the Latin proverb *Praemonitus praemunitus* ("Forewarned is forearmed") governs. Knowing in advance what our own ethical obligations are, and that they extend to those under our supervision, is vital—as is communicating those obligations and their importance in a social media policy and accompanying education.

170. Stephen Louis A. Dillard & Bridget Mary McCormack, *The Robed Tweeter: Two Judges' Views on Public Engagement*, 20 J. APP. PRAC. & PROCESS 179, 180 (2019).

171. *See, e.g.*, John G. Browning, *The Judge as Digital Citizen: Pros, Cons, and Ethical Limitations on Judicial Use of New Media*, 8 FAULKNER L. REV. 131, 133 (2016); John G. Browning & Justice Don Willett, *Rules of Engagement: Exploring Judicial Use of Social Media*, 79 TEX. B.J. 100, 101–02 (2016).