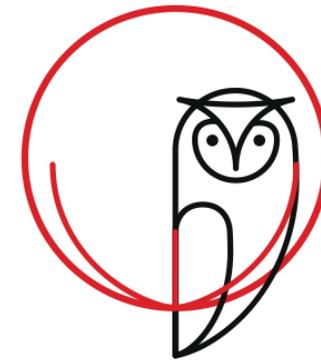

WELCOME TO THE JUNGLE – ETHICS, AD RULES, AND SOCIAL MEDIA FOR LAWYERS



O'NEIL WYSOCKI
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The Wise Choice

Michelle May O'Neil

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TYPES OF SOCIAL MEDIA NETWORKS

- Social media is a form of electronic communication through which users create online communities to share information and content.
 - Social networks is the creation and maintenance of personal and business relationships online. (Facebook, Twitter, LinkedIn)
 - Media sharing networks are used to find and share content on the internet. (Instagram, Snapchat, YouTube)
 - Discussion forums used for finding and discussing information, opinions, and news. (Reddit, Quora, Digg)
 - Bookmarking and content curation networks find and save content and media according to your interests. (Pinterest, Flipboard)
 - Consumer review networks find, share, and review information about product, service, or brand. (Yelp, Zomato, TripAdvisor)
 - Blogging networks publish content articles and commentary in a blogging platform. (Tumblr, Medium) Also, traditional blogging platforms provide a place to maintain created content that can be shared to other networks. (WordPress)
 - Social shopping networks allow users to follow certain brands and make purchases within the platform. (Polyvore, Etsy, Fancy)
 - Interest-based networks connect users with others who have similar interests. (Goodreads, Houzz, Last.fm)
 - Sharing economy networks advertise, buy/sell, trade products and services. (Airbnb, Uber, Taskrabbit)
-

JAN
2020

DIGITAL AROUND THE WORLD IN 2020

THE ESSENTIAL HEADLINE DATA YOU NEED TO UNDERSTAND MOBILE, INTERNET, AND SOCIAL MEDIA USE

TOTAL
POPULATION



7.75
BILLION

URBANISATION:

55%

UNIQUE MOBILE
PHONE USERS



5.19
BILLION

PENETRATION:

67%

INTERNET
USERS



4.54
BILLION

PENETRATION:

59%

ACTIVE SOCIAL
MEDIA USERS



3.80
BILLION

PENETRATION:

49%

8

SOURCES: POPULATION: UNITED NATIONS; LOCAL GOVERNMENT BODIES; MOBILE: GSMA INTELLIGENCE; INTERNET: ITU; GLOBALWEBINDEX; GSMA INTELLIGENCE; LOCAL TELECOMS REGULATORY AUTHORITIES AND GOVERNMENT BODIES; APJII; KEPIOS ANALYSIS; SOCIAL MEDIA: PLATFORMS' SELF-SERVICE ADVERTISING TOOLS; COMPANY ANNOUNCEMENTS AND EARNINGS REPORTS; CAFEBAZAAR; KEPIOS ANALYSIS. ALL LATEST AVAILABLE DATA IN JANUARY 2020. ♦ **COMPARABILITY ADVISORY:** SOURCE AND BASE CHANGES.

we
are
social



Hootsuite®

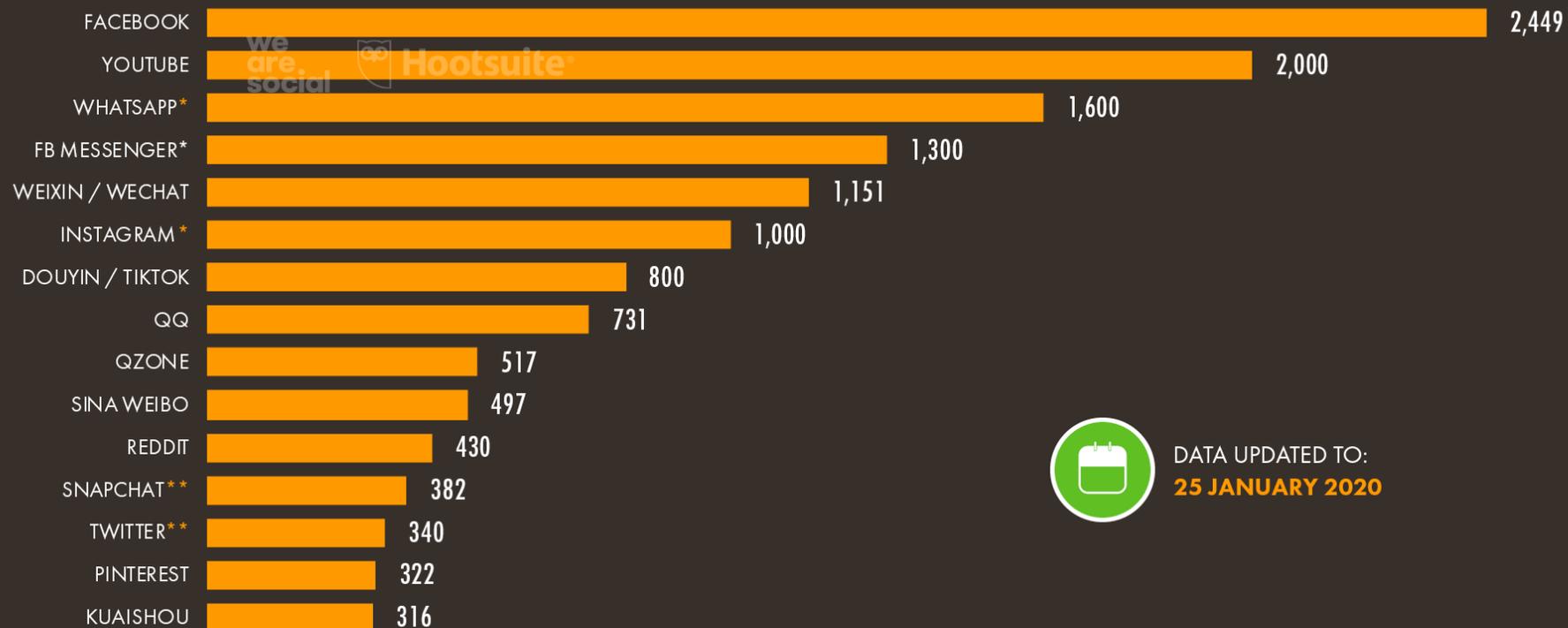
DIGITAL AROUND THE WORLD 2020

- Most of the unconnected are in Southern Asia, Africa.
 - 53% use a mobile phone to access the internet. 44% use a laptop/desktop. 2.7% use a tablet. 0.07% use other devices (like gaming units).
 - 10 out of every 11 minutes on mobile devices uses apps. Web browsing is only 9% of that time.
 - Tinder is the most used non-game app.
-

JAN
2020

THE WORLD'S MOST-USED SOCIAL PLATFORMS

BASED ON MONTHLY ACTIVE USERS, ACTIVE USER ACCOUNTS, ADVERTISING AUDIENCES, OR UNIQUE MONTHLY VISITORS (IN MILLIONS)



DATA UPDATED TO:
25 JANUARY 2020

APRIL 2021 STATS

- Most popular social media network worldwide as of April 2021 by monthly active users:
 - Facebook 2.79 billion (up 34 million);
 - YouTube 2.29 billion (up 29 million);
 - WhatsApp (owned by FB) 2.00 billion (up 40 million);
 - FB Messenger (owned by FB) 1.30 billion (no change);
 - Instagram (owned by FB) 1.28 billion (up 28 billion);
 - We Chat 1.22 billion (users decreased);
 - TikTok 732 million (users decreased).
-

AMERICA'S STATISTICS

- 72% of all Americans use some social media site as of Feb 2021. Up from 5% in 2005.
 - 84% of 18-29 year olds, 81% of 30-49 year olds, and 73% of 50-64 year olds use some social media site.
 - 81% American adults use YouTube, 69% use Facebook, 40% use Instagram.
 - 70% who use Facebook use it daily; 49% use Facebook multiple times a day. 59% of Instagram users use it daily. 54% of YouTube users use it daily.
 - 36% of American adults get news from Facebook, 23% from Youtube. But 59% distrust Facebook for political news.
 - 61% of Facebook users are Americans between the ages of 25-54.
-

CONSUMERS

- Average 55% of consumers of any age bracket use social media to learn about brands or companies before they do business with them. (78% Gen Z, 61% Millennials, 56% Gen X).
 - 84% of companies use Facebook, 64% Instagram, 60% Twitter, 57% YouTube, 42% LinkedIn.
 - Social media is the primary communication channel for companies in social media (60%), lead gen (61%), sales (68%), brand awareness (67%), customer engagement (72%)
 - About 40% of American adults research a brand online before buying. About 1/4 look at reviews before buying.
-

JUL
2020

COVID-19: INCREASE IN ONLINE AND DIGITAL ACTIVITIES

PERCENTAGE OF INTERNET USERS AGED 16 TO 64 IN SELECT COUNTRIES* WHO REPORT SPENDING MORE TIME ON EACH ACTIVITY DUE TO COVID-19

WATCHING MORE SHOWS &
FILMS ON STREAMING SERVICES



54%



SPENDING LONGER
USING SOCIAL MEDIA



43%



SPENDING LONGER ON
MESSENGER SERVICES



42%



LISTENING TO MORE MUSIC
STREAMING SERVICES



37%

SPENDING MORE TIME
ON MOBILE APPS



36%



SPENDING MORE TIME PLAYING
COMPUTER OR VIDEO GAMES



35%



CREATING AND
UPLOADING VIDEOS



16%



LISTENING TO
MORE PODCASTS



15%



FACEBOOK

- Build relationships
 - Show human side of business
 - Multiple types of content – text, articles, images, and video
 - Share information about your business
-

INSTAGRAM

- Images and video are key content
- No clickable links

TWITTER

- Immediacy of content – breaking news, announcements, important messages
 - In the moment information
 - Under age 50
 - Text is key content
 - Some images, no video.
 - Started as the place to answer the question “what are you doing?”
-

LINKEDIN

- B2B content
 - Editorial content
 - Users age 30-49
-

PINTEREST

- Images are key content
 - Graphics intensive with click through links
 - Mostly women
 - Good for businesses that market fashion, art, home decor
-

ETHICS RULES AT ISSUE

- 1.01 – don't accept employment beyond your competence, including use of current technology.
 - 1.05 – confidentiality of client information.
 - 7.02 communications concerning a lawyer's services – false or misleading statements regarding qualifications are prohibited. Use general summaries. Don't share client information. Don't compare one case to another.
 - 7.03 prohibited solicitations and payments – communications are unsolicited on social media platforms so be careful the advice you give in video or other social media posts.
 - 7.04 -- addresses advertisements in the public media. Content is not an advertisement so long as it is educational or editorial. If you are not directly advertising, you don't need to treat it like an advertisement. If you do a call-to-action and pay to boost a post, then it's advertising that needs to be submitted for approval. Law firm websites, video-sharing for lead generation, and internet banners and pop-ups are all considered advertising and public media. Must call it advertising and be approved by an attorney. Must file copies with the ad review committee and get approval. Keep a copy of the advertising.
 - 7.05 prohibits solicitations – solicitations are personal in nature, so using metrics in advertising to share content can cross solicitation boundaries.
 - Actors cannot portray a lawyer or client.
 - Use disclaimers.
-

DR 1.01

- Rule 1.01. Competent and Diligent Representation (a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless: (1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or (2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances. (b) In representing a client, a lawyer shall not: (1) neglect a legal matter entrusted to the lawyer; or (2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients. (c) As used in this Rule, “neglect” signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.
-

DR 1.05(A)

- (a) “Confidential information” includes both “privileged information” and “unprivileged client information.” “Privileged information” refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates. “Unprivileged client information” means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.
-

DR 1.05(B)

- (b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly: (1) Reveal confidential information of a client or a former client to:
23 (i) a person that the client has instructed is not to receive the information; or (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm. (2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation. (3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known. (4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.
-

DR 7.02

- (a) An advertisement of legal services shall publish the name of a lawyer who is responsible for the content of the advertisement and identify the lawyer's primary practice location. (b) A lawyer who advertises may communicate that the lawyer does or does not practice in particular fields of law, but shall not include a statement that the lawyer has been certified or designated by an organization as possessing special competence or a statement that the lawyer is a member of an organization the name of which implies that its members possess special competence, except that:
-

DR 7.02(B) EXCEPT...

- (1) a lawyer who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, may state with respect to each such area, “Board Certified, area of specialization -- Texas Board of Legal Specialization”; and (2) a lawyer who is a member of an organization the name of which implies that its members possess special competence, or who has been certified or designated by an organization as possessing special competence in a field of practice, may include a factually accurate, nonmisleading statement of such membership or certification, but only if that organization has been accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of published criteria which the Texas Board of Legal Specialization has established as required for such certification.
-

DR 7.02 CONTINUED...

- (c) If an advertisement by a lawyer discloses a willingness to render services on a contingent fee basis, the advertisement must state whether the client will be obligated to pay for other expenses, such as the costs of litigation. (d) A lawyer who advertises a specific fee or range of fees for an identified service shall conform to the advertised fee or range of fees for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement specifies a shorter period. However, a lawyer is not bound to conform to the advertised fee or range of fees for a period of more than one year after the date of publication, unless the lawyer has expressly promised to do so.
-

DR 7.03(A)

- (a) The following definitions apply to this Rule: (1) “Regulated telephone, social media, or other electronic contact” means telephone, social media, or electronic communication initiated by a lawyer, or by a person acting on behalf of a lawyer, that involves communication in a live or electronically interactive manner. (2) A lawyer “solicits” employment by making a “solicitation communication,” as that term is 102 defined in Rule 7.01(b)(2).
-

DR 7.03 CONTINUED...

- (b) A lawyer shall not solicit through in-person contact, or through regulated telephone, social media, or other electronic contact, professional employment from a non-client, unless the target of the solicitation is: (1) another lawyer; (2) a person who has a family, close personal, or prior business or professional relationship with the lawyer; or (3) a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters. (c) A lawyer shall not send, deliver, or transmit, or knowingly permit or cause another person to send, deliver, or transmit, a communication that involves coercion, duress, overreaching, intimidation, or undue influence.
-

DR 7.03 CONTINUED...

- (d) A lawyer shall not send, deliver, or transmit, or knowingly permit or cause another person to send, deliver, or transmit, a solicitation communication to a prospective client, if: (1) the communication is misleadingly designed to resemble a legal pleading or other legal document; or (2) the communication is not plainly marked or clearly designated an “ADVERTISEMENT” unless the target of the communication is: (i) another lawyer; (ii) a person who has a family, close personal, or prior business or professional relationship with the lawyer; or (iii) a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters.
-

DR 7.03 CONTINUED...

- (e) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting or referring prospective clients for professional employment, except nominal gifts given as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services. (1) This Rule does not prohibit a lawyer from paying reasonable fees for advertising and public relations services or the usual charges of a lawyer referral service that meets the requirements of Texas law. 103 (2) A lawyer may refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if: (i) the reciprocal referral agreement is not exclusive; (ii) clients are informed of the existence and nature of the agreement; and (iii) the lawyer exercises independent professional judgment in making referrals.
-

DR 7.03 CONTINUED...

- (f) A lawyer shall not, for the purpose of securing employment, pay, give, advance, or offer to pay, give, or advance anything of value to a prospective client, other than actual litigation expenses and other financial assistance permitted by Rule 1.08(d), or ordinary social hospitality of nominal value.
-

DR 7.04

- Rule 7.04. Filing Requirements for Advertisements and Solicitation Communications (a) Except as exempt under Rule 7.05, a lawyer shall file with the Advertising Review Committee, State Bar of Texas, no later than ten (10) days after the date of dissemination of an advertisement of legal services, or ten (10) days after the date of a solicitation communication sent by any means: 107 (1) a copy of the advertisement or solicitation communication (including packaging if applicable) in the form in which it appeared or will appear upon dissemination; (2) a completed lawyer advertising and solicitation communication application; and (3) payment to the State Bar of Texas of a fee authorized by the Board of Directors. (b) If requested by the Advertising Review Committee, a lawyer shall promptly submit information to substantiate statements or representations made or implied in an advertisement or solicitation communication.
-

DR 7.04 CONTINUED...

- (c) A lawyer who desires to secure pre-approval of an advertisement or solicitation communication may submit to the Advertising Review Committee, not fewer than thirty (30) days prior to the date of first dissemination, the material specified in paragraph (a), except that in the case of an advertisement or solicitation communication that has not yet been produced, the documentation will consist of a proposed text, production script, or other description, including details about the illustrations, actions, events, scenes, and background sounds that will be depicted. A finding of noncompliance by the Advertising Review Committee is not binding in a disciplinary proceeding or action, but a finding of compliance is binding in favor of the submitting lawyer as to all materials submitted for pre-approval if the lawyer fairly and accurately described the advertisement or solicitation communication that was later produced. A finding of compliance is admissible evidence if offered by a party.
-

DR 7.05

- Rule 7.05. Communications Exempt from Filing Requirements The following communications are exempt from the filing requirements of Rule 7.04 unless they fail to comply with Rules 7.01, 7.02, and 7.03: (a) any communication of a bona fide nonprofit legal aid organization that is used to educate members of the public about the law or to promote the availability of free or reduced-fee legal services; (b) information and links posted on a law firm website, except the contents of the website homepage, unless that information is otherwise exempt from filing; (c) a listing or entry in a regularly published law list; (d) an announcement card stating new or changed associations, new offices, or similar changes relating to a lawyer or law firm, or a business card;
-

DR 7.05 CONTINUED...

- (e) a professional newsletter in any media that it is sent, delivered, or transmitted only to: (1) existing or former clients; (2) other lawyers or professionals; (3) persons known by the lawyer to be experienced users of the type of legal services involved for business matters; (4) members of a nonprofit organization which has requested that members receive the newsletter; or (5) persons who have asked to receive the newsletter; (f) a solicitation communication directed by a lawyer to: (1) another lawyer; (2) a person who has a family, close personal, or prior business or professional relationship with the lawyer; or (3) a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters;
-

DR 7.05 CONTINUED...

- (g) a communication in social media or other media, which does not expressly offer legal services, and that: 109 (1) is primarily informational, educational, political, or artistic in nature, or made for entertainment purposes; or (2) consists primarily of the type of information commonly found on the professional resumes of lawyers; (h) an advertisement that: (1) identifies a lawyer or a firm as a contributor or sponsor of a charitable, community, or public interest program, activity, or event; and (2) contains no information about the lawyers or firm other than names of the lawyers or firm or both, location of the law offices, contact information, and the fact of the contribution or sponsorship;
-

DR 7.05 CONTINUED...

- (i) communications that contain only the following types of information: (1) the name of the law firm and any lawyer in the law firm, office addresses, electronic addresses, social media names and addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession, such as “attorney,” “lawyer,” “law office,” or “firm;” (2) the areas of law in which lawyers in the firm practice, concentrate, specialize, or intend to practice; (3) the admission of a lawyer in the law firm to the State Bar of Texas or the bar of any court or jurisdiction; (4) the educational background of the lawyer; (5) technical and professional licenses granted by this state and other recognized licensing authorities; (6) foreign language abilities; (7) areas of law in which a lawyer is certified by the Texas Board of Legal Specialization or by an organization that is accredited by the Texas Board of Legal Specialization; (8) identification of prepaid or group legal service plans in which the lawyer participates; (9) the acceptance or nonacceptance of credit cards; (10) fees charged for an initial consultation or routine legal services; (11) identification of a lawyer or a law firm as a contributor or sponsor of a charitable, community, or public interest program, activity or event; (12) any disclosure or statement required by these Rules; and (13) any other information specified in orders promulgated by the Supreme Court of Texas.
-

DR 7.05 COMMENTS

- Comment: 1. This Rule exempts certain types of communications from the filing requirements of Rule 7.04. Communications that were not substantially motivated by pecuniary gain do not need to be filed. Website-Related Filings 2. While the entire website of a lawyer or law firm must be compliant with Rules 7.01 and 7.02, the only material on the website that may need to be filed pursuant to this Rule is the contents of the homepage. However, even a homepage does not need to be filed if the contents of the homepage are exempt from filing under the provisions of this Rule. Under Rule 7.04(c), a lawyer may voluntarily seek pre-approval of any material that is part of the lawyer's website.
-

GENERAL RULE – IS IT AN “AD” OR NOT?

- A public media advertisement does not include posts which are
 - Educational or editorial in nature.
 - Comment on a specific area of the law or development.
 - Gain credibility on a subject area
 - Tombstone info/Business card
 - No call to action – some form of “hire me” and it’s now an ad.
 - Addresses the qualifications of the lawyer or firm – it’s an ad.
 - Texas Young Lawyer’s Association Pocket Guide: Social Media 101:
<https://tyla.org/resource/social-media-101/> (free download)
-

ETHICAL DILEMMAS FOR SOCIAL MEDIA

- Can you friend an opposing party or juror to do opp research?
 - A lawyer may view an opposing party or juror's open page as long as it doesn't require a friend request or other type of permission. A friend request would constitute an ex parte communication. This is distinguished from a notification (like LinkedIn) when someone views your profile. False friending is grounds for a grievance.
 - Can I get advice on a case without violating privilege?
 - Lawyers must be careful about sharing case-related information online. DR 1.05 forbids a lawyer from knowingly revealing confidential information outside of the law firm and client. Discussing a case will be problematic if sufficient identifying info is used that the client's identity can be determined. Private FB groups are not as private as you think. DR 1.05 talks about confidentiality and defines confidential and privileged information.
-

-
- Does using a hypothetical scenario similar to a case violate privilege? ABA Model Rule 1.6 permits hypotheticals so long as there is no reasonable likelihood that the listener may obtain the identify of the client or situation. No exception for information generally known.
 - Communicating electronically (via zoom or other internet telephony) can cause a violation of privilege. Zoombombing is where an unknown interloper invades a zoom call can violate privilege. Tips: always host the meeting with a client to control the settings. Use a new meeting ID and password for every meeting. Do not share meeting info on social media. Lock meetings once they start to prevent Zoombombing. Do not allow Zoom to record a meeting (they keep a copy).
 - Can I delete that post? Spoliation prohibits the deletion of evidence. DR 3.04 says lawyers cannot unlawfully obstruct another party's access to evidence including destruction or concealment of evidence. Impose a litigation hold on client's social media accounts and don't allow them to be altered during litigation.
-

SOCIAL MEDIA FOR JUDGES

- Canon 2: Avoid impropriety and the appearance of impropriety in all activities.
 - Canon 3: Performing the duties of judicial office impartially and diligently.
 - Canon 4: Conduct the judge's extra-judicial activities to minimize risk of conflict with judicial obligations. ABA Ethics Opinion 462 says judges may use social media but should be cautious about posts.
 - Facebook friendship with judge alone is not grounds for recusal of judge.
-

TIPS FOR ETHICAL SOCIAL MEDIA USAGE

- Don't give advice online.
 - Be educational or editorial – don't ask for the business.
 - Give an educational disclaimer, especially when using video.
 - Maintain client confidentiality.
 - Don't overstate your qualifications or abilities. Don't use words like “expert” or “specialist” unless you are.
 - Treat social platforms like any other communication.
 - Practice the pause – pause before posting if you are emotional.
-

-
- Careful gloating about results.
 - File ads with the state bar.
 - Don't accidentally establish an attorney-client relationship through electronic communication.
 - Avoid soliciting clients.
 - Avoid giving advice on other jurisdictions.
 - Include disclaimers.
-

DEALING WITH ONLINE REVIEWS

- Ethics opinion 662: you can respond publicly to an adverse review online but...
 - Don't reveal confidential information.
 - Know the rules for the social media platform to report a review.
 - Ethics opinion 685: May lawyers encourage clients to post positive reviews and comments online?
 - Yes as long as they are truthful and accurate.
 - Do not offer anything of value in exchange for the review.
 - Don't react and respond in kind. Practice the pause. Don't threaten suit because that could be extortion.
-

DANCE LIKE NO ONE
IS WATCHING,
BUT TEXT,
POST AND EMAIL LIKE
IT WILL BE READ IN
COURT ONE DAY.
-YOUR LAWYER

JAN
2020

MOST-USED EMOJI ON TWITTER

EMOJI THAT HAVE BEEN USED THE GREATEST NUMBER OF TIMES ON TWITTER (ALL TIME)

#	EMOJI	TIMES USED	#	EMOJI	TIMES USED	#	EMOJI	TIMES USED	#	EMOJI	TIMES USED
01		2,671,000,000	11		428,000,000	21		245,000,000	31		198,000,000
02		1,289,000,000	12		389,000,000	22		238,000,000	32		193,000,000
03		966,000,000	13		382,000,000	23		237,000,000	33		191,000,000
04		964,000,000	14		365,000,000	24		236,000,000	34		187,000,000
05		817,000,000	15		359,000,000	25		232,000,000	35		182,000,000
06		743,000,000	16		336,000,000	26		229,000,000	36		181,000,000
07		632,000,000	17		309,000,000	27		217,000,000	37		168,000,000
08		500,000,000	18		273,000,000	28		216,000,000	38		165,000,000
09		493,000,000	19		258,000,000	29		212,000,000	39		163,000,000
10		475,000,000	20		246,000,000	30		199,000,000	40		163,000,000

RESOURCES

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 - The State of Social Media, Sprout Social (2020).
 - Social Media Fact Sheet, Pew Research Center, <https://www.pewresearch.org/internet/fact-sheet/social-media/>
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 - Which social media platform should you use for your business? Digital Marketing Institute, <https://digitalmarketinginstitute.com/blog/which-social-media-platforms-should-you-use-for-your-business>
-

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