VIRAL TEMPTATIONS: HOW SOCIAL MEDIA HAS RESHAPED CIVILITY AND ETHICS IN LEGAL PRACTICE

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> "[L]awyers who know how to think but have not learned how to behave are menace and a liability, not an asset, to the administration of our justice…. [C]ivility is relevant to lawyers because [they] are the living exemplars—and thus teachers—[and their] worst conduct will be emulated perhaps more readily than [their] best. When you flout the standards of professional conduct once, your conduct will be echoed in multiples and for years to come and long after you leave the scene."
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> — Chief Justice Warren E. Burger[1]

INTRODUCTION

In spring of 2025, the American Bar Association (ABA) reminded the legal community that civility is a fundamental pillar of professionalism, stating "Civility encompasses respect, courtesy, and integrity in interactions with clients, colleagues, opposing counsel, and the judiciary."[2] While Model Rule 1.3 urges lawyers to act with diligence and zeal, zealous advocacy is not a license for incivility.[3] Professionalism and respect are indispensable to upholding the legal system's dignity and ensuring justice is administered effectively. Thus, although the practice of law is inherently adversarial, civility requires lawyers to uphold professional integrity and societal norms in achieving their clients' interests.

In recent years, lawyers' use of social media has dramatically changed legal discourse and, perhaps, the public's view of the legal profession and members of

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1. *Excerpts from the Chief Justice's Speech on the Need for Civility*, N.Y. TIMES (May 19, 1971), https://www.nytimes.com/1971/05/19/archives/excerpts-from-the-chief-justices-speech-on-the-need-for-civility.html.

2. Daniel S. Wittenberg, *Civility in the Practice of Law: A Pillar of Professionalism*, A.B.A. (Mar. 26, 2025), https://www.americanbar.org/groups/litigation/resources/litigation-news/2025/winter/civility-practice-law-pillar-professionalism/?login.

3. MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (A.B.A. 2025) ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor…. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.").

the bar. Now more than ever, lawyers and litigants seek to share their thoughts, feelings, beliefs, and grievances instantly through social media platforms such as Twitter, Facebook, Instagram, TikTok, and LinkedIn. Mirroring a societal trend among the general public, lawyers and their clients now seek to act as "first movers" or "first influencers" in the social media space. For a lawyer, however, to do so presents peril and danger. In an age of instant gratification and communication, thoughtless or careless social media posts often subject lawyers and litigants to court sanctions and diminished reputations.

Adding to the peril, in this age of instantaneous widespread communication, the online community has developed a penchant for quick and drastic reactions to controversial posts that they believe go too far. The same tools that allow opinions to spread faster than ever also allow near instantaneous backlash. Removing or deleting an ill-advised post does little to blunt the repercussions—the internet, as they say, is forever. Many lawyers and professionals have seriously damaged their careers after a deluge of fellow internet users deemed their posts inappropriate. In this world of drastically improved communication, it is easier than ever to flippantly post a comment that will lead to you being "cancelled."

This Article will discuss several examples of lawyer incivility through social media. First, however, it will briefly review the historical professional view of lawyers in society and their obligation to act appropriately in furthering client goals. It will then provide several illustrative examples of how lawyers and litigants have run afoul of the rules of professional conduct, local rules, and other regulations in their respective jurisdictions. It will also discuss how professionals have harmed their careers through inappropriate posts related to politics and other public affairs. Finally, it will provide several suggestions for lawyers and litigants to consider before discussing any legal matter or posting other potentially inflammatory content online.

I. THE TRADITIONAL ROLE OF CIVILITY AND ETHICS IN LEGAL PRACTICE

The Model Rules of Professional Conduct embody the traditional foundation of civility and ethics in the legal profession. They codify the lawyer's duty to advocate zealously while maintaining respect for the court, opposing counsel, and the rule of law.[4] Model Rule 3.6, governing trial publicity, is one of the most directly implicated ethical rules when attorneys engage with social media during ongoing litigation. The rule prohibits a lawyer from making prejudicial extrajudicial statements that they "know[] or reasonably should know will be disseminated [to the] public…and will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[5] Traditionally, this rule applied to press conferences, media interviews, and statements to reporters. Prosecutors, in particular, have a heightened duty and, under Rule 3.8, must refrain from making extrajudicial comments that "have a substantial likelihood of heightening public condemnation of the accused."[6]

4. *Id.* r. 1.3 cmt. 1; *id.* r. 3.5.
5. *Id.* r. 3.6(a).
6. *Id.* r. 3.8(f).

In the modern digital landscape, however, attorneys are now their own publishers—what once required a press conference now takes only a few keystrokes. Social media has virtually erased the barrier between the courtroom and the public sphere, amplifying every post and tweet with the potential to reach thousands instantly and influence the perception of pending cases.

Model Rule of Professional Conduct 8.2(a) bars false or reckless statements about judges or legal officials.[7] The primary purpose of this rule is to safeguard public confidence in the administration of justice and to prevent the unfair undermining of the reputation of the judiciary.[8] Yet, emerging trends indicate that lawyers frequently lower their level of professionalism on social media, resorting to disrespectful or disparaging language that contravene the well-established expectations of this ethical rule.[9]

Model Rule 8.4(d) prohibits lawyers from engaging in "conduct that is prejudicial to the administration of justice."[10] Historically, this expansive rule has served as a catch-all ethical standard, addressing behavior or actions that bring the legal profession into general disrepute.[11] Recently, courts have also invoked Rule 8.4(d) to discipline lawyers for offline speech involving disparaging judges publicly, making inflammatory statements about opposing counsel, or using abusive language in pleadings.[12]

Thus, when a lawyer engages in such behavior in the arena of social media, posting deprecating remarks about a judge or mocking opposing parties, that conduct may not only violate Rule 3.6, but also fall squarely within the ambit of Rule 8.4(d). Even if the case is not prejudiced as a result, the overall effect of unprofessional online behavior can be seen as damaging to public trust in the legal system's fairness and integrity.

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7. *Id.* r. 8.2 ("A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.").

8. *Id.* r. 8.2 cmt. 1.

9. *See* Jan L. Jacobowitz Ms., *Negative Commentary—Negative Consequences: Legal Ethics, Social Media, and the Impact of Explosive Commentary*, 11 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 312, 339-45 (2021); Jim Ash, *Never Hit Send in Anger: Navigating Professionalism in the Electronic Age*, THE FLA. BAR (June 30, 2020), https://www.floridabar.org/the-florida-bar-news/never-hit-send-in-anger-navigating-professionalism-in-the-electronic-age/.

10. MODEL RULES OF PRO. CONDUCT r. 8.4 (A.B.A. 2025).

11. *See* Kevin T. Slator, *What Conduct Is Prejudicial to the Administration of Justice*, MINN. LAW. (July 6, 2015) ("Despite the lack of specificity in Rule 8.4(d), perhaps no rule has been cited more often in lawyer discipline cases—some 300 times—and for a wide range of misconduct."), *reprinted in What Conduct Is Prejudicial to the Administration of Justice* (MINN. OFF. OF LAWS. PRO. RESP.), https://lprb.mncourts.gov/articles/Articles/What%20Conduct%20is%20Prejudicial%20to%20the%20Administration%20of%20Justice.pdf [https://web.archive.org/web/20250619031729/https://lprb.mncourts.gov/articles/Articles/What%20Conduct%20is%20Prejudicial%20to%20the%20Administration%20of%20Justice.pdf] (last visited Mar. 10, 2026).

12. *See Ethics Alert: Activities That Threaten the Safety of Judges and Judicial Officers*, THE STATE BAR CAL.: COMM. ON PRO. RESP. & CONDUCT (Mar. 2025), at 3-5, https://www.calbar.ca.gov/sites/default/files/portals/0/documents/ethics/COPRAC/Ethics-Alert_Rules-Activities-that-Threaten-the-Safety-of-Judges-and-Judicial-Officers.pdf.

Many jurisdictions have adopted aspirational codes supplementing official rules. While drafted with traditional modes of speech in mind, they can provide guidance directly applicable to lawyers' social media activity and posting during trial proceedings. The Seventh Circuit's Standards for Professional Conduct, for example, details lawyers' duties to other counsel stating, "We will not reflect the ill feelings of our clients. We will treat all other counsel, parties, and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications."[13] Social media has undoubtedly become a form of "written communication," and this broad principle naturally extends to all online communications including posts, comments, or tweets, about ongoing cases. Another provision advises, "We will not engage in any conduct that brings disorder or disruption to the courtroom."[14] In the digital context, "disruption" includes extrajudicial statements made virtually that inflame public sentiment, invite media attention, or otherwise interfere with the fairness and decorum of court proceedings.

The Model Rules emerged in an era that envisioned deliberate, formal communication, not twenty-four-hour instantaneous online discourse. Yet the landscape of professional communication has transformed with the rise of social media, enabling rapid, unfiltered exchanges, and often uncivil commentary that strains the ethical foundations on which the rules of civility were built. Courts now must grapple with the effects of this digital revolution and its continually increasing prevalence in everyday life.

II. THE RISE OF DIGITAL INCIVILITY

People often behave differently online than they would in face-to-face interactions, and while their conduct may be less restrained on social media, users often fail to grasp that using social media usually leaves a permanent electronic footprint.[15] For attorneys, this failure is particularly consequential: many do not distinguish between personal expression and professional identity, forgetting that even seemingly private or off-duty posts can be attributed to them in their capacity as officers of the court, of which they will be held to the same ethical standards that govern their professional conduct.

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13. *Standards for Professional Conduct Within the Seventh Federal Judicial Circuit*, U.S. CT. OF APP. FOR THE SEVENTH CIR., https://www.ca7.uscourts.gov/pages/LandingPage.php?page=standards-for-professional-conduct#standardstocourt (last visited Mar. 10, 2026); Dillinger v. Brandt 2020 WL 5642192, at *3 (S.D. Ind. 2020).

14. *Standards for Professional Conduct Within the Seventh Federal Judicial Circuit*, *supra* note 13.

15. *See* Robert C. Nagle & Pamela Chandran, *Attorney Misconduct on Social Media: Recognizing the Danger and Avoiding Pitfalls*, 33 ABA J. LAB. & EMP. L. 427, 428 (2018) ("While people's conduct may be less restrained on social media, its users may fail to understand that using social media usually leaves a permanent electronic record."); John Suler, *The Online Disinhibition Effect,* 7 CYBERPSYCHOLOGY & BEHAVIOR 321, 321 (2004) ("people say and do things in cyberspace that they wouldn't ordinarily say and do in the face-to-face world. They loosen up, feel less restrained, and express themselves more openly. So pervasive is the phenomenon that a term has surfaced for it: the on-line disinhibition effect.").

A. Social Media as a Catalyst for Misconduct

Impulse, urgency, and the race to control the narrative on social media has given rise to a "post-first-think-later" culture that erodes reflective judgment in the practice of law.[16] Instantaneous publication of trial details has become a dangerous trap for attorney misconduct.[17] Early postings of controversial opinions after events often leads to the most "liked" posts, some "going viral."[18] This potential for popularity incentivizes zealous attorneys and litigants alike to make fast, and perhaps thoughtless, posts after a major trial event or in response to another person's critical post.[19] The urge to post immediately is compounded by the ability to reach an amplified audience online. Tweets and Facebook posts potentially reach jurors, journalists, and clients simultaneously and blur the boundaries between client advocacy, trial publicity, and personal expression. Ultimately, this transforms what was once seen as private commentary into a public performance with ethical consequences.

The social media attention to trials makes the "fair reply" exception in Model Rule 3.6(c) especially tempting for attorneys to abuse. Rule 3.6(c) is an exception that allows a lawyer to make statements to mitigate adverse publicity "not initiated by the [government]" that a "reasonable lawyer would believe is [necessary] to protect [the client] from substantial and undue prejudice."[20] Notably, any response must be limited to the information necessary to mitigate or redress the adverse publicity.[21] Thus, the rule is not a license to engage in a public relations battle in response to online criticism. What feels like a "fair reply" can easily cross the line

16. *See, e.g.*, *In re Sitton*, 618 S.W.3d 288 (Tenn. 2021) (Tennessee attorney responded to a Facebook post inquiring about carrying a gun in a car. The attorney posted advice on escalating use of force, how to use the "castle doctrine" to justify deadly force by luring an ex-boyfriend into the home and claiming self-defense—then identified himself as a lawyer and asked for the Facebook thread to be deleted. Attorney was found to have violated Rules of Professional Conduct 8.4(a) and (d) by counseling conduct prejudicial to the administration of justice.).

17. *See* Kroft v. Viper Trans, Inc., 263 N.E.3d 1245, 1261 (Ill. App. Ct. 2025) (finding that the trial attorney's social media posts during trial constituted a serious effort to reach and influence the jury by providing inadmissible and prejudicial information in violation of ethics rules).

18. *See* Jonah Berger & Katherine L. Milkman, *What Makes Online Content Viral?*, 49 J. MKTG. RSCH. 192, 197-98 (2012) (finding that high-arousal emotions such as anger substantially increase sharing and engagement); *see also* Castillo et al., *Characterizing the Life Cycle of Online News Stories Using Social Media Reactions*, FILTER BUBBLES & NEWS, Feb. 15-19, 2014, at 221 (showing that early reactions strongly predict total engagement).

19. *See* Suler, *supra* note 15, at 321-23 ("In an increasingly intimate e-mail relationship, people may quickly reveal personal information, then later regret their self-disclosures—feeling exposed, vulnerable, or shameful…. Some people may even experience asynchronous communication as 'running away' after posting a message that is personal, emotional, or hostile. It feels safe putting it 'out there' where it can be left behind.").

20. MODEL RULES OF PRO. CONDUCT r. 3.6(c) (A.B.A. 2025) ("Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.").

21. *Id.*

into prohibited commentary about pending litigation, client strategy, or the credibility of parties and witnesses.

Finally, while posting anonymous or pseudonymous comments may seem innocuous, this behavior may still have highly prejudicial effects during litigation and violate a myriad of professional conduct rules when traceable to an attorney. As discussed below, attorneys have run afoul of ethical rules when posting comments under fake names or "throwaway" accounts. Believing that online anonymity exists remains another tempting trap for some attorneys. Simply stated, and as demonstrated through the cases below, social media posts, regardless of the account used, can and often will be tracked back to those who post them, when questions arise.

B. Attorneys' Online Misconduct and Imprudent Behavior

Attorneys now live and practice in a world where digital platforms are always within reach. The same tools that allow lawyers to market their services, connect with clients, and follow the news also create new avenues for misconduct. A single post, blog entry, or clever use of social media may quickly exceed professional boundaries, shape public perception, and undermine confidence in the justice system. Courts now must confront behavior that once seemed unimaginable, such as lawyers attempting to speak directly to jurors through social media and prosecutors inventing false online identities in an attempt to manipulate witnesses.

The cases that follow demonstrate the consequences attorneys face when they blur the line between advocacy and digital incivility. In one, a personal injury firm employed blog and Facebook posts suggesting jurors to provide their client with a larger damages award.[22] In another, a prosecutor crafted a fictional Facebook persona to pressure alibi witnesses.[23] Both episodes illustrate how quickly online misconduct corrodes the fairness of proceedings and draws sharp rebuke from the courts. Other cases reiterate and expand on these general themes. Together, these cases underscore the profession's broader challenge: maintaining ethical standards in an environment where digital shortcuts are incredibly tempting, but ultimately traceable and completely indefensible.

22. *Kroft*, 263 N.E.3d at 1252.

23. Disciplinary Couns. v. Brockler, 48 N.E.3d 557, 558 (Ohio 2016).

Case Illustration 1: Kroft v. Viper Trans, Inc.

Cynthia Kroft suffered catastrophic injuries in a 2016 rear-end collision with a tractor-trailer.[24] The driver admitted fault, and the only dispute at trial was the amount of damages.[25] The first jury returned a $43 million verdict.[26] The trial judge overturned that verdict because of plaintiff's counsel's misconduct during the trial and ordered a new trial on damages.[27] By the time of the second trial, Kroft's condition had worsened.[28] Doctors discovered a syrinx in her spinal cord, a dangerous complication that can ultimately lead to complete paralysis.[29]

The second trial began in July 2023.[30] Soon after jury selection, plaintiffs' attorneys began posting about the case online.[31] Their blog and Facebook page carried the headline: "What Jurors Should Know But Don't."[32] The posts spelled out the full caption and docket number and discussed the prior $43 million verdict, while expressing their opinion that the new evidence should push a fair verdict closer to $100 million.[33] They explained that medical liens, attorney's fees, and insurance recoupments mean that plaintiffs never personally enjoy the full amount of a verdict.[34] They framed the legal system as one that keeps jurors in the dark on this reality.[35] Their message seemed obvious: jurors should award more money in this case and cases like it.[36]

The defense discovered the posts mid-trial.[37] They moved for mistrial, arguing that the posts presented a deliberate attempt to reach jurors.[38] The trial judge responded by asking the entire jury, in open court, whether anyone had done outside research.[39] Nobody raised a hand.[40] The judge called that "a relief" and

24. *Kroft*, 263 N.E.3d at 1250.
25. *Id.*
26. *Id.* at 1251.
27. After the first jury verdict, the trial court found that plaintiffs' counsel repeatedly violated rulings on motions in limine. Counsel tried to bring in facts about the collision that the court had excluded, made improper ad hominem attacks on defense counsel (calling them "hypocrites" and "two-faced"), and continuously talked to the jury about brain injury despite the court's order barring such references. The trial judge concluded that these comments were premeditated and intended to inflate damages by raising issues not properly in the case. As a result, the trial court granted the defendants' motion for a new trial and threw out the $43 million verdict. *Id.*
28. *Id.* at 1252.
29. *Id.* at 1251.
30. *Id.* at 1252.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 1252-53.
35. *Id.*
36. *Id.*
37. *Id.* at 1254.
38. *Id.*
39. *Id.*
40. *Id.*

denied the defendant's motion.[41] The trial continued, and the jury returned a verdict almost identical to the first one—$43.8 million.[42]

On appeal, the court viewed the social media posts as a direct threat to trial fairness.[43] It relied on Illinois Rule of Professional Conduct 3.6(a), which prohibits lawyers from making public statements that pose a serious and imminent threat to the fairness of a proceeding.[44] The court stressed that no lawyer could ever stand in the courtroom and tell a jury what a prior jury awarded, suggest a floor for damages, or explain how much of the money goes to liens, fees, and expenses.[45] Yet the posts did all of that, outside the courtroom, while the parties tried the case.[46]

The appellate court also criticized the trial judge's investigation.[47] The trial court questioned the jury as a group, asking whether any juror had seen the relevant posts.[48] All jurors remained silent. The appellate court stated that this type of group questioning in open court, preceded by warnings about contempt and violations, made it unlikely any juror would admit exposure.[49] Instead, the trial court should have questioned each juror individually and privately.[50] Because the inquiry was inadequate, the judge's denial of a mistrial was an abuse of discretion.[51]

As a result, the court vacated the $43.8 million verdict and remanded the case for a second new trial.[52] This case underscored that courts cannot tolerate attempts by lawyers to use social media to influence jurors. Even without proof that a juror saw the posts, the risk to the fairness of the trial provided too great a risk to the fairness of the proceedings. This conduct squarely represents the worst of digital incivility: the misuse of online platforms to gain a tactical advantage, ignoring professional norms, court orders, and the integrity of the trial process. It is incivility amplified by technology. The lawyers bypassed procedural safeguards, spoke directly to jurors in ways they never could in court and undermined public confidence in the fairness of the proceedings.

41. *Id.*
42. *Id.* at 1255.
43. *Id.* at 1259-60.
44. *Id.* at 1259.
45. *Id.* at 1261.
46. *See id.* at 1260-61.
47. *Id.* at 1264.
48. *Id.*
49. *Id.* at 1264-65.
50. *See id.*
51. *Id.* at 1264.
52. *Id.* at 1265-66.

Case Illustration 2: Disciplinary Counsel v. Brockler

In *Disciplinary Counsel v. Brockler*, the Ohio Supreme Court reviewed misconduct by Aaron James Brockler, an assistant Cuyahoga County prosecutor.[53] Brockler suspected that a murder defendant fabricated his alibi.[54] To investigate his theory, he created a persona and a Facebook profile for the name "Taisha Little," complete with a photo and details pulled from jailhouse calls.[55] Using this fake persona, he contacted the defendant's girlfriend and another alibi witness, claiming that Taisha had a romantic relationship with the defendant.[56] "Taisha" also suggested she had a child with the defendant.[57] Through the persona, Brockler pressed both women to admit that the defendant fabricated his alibi.[58] When the witnesses grew suspicious, Brockler deleted the account.[59] Brocker, of course, did not disclose his deception to defense counsel or the court until it surfaced through other sources.[60]

After discovering Brockler's actions, the court held that Brockler's conduct violated Ohio Professional Conduct Rule 8.4(c), which prohibits dishonesty, fraud, deceit, or misrepresentation, and Rule 8.4(d), which bars conduct prejudicial to the administration of justice.[61] His Facebook ruse risked generating false testimony, introduced new issues shortly before trial, and forced the appointment of a special prosecutor.[62] The court rejected Brockler's argument that prosecutors should enjoy a special exemption for investigative deception like that which he undertook.[63]

Ultimately, Brockler received a one-year suspension from the practice of law, fully stayed on conditions that he commit no further misconduct.[64] The Ohio Supreme Court's majority opinion emphasized mitigating factors: Brockler had no prior disciplinary history, he cooperated in the investigation, proffered strong character evidence, and the Court viewed that this was an isolated lapse of judgment.[65] Notably, two dissenting justices argued that the sanction was far too lenient, stressing the seriousness of lying to witnesses in a murder case and stating that they would indefinitely suspend the attorney from the practice of law.[66]

The Brockler decision highlights how attorneys and litigants may abuse digital tools in a manner that compromises the fairness of proceedings. Here, Facebook became a vehicle for deception and manipulation. The misconduct was

53. Disciplinary Couns. v. Brockler, 48 N.E.3d 557, 558 (Ohio 2016).
54. *Id.* at 558-59.
55. *Id.* at 558-60.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 559-60 (notably, Brocker was terminated from his position with the prosecutor's office for his conduct during this matter).
61. *Id.* at 560.
62. *Id.* at 560-61.
63. *Id.*
64. *Id.* at 561-62.
65. *Id.* at 560-62.
66. *Id.* at 562-64.

not public speech, but covert digital subterfuge aimed at witnesses. When lawyers exploit online platforms outside accepted tactics and behaviors, they erode trust in the justice system. Digital incivility can occur in both public and private forms, but either way, it undermines the public's confidence in professional judgment and the rule of law.

Case Illustration 3: In re Perricone

In December 2018, the Louisiana Supreme Court disbarred assistant U.S. Attorney Salvador Perricone for posting anonymous online comments about cases being handled by himself or by his office, stating that the case served a cautionary lesson for all lawyers—"Our decision today must send a strong message to…all the members of the bar that a lawyer's ethical obligations are not diminished by the mask of anonymity provided by the Internet."[67]

Between November 2007 and March 2012, Salvador Perricone posted more than 2,600 comments on nola.com, the website of the New Orleans Times-Picayune, approximately 100 to 200 of which concerned matters then being prosecuted by his office.[68] Writing under at least five pseudonyms—"campstblue," "legacyusa," "dramatis personae," "Henry L. Mencken1951," and "fed up"—Perricone did not disclose his affiliation with the U.S. Attorney's Office or his connection to the cases about which he commented.[69]

For example, in one of his posts, Perricone stated that he had read the indictment, and "there is no legitimate reason for this type of behavior. …GUILTY!!!"[70] Posting about a different case that he was actively prosecuting, Perricone claimed that the defense lawyer had "screwed his client."[71] Perricone's comments bore a pattern of denigrating the testimony of witnesses for the defense, insinuating coverups and corruption.[72] The timing of the posts, made during trial, often coincided with jury deliberations.[73]

Although Perricone initially proffered that he made the comments to relieve stress and he did not intend to prejudice the fairness of any legal proceeding, as one district court involved noted, "the fact that the government's actions were conducted in anonymity makes it all the *more* egregious, and forces the Court, the defendants, and the public into an indecent game of 'catch-me-if-you-can.'"[74] Indeed, Perricone later admitted to violating legal ethics rules, and the Louisiana Supreme Court determined that his pseudonym posting "violated duties owed to his client, the public, the legal system, and the profession" (Rules 3.6, 3.8(f),

67. *In re* Perricone, 263 So. 3d 309, 319 (La. 2018).

68. *Id.* at 310.

69. *Id.*

70. Debra Cassens Weiss, *Former Prosecutor's Disbarment for Anonymous Online Posts Is Lesson for Other Lawyers, Court Says*, A.B.A.: ABA J. (Dec. 10, 2018, at 07:25 CT), https://www.abajournal.com/news/article/former_prosecutors_disbarment_for_anonymous_online_posts_is_lesson_for_othe.

71. *Id.*

72. *See id.*

73. *See Perricone*, 263 So. 3d at 312-14.

74. *Id.*; United States v. Bowen, 969 F. Supp. 2d 546, 626 (E.D. La. 2013).

8.4(d), and 1.7(a)(2)).[75] The Court explicitly rejected Perricone's defense of mental disability stemming from a diagnosis of PTSD.[76] Ultimately, due to his position of public trust as a prosecutor, his intentional decision to post comments in contravention of the ethical rules, and the serious harm that it caused both to individual litigants and to the legal profession as a whole, the Court disbarred Perricone.[77]

This case highlights the viral temptation for attorneys to vent online through social media platforms. Perricone himself openly admitted that "he was angry over public corruption and he vented this anger in the caustic criticism leveled against all who, in his judgment, warranted accountability, even though he knew this was improper."[78] Motivated by his frustration with the justice system, this seasoned attorney rationalized his behavior by using anonymity as a shield. However, as the Court stressed, anonymous or pseudonymous comments can still have highly prejudicial effects and result in disciplinary sanctions when traceable to an attorney.

C. The "Shadow Social" Problem—Ephemeral Messaging and Client Oversight

The ABA has made clear that parties to litigation have a duty to preserve all electronically stored information (ESI) related to their matter including posts on social media.[79] The lawyer's role is not only to inform the client of this obligation, but to take positive action to implement controls and see that the client complies with the obligation.[80] A lawyer who blindly relies on their client to identify and preserve all relevant social media messaging and information runs afoul of their ethical duties.

The duty to preserve social media evidence arises when a party reasonably anticipates litigation.[81] Thus, in practice, a plaintiff's duty to preserve could be triggered as early as the first consultation. The lawyer, in turn, must familiarize themselves with any evidence that the client has and give clear instructions to the client on how to preserve it.[82] Once social media accounts and potential evidence has been identified, a lawyer may not permit, assist, or advise a client to conceal

75. *Perricone*, 263 So. 3d at 318.

76. *Id.*

77. *Id.* at 319.

78. *Id.* at 318.

79. *The Ethics of Managing a Client's Social Media Content*, A.B.A. (Mar. 27, 2024), https://www.americanbar.org/groups/gpsolo/resources/ereport/2024-march/ethics-managing-clients-social-media-content/?login.

80. *Id.*

81. *Id.*

82. *Id.* (the ABA guidance suggests, among other things: (1) providing the client with a litigation hold letter, (2) identifying all social media sources of ESI, (3) documenting steps taken to preserve ESI, and (4) hiring a forensic expert to conduct the preservation of ESI).

or destroy evidence.[83] However, advising a client to "take down" a damaging post is distinguishable from outright deleting it and may be permissible under certain circumstances.[84]

The rise of ephemeral messaging platforms—such as Snapchat, WhatsApp, Signal, Slack, and disappearing Instagram chats—has further complicated ESI by creating new ethical blind spots for attorneys. Because ephemeral messages automatically delete after a period of time, preserving and collecting relevant communications is often difficult for counsel.[85] Their disappearance can result in spoliation of key evidence and expose a party to sanctions, particularly where deletion was intentional.[86] What is more, the use of ephemeral messaging apps *during* litigation or pre-trial investigations often raises suspicions of parties attempting to conceal or destroy evidence, leading to allegations of obstruction of justice.[87]

A review of recent decisions reveals that courts increasingly treat ephemeral messages like any other form of ESI, enforcing the duty to preserve them once litigation is anticipated or a hold is in place. In the 2021 age discrimination case *Herzig v. Arkansas Foundation for Medical Care, Inc.*, plaintiffs began using ephemeral messaging on Signal after preservation orders were in place.[88] The Western District of Arkansas Court considered prior communications between the plaintiffs and determined that communications using Signal were responsive.[89]

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83. *See* MODEL RULES OF PRO. CONDUCT r. 3.4 (A.B.A. 2025) (providing that a lawyer should not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal" evidence or assist another in doing so).

84. *See NYCLA Ethics Opinion 745: Advising a Client Regarding Posts on Social Medica Sites*, N.Y. CNTY. LAWS. ASS'N (July 2, 2013), https://www.nycla.org/resource/ethics-opinion/nycla-ethics-opinion-745/ ("there is no ethical bar to taking down such material" if the substance of the post is "preserved in cyberspace or on the user's computer."); *L.E.O. No. 2015-02: Social Media and Attorneys*, OFF. OF DISCIPLINARY COUNS. W. VA. JUD. TOWER 9 (2015), https://storage.googleapis.com/msgsndr/Rgd68xOkcVdteTsBkf6O/media/66a7ea7dc87f33d3e149ff03.pdf (stating that attorneys may instruct clients to delete information on social media if the deletion is not illegal or spoliation and the attorney takes appropriate steps to preserve the information); *Florida Bar Ethics Opinion: Opinion 14-1*, THE FLA. BAR (June 25, 2015), https://www.floridabar.org/etopinions/etopinion-14-1/; *2014 Formal Ethics Opinion 5: Advising a Civil Litigation Client About Social Media*, N.C. STATE BAR (July 17, 2015), https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-5/.

85. *See* Mark Rosman, *DOJ Messaging App Warnings Undermine Trust in Counsel*, LAW360 (May 24, 2024), https://www.law360.com/articles/1837451/doj-messaging-app-warnings-undermine-trust-in-counsel ("While deletion of electronic evidence such as chats is not uncommon, it is usually done inadvertently or by a panicked employee who disregards a preservation notice drafted by counsel and issued by the company.").

86. *See id.* ("In addition to emphasizing the possibility of charging lawyers with obstruction of justice, the Antitrust Division has publicized its recent success in piercing the attorney-client privilege via the crime fraud exception.").

87. Waymo LLC v. Uber Techs., Inc., 2018 WL 646701, at *3 (N.D. Cal. 2018) ("evidence of Uber's litigation misconduct or other bad behavior may be relevant and admissible insofar as it reasonably bears on actual claims and defenses in this case. For example, facts like Uber's use of ephemeral messaging may be used to explain gaps in Waymo's proof that Uber misappropriated trade secrets or to supply proof that is part of the res gestae of the case.").

88. Herzig v. Ark. Found. for Med. Care, Inc., 2019 WL 2870106, at *4 (W.D. Ark. 2019).

89. *Id.* at *5.

The Court also found that the destruction of ESI was intentional because the plaintiffs had manually configured Signal to delete communications.[90] As a result, the case was dismissed with prejudice.[91] That same year, in *Doe v. Purdue University*, plaintiff's replacement Snapchat download was missing eleven videos and images, which he claimed were deleted from his phone to free storage space, unintentionally erasing them from Snapchat's servers as well.[92] Although the court could not find that the plaintiff had acted in bad faith to hide information,[93] he was nonetheless sanctioned to pay the defendants' Rule 37 motion fees, and the Court allowed the jury to hear evidence about the missing data.[94]

More recently, in 2023, the Northern District of California Court sanctioned Google for Google Chat spoliation, ordering Google to cover the plaintiffs' attorneys' fees and costs in bringing the Rule 37 motion—with additional sanctions possible at the close of discovery.[95] After litigation began, Google failed to disable auto-deletion of Google Chat messages, and instead allowed employees to choose whether or not to preserve chats.[96]

Collectively, these cases demonstrate that courts view ephemeral messaging no differently from other forms of ESI when it comes to preservation obligations. The automatic or intentional deletion of such communications—whether through user choice or platform design—can lead to significant sanctions, including dismissal.

In January 2024, the Federal Trade Commission (FTC) and Department of Justice (DOJ) issued a joint update providing guidance that reinforces parties' preservation obligations for ephemeral messaging.[97] The press release advises that "[c]ompanies and individuals have a legal responsibility to preserve documents when involved in government investigations or litigation…this preservation responsibility applies to new methods of collaboration and information sharing tools, even including tools that allow for messages to disappear via ephemeral messaging capabilities."[98] These updates are explicitly aimed at preventing opposing counsel and their clients from disclaiming knowledge when transactions or communications occur through ephemeral messaging tools.[99] This guidance underscores the risk that the use of disappearing texts or auto-delete features may constitute sanctionable evidence destruction. Going forward, lawyers must treat

90. *Id.*

91. *Id.* at *7.

92. Doe v. Purdue Univ., 2021 WL 2767405, at *5-6 (N.D. Ind. 2021).

93. *Id.* at *10 ("With nothing but Defendants' speculative assertions to the contrary, the Court cannot find that Plaintiff deleted the files for the purpose of hiding adverse information.").

94. *Id.* at *15.

95. *In re* Google Play Store Antitrust Litig., 664 F. Supp. 3d 981, 992-94 (2023).

96. *Id.* at 982.

97. *FTC and DOJ Update Guidance That Reinforces Parties' Preservation Obligations for Collaboration Tools and Ephemeral Messaging*, FED. TRADE COMM'N (Jan. 26, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-doj-update-guidance-reinforces-parties-preservation-obligations-collaboration-tools-ephemeral.

98. *Id.*

99. *Id.*

ephemeral platforms with the same vigilance applied to all other sources of discoverable information.

D. Non-Legal Political Discourse That Damaged Careers

The assassination of Charlie Kirk sparked an immediate and volatile online response. Several professionals lost their positions after posting comments that many saw as celebratory or reckless. For example, a Perkins Coie lawyer posted, "[m]aybe this will be the event that gets MAGA to be serious about gun control. Dead school children haven't been enough."[100] Screenshots spread across Twitter and LinkedIn. Perkins Coie quickly announced the lawyer's dismissal "with immediate effect," stressing that the remarks "fell far short" of the firm's expectations and professional standards.[101] For a lawyer, such public celebration of violence runs directly against the aspirational ideals of civility embedded in state professionalism codes and undermines public confidence in the bar.

On MSNBC, political analyst Matthew Dowd commented that Kirk's killing "hateful thoughts lead to hateful words, which then lead to hateful actions…. You can't stop with these sort of awful thoughts you have and then saying these awful words and then not expect awful actions to take place."[102] Clips of the segment went viral, as some interpreted the statements as insensitive, or as Dowd downplaying the gravity of the murder. Critics flooded social media with calls for his firing. Within days, MSNBC confirmed Dowd was no longer with the network.[103] Although Dowd was not bound by the Rules of Professional Conduct, the same principle applies: speech that appears to excuse political assassination violates baseline expectations of professional decorum and independence.

In Arkansas, law professor Felicia Branch posted on Facebook about Kirk's murder: "I will not pull back from CELEBRATING that an evil man died by the method he chose to embrace."[104] Screenshots of her posts circulated widely. Legislators condemned her remarks and demanded action.[105] The university

100. Rob Harkavy, *Perkins Coie Lawyer Dismissed over Social Media Post on Charlie Kirk's Death*, ICLG (Sep. 16, 2025), https://iclg.com/news/23069-perkins-coie-lawyer-dismissed-over-social-media-post-on-charlie-kirk-s-death.

101. Debra Cassens Weiss, *Perkins Coie Lawyer Is Out of a Job, Apparently Because of Post Criticizing Charlie Kirk After His Shooting Death,* A.B.A.: ABA J. (Sep. 15, 2025, at 12:43 CT), https://www.abajournal.com/news/article/perkins-coie-lawyer-is-out-of-a-job-after-post-criticizing-charlie-kirks-politics-after-his-shooting-death.

102. Jospeh Gedeon, *MSNBC Fires Analyst Matthew Dowd over Charlie Kirk Shooting Remarks*, THE GUARDIAN (Sep. 11, 2025, at 09:50 ET), https://www.theguardian.com/us-news/2025/sep/11/msnbc-fires-matthew-dowd-charlie-kirk-shooting.

103. *Id.*

104. Debra Cassens Weiss, *Law Prof Fired for Online Comments After Charlie Kirk's Death that Led to 'Torrent of Complaints'*, A.B.A.: ABA J. (Oct. 21, 2025, at 12:37 CT), https://www.abajournal.com/news/article/law-prof-is-fired-for-online-comments-after-charlie-kirks-death-that-led-to-torrent-of-complaints.

105. *State Officials Demand Firing of Law Professor over Kirk Comments*, WHITE RIVER NOW (Sep. 16, 2025), https://www.whiterivernow.com/2025/09/16/state-officials-demand-firing-of-law-professor-over-kirk-comments/ ("Gov. Sarah Huckabee Sanders called Branch's comments "vile, disgusting, and unacceptable" in a post on X, demanding her termination…. Lt. Gov. Leslie Rutledge

suspended her with pay and opened an investigation, citing damage to public trust.[106] For a professor in a public law school, such comments implicate not only academic freedom, but also institutional civility norms. The American Bar Association's Model Rule 8.4(d) warns that it is misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.[107] Public comments glorifying violence against a political figure, even if outside the courtroom, undermine respect for the rule of law.[108]

These examples illustrate just a few of the more prominent people to damage their careers based on this incident.[109] Many other lesser known people were reprimanded or fired for similar online posts.[110] Their comments, and the swift and substantial reactions to them, demonstrate another modern enforcement mechanism of civility: not bar complaints or disciplinary hearings, but viral social media outrage followed by swift employer action.[111] Digital incivility carries immediate reputational costs. Institutions now treat uncivil online speech—especially speech celebrating violence—as professional misconduct, whether or not a formal rule is invoked.

III. PRACTICAL SUGGESTIONS AND SOLUTIONS FOR ATTORNEYS AND LITIGANTS

The challenge of digital incivility is not simply one of personal restraint—it implicates professional duties and the collective reputation of the bar. In this environment, attorneys must move beyond reactive admonitions to a structured framework that aligns daily social media use with their ethical obligations. To protect themselves and their clients, attorneys should develop internal policies to safeguard against the pitfalls presented above. Attorneys should invest time and

called for an investigation, writing to law school Dean Colin Crawford that Branch's statements are "incompatible with the values of higher education, the legal profession, and the rule of law.").

106. Scott Solomon & Tyre White, *Arkansas Law Professor Suspended for Controversial Comments on Charlie Kirk Assassination*, ABC 7: KATV NEWS (Sep. 16, 2025, at 22:16 ET), https://katv.com/news/local/arkansas-law-professor-suspended-for-controversial-comments-on-charlie-kirk-assassination-katv-news-share-inform-community; Weiss, *supra* note 104 (Chancellor of the University of Arkansas wrote to Branch, "I cannot see a pathway where you could remain in your position at the Bowen Law School without compromising the trust and confidence of your students and colleagues.").

107. MODEL RULES OF PRO. CONDUCT r. 8.4 (A.B.A. 2025).

108. Weiss, *supra* note 104.

109. Jonathan Friedman & Elly Brinkley, *Charlie Kirk's Murder Spurs McCarthy-Esque Crackdown on Free Expression*, PEN AM. (Sep. 15, 2025), https://pen.org/charlie-kirks-murder-spurs-mccarthy-esque-crackdown-on-free-expression/ ("A broad campaign has emerged to police speech about the incident online, leading to a spate of suspensions, firings, harassment, and doxing, some of it at the behest of elected officials."); Manisa Krishan, *Cancel Culture Comes for Artists Who Posted About Charlie Kirk's Death*, WIRED, https://www.wired.com/story/charlie-kirk-art-censorship/ [https://archive.ph/UnhGl] (last visited Mar. 10, 2026).

110. Friedman & Brinkley, *supra* note 109.

111. David Bauder & Ali Swenson, *Matthew Dowd's Firing Begins Flood of People Facing Consequences for Their Comments on Kirk's Death*, AP (Sep. 11, 2025, at 19:19 ET), https://apnews.com/article/dowd-msnbc-kirk-comments-e08f349022c9d69171cd575664141075.

resources to create a framework that, at the minimum, establishes the following guiderails and minimum competencies.

A. Establish Competence in Technology and Social Media

Model Rule 1.1 requires lawyers to provide competent representation, which increasingly encompasses technological literacy.[112] Comment 8 to Rule 1.1 explicitly directs attorneys to keep abreast of the "benefits and risks associated with relevant technology."[113] Today, that obligation extends to understanding the mechanics of social media platforms, their reach, permanence, and potential for misinterpretation. A competent lawyer must recognize how a "private" Facebook post can become public through screenshots, how hashtags or trending topics can amplify content, and how ephemeral messaging tools can trigger preservation concerns. Competence thus requires lawyers not only to avoid missteps themselves, but also to appreciate the risks inherent in the digital tools they and their clients use.

B. Advise Clients on Digital Conduct

An attorney's duty extends to counseling clients on the dangers of online commentary during litigation. Clients are often unaware that their posts—even casual or emotional remarks—can become exhibits, evidence of bias, or the basis for sanctions. Lawyers must take affirmative steps to explain what is acceptable and what is not. At minimum, this requires issuing clear litigation-hold instructions that cover digital communications, explaining that "deleting" rarely erases content permanently, and reinforcing that any commentary on pending matters—even indirect or coded—can prejudice the case. By taking ownership of client education, attorneys fulfill their supervisory role and safeguard the fairness of proceedings.

C. Pause and Conduct a Cost-Benefit Analysis Before Posting

In the age of instant reaction, the professional obligation is to resist immediacy. Before posting, attorneys should engage in a deliberate cost-benefit analysis. Questions to consider include: Would I make this statement in open court before a judge? Could this be misconstrued as prejudicial trial publicity? Does the potential benefit of posting outweigh the professional and reputational risks? Most often, the answer to the last question will be no. By institutionalizing this reflective step—akin to the mental discipline of reviewing a filing before submitting it—lawyers can avoid the reputational and ethical hazards of impulsive online commentary.

112. MODEL RULES OF PRO. CONDUCT r. 1.1 (A.B.A. 2025).
113. *Id.* r. 1.1 cmt. 8.

D. Maintain Strict Professional and Personal Boundaries

A practical safeguard is separating professional and personal online identities. Distinct accounts, combined with disclaimers clarifying that posts are not legal advice, reduce the likelihood of misinterpretation. Even then, however, the prudent lawyer remembers that audiences rarely distinguish between "personal" and "professional." Posts celebrating violence, mocking opponents, or venting about litigation inevitably bleed into professional identity and can trigger both formal and informal consequences.

E. Establish Institutional Practices and Culture

Law firms and legal institutions should not leave digital civility to chance. Written policies on attorney social media use, annual ethics trainings that include digital scenarios, and internal review mechanisms for high-risk communications can all mitigate exposure. By creating a culture of proactive restraint, including standardized policies and training, institutions help lawyers internalize civility as part of their professional identity.

F. Create an Integration Case Strategy for Social Media

Finally, lawyers must approach social media as part of a broader case strategy, not as an informal outlet for commentary. This means counseling clients and subordinates, monitoring public online content for potential prejudice, intervening when clients or colleagues post inappropriately, and documenting compliance with preservation and ethical obligations. Treating social media as an extension of case management—subject to the same discipline as discovery or trial preparation—ensures that lawyers meet both their ethical duties and strategic obligations.

Taken together, these measures emphasize that civility in the digital age is not passive restraint, but active stewardship. The duty of competence requires lawyers to understand technology; the duty of advocacy demands they educate and restrain their clients; and the duty of professionalism obligates them to weigh every post against its potential cost to justice and reputation. Civility, therefore, is not merely a matter of etiquette, but the profession's currency in an era where one careless post can undermine decades of earned trust.

CONCLUSION

In a real sense, the legal profession now stands at a crossroads. The same tools that promise connection and efficiency also tempt lawyers into careless shortcuts that erode trust in the courts and diminish the dignity of advocacy. Digital incivility is not a side issue—it is fast becoming one of the defining challenges of professional identity in the twenty-first century.

The solution will not be found in more rules alone, but in a cultural shift. Civility must be reframed as strategic strength, rather than restraint: it is the mindset and discipline that preserves reputation in a world where credibility can

be lost in a single post. Lawyers who internalize this ethic of digital stewardship will not only protect their own reputations, but will model for the public that advocacy can be both zealous and dignified. The measure of lawyers in the digital era is not how quickly they can respond, but how carefully they choose when not to respond. In that silence—and in that restraint—the profession preserves its authority, its honor, and its indispensable role in our democracy.