
September 2014

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Recommended Citation

Nicola A. Boothe-Perry, *Friends of Justice: Does Social Media Impact the Public Perception of the Justice System?*, 35 Pace L. Rev. 72 (2014)

DOI: <https://doi.org/10.58948/2331-3528.1876>

Available at: <https://digitalcommons.pace.edu/plr/vol35/iss1/3>

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Friends of Justice: Does Social Media Impact the Public Perception of the Justice System?

Nicola A. Boothe-Perry*

I. Introduction

Lawyers have long been recognized as being necessary in the effective functioning of an ordered society¹ in roles as both officers of the court and, more broadly, as officers of the system of justice. In 2014, the ABA Task Force on the Future of Legal Education report noted that “[s]ociety has a deep interest in the competence of lawyers, in their availability to serve society and clients, in the broad public role they can play, and in their professional values.”² Values such as those noted in the Model Rules of Professional Conduct (advisor, counselor, and advocate) are instrumental in the lawyer’s contribution to the “effective functioning of an ordered society.”³ These expected values and their interplay in society creates what has been

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1. A.B.A. TASK FORCE ON THE FUTURE OF LEGAL EDUC., *Report and Recommendations*, 6 (2014) [hereinafter A.B.A. TASK FORCE, *Report & Recommendations*], *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf.

2. *Id.*

3. *Id.*

posited as a social contract between lawyers and the general public.⁴ This symbolic idea of a social contract connotes a “sense of connectedness and unity among those in a society in the same way that contracts between individuals reflect binding relationships.”⁵ The explosive use of social media has expanded the context of the meaning of relationships, including relationships specifically between clients and attorneys and more broadly between the public and the justice system.

Social media has and will continue to make relationships, including legal relationships, more collaborative and social. However the use of social media can also adversely affect a lawyer’s ethical obligations and professional responsibilities. For example, prolific use of social media could affect the provision of competent representation and/or compliance with rules of confidentiality required by the Model Rules of Professional Responsibility.⁶ In addition to the impact on the provision of legal services the use of social media also has consequences on the general public’s perception of the legal profession. Social media use that either directly violates ethical rules or questions the actions of even a small portion of lawyers will taint the image of the legal community and lead to diminished public confidence in our legal institution.⁷ Where

4. See, e.g., JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 24-25 (Donald A. Cress trans., 1987) (1762) (stating that “the “social contract” produces a moral and collective body. . .which receives from this same act its unity, its common self, its life and its will). See also WILLIAM SULLIVAN ET. AL, CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 126-47 (Jossey-Bass 2007) (noting that lawyers operate under this social contract both “in the public sphere and with the public trust.”).

5. Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1413 (2001).

6. See, e.g., Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 118 (2009) (discussing lapses in confidentiality that may inadvertently occur through lawyer use of SNS); see also Melissa Blades & Sarah Vermeylen, *Virtual Ethics for a New Age: The Internet and the Ethical Lawyer*, 17 GEO. J. LEGAL ETHICS 637, 647 (2004) (discussing the potential for formation of an attorney-client relationship); J.T. Westermeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 301 (2004) (suggesting that lawyers should be required to keep abreast of technological advances in security, as well as the technological advances being developed by hackers).

7. See CONF. OF CHIEF JUSTICES, A NATIONAL ACTION PLAN ON LAWYER

inappropriate use of social media by those in the legal profession takes place, regardless of whether or not it results in a negative outcome, the publication of the act itself directly affects the public's perception of not just the inappropriate lawyer/judge/juror-actors, but the legal profession in general. The unavoidable consequences are both direct and indirect impacts on the justice system. For instance, if the public experiences anxiety, mistrust and difficulty in evaluating lawyers, many consumers will simply avoid the use of lawyers altogether.⁸ This means that some consumers will not get their legal needs met, while others will find ways to solve their problems without having to hire a lawyer. Where the public feels that lawyers are not accessible to them - whether as a result of economic reasons or due to the distrust that accompanies the negative perception of lawyers - its faith in the justice system is ultimately eroded. As such the public's perception of lawyers is not just an issue of personal or professional pride. "It affects the public's belief in our justice system, and ultimately, their faith in our democracy."⁹

This article will demonstrate how the unregulated use of social media by participants in the justice system (judges, attorneys and jurors specifically) affects the public perception and subsequently the integrity of our justice system. The article will provide a holistic review of social media use by judges, attorneys and jurors, and demonstrate why their use of social media should be harnessed in a manner to ensure compliance with ethical rules and reduce potential negative effects to the social contract between law and society.

Social media is like a culvert. It catches pictures, novelties, personal profiles, gossip, news, unfiltered opinions, and punditry. It is subject to misuse. This article draws lines

CONDUCT 17 (1999) [hereinafter CONF. OF CHIEF JUSTICES, A NATIONAL ACTION PLAN], *available at* <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Web%20Documents/National-Action-Plan-Full.ashx> (noting that the unethical and unprofessional conduct of a small portion of lawyer has tainted the image of the legal community and diminished public confidence in legal and judicial institutions).

8. See A.B.A. SECTION OF LITIG., *Public Perceptions of Lawyers Consumer Research Findings*, 24 (2002) [hereinafter A.B.A. SECTION OF LITIG., *Public Perceptions*].

9. *Id.* at 5.

beyond which the users in the justice system should not go. It recounts important cases and provides guidance when doubt seeps into what judges, jurors, and attorneys want to do. Part II of the article will discuss the perception of lawyers held by the public in general as a foundational basis to discuss the importance of appropriately regulated social media use in the legal profession. Part III will briefly discuss social media use in the legal community providing a backdrop to the opportunities and pitfalls of such use, which will be more specifically addressed in Part IV where the correlation between the provision of justice and social media use by judges, jurors, and attorneys will be analyzed. Part V will provide justification for regulation, or at the very least, detailed guidance for social media use for those in the justice system, recognizing that social media's rapid dissemination of material requires that the legal profession harness or, less restrictively, regulate unfettered use of social media by attorneys as any negative implications will serve to further undermine the public trust in the profession. Suggested guidelines and proposed amendments to current provisions will be provided in support. Part VI provides the conclusion.

II. Public Perception of Legal Profession

Once viewed as a profession of prestige, the public perception of the legal profession has steadily declined.¹⁰ For decades Louis Harris and Associates have conducted polls asking random samples of adult Americans to rate a variety of occupations as having "very great prestige," "considerable prestige," "some prestige," or "hardly any prestige at all."¹¹ In

10. See Chris Klein, *Poll: Lawyers Not Liked*, NAT'L L.J., Aug. 25, 1997, at A6. The Harris survey showed that the percentage of the public who viewed the law as very prestigious had dropped from 36 % in 1977 to 19 % in 1997. For a general review of empirical data concerning public perception, see several studies commissioned in the 1980s assessed the declining public perception of lawyers, finding a "surprising level of mistrust and dislike of lawyers and the legal profession in general." See Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1346 (1997).

11. HARRIS INTERACTIVE, <http://www.harrisinteractive.com> (last visited Sept. 19, 2014).

1977, almost 75% of respondents believed the legal profession had either very great or considerable prestige.¹² Twenty years later, public opinion changed dramatically with a near majority (47%) of respondents to the same question ranking the legal profession as having either some or hardly any prestige at all.¹³ By 2001 percentages were down further: to 21%.¹⁴

In general, the public views practicing lawyers as the face of the legal profession. This may be an incomplete assessment of the profession as it does not take into account those members of the profession who do not actively engage in the practice of law. Nevertheless, a significant portion of information received by the public about the legal profession relates to the actions of practicing lawyers. So like it or not, that segment of the legal profession has become the representation of the profession to many consumers. As such in assessing the public perception of the legal system it is important to recognize that such perception is in great part determined by the public's observation of lawyers.

As the ABA 2014 Task Force on the Future of Legal Education succinctly stated in its Report, "[l]aw is the fundamental form of social ordering in reasonably organized society . . . [with] lawyers [being] the primary form of law service provider.¹⁵ Yet, as far back as Biblical times, law and its teaching was mostly a disparaged profession.¹⁶ The

12. Humphrey Taylor, *Lawyers and Law Firms Plumb the Depths of Public Opinion*, HARRIS POLL, Aug. 11, 1997.

13. *Id.*

14. Humphrey Taylor, *Doctors Seen as Most Prestigious of Seventeen Professions and Occupations, Followed by Scientists (#2), Teachers (#3), Ministers/Clergy (#4) and Military Officers (#5)*, HARRIS POLL (Sep. 6, 2000), <http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-DOCTORS-SEEN-AS-MOST-PRESTIGIOUS-OF-SEVENTEEN-PROF-2000-09.pdf>.

15. ABA TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, Report and Recommendations, *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf.

16. Luke 11:46 states, "How terrible also for you teachers of Law! You put onto people's backs loads which are hard to carry, but you yourselves will not stretch out a finger to help them carry those loads." *Luke* 11:46. Luke 11:52 states, "How terrible for you teachers of the Law! You have kept the key that opens the door to the house of knowledge; you yourselves will not go

downward trend of the perception of lawyers continues and currently lawyers are generally not well perceived by the public¹⁷ with lawyer jokes being prevalent in culture, books, the worldwide web and social media. As one attorney put it, “[a]s long as there have been lawyers, there have been critics condemning them for their cramped souls, their devotion to lucre, their abusive and uncivil ways.”¹⁸ Lawyer jokes and media depicting lawyers in a distasteful manner lends to the negative stereotypes and disparaging perception of the public.¹⁹ The problem with lawyer jokes, however, is twofold: first, “lawyers don’t think they are funny; and second, “everyone else doesn’t (sic) think they are jokes!”²⁰

The public’s perception of the legal profession has declined in part due to a decline in professionalism noted within the legal community itself.²¹ In a 1986 American Bar Association report on lawyer professionalism, in addition to noting that “[t]he public views lawyers, at best, as being of uneven character and quality,”²² the Commission provided results of a

in and you stop those who are trying to go in!” *Luke* 11:52.

17. See Honorable Paul W. Grimm & Michael Schwarz, *Current Developments in Employment Law: The Obama Years, Professionalism – Supplemental Material*, CS006 ALI-ABA 1425 (2010) (noting that lawyers are often called “shysters, money grabbers and a whole range of expletives.”). See also Nicola A. Boothe-Perry, *Enforcement of Law Schools’ Non-Academic Honor Codes: A Necessary Step Towards Professionalism?*, 89 NEB. L. REV. 634, 635 (2011) (noting that “unprofessional behavior of some lawyers has birthed a plethora of lawyer jokes and other unsavory illustrations of the practice of law.”).

18. Kevin F. Ryan, *Lex Et Ratio Professionalism and the Practice of Law (Part One)*, 27 VT. B.J. 7, 7 (2001).

19. Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 SETON HALL L. REV. 1405 (recounting a typical lawyer joke: “[H]ow many personal injury attorneys does it take to change a lightbulb? Three – one to turn the bulb, one to shake him off the ladder, and one to sue the ladder company.”).

20. *Id.*

21. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 94-96, 303-304 (2d ed. 1986); See also AMERICAN BAR ASSOCIATION, COMMISSION ON PROFESSIONALISM,IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 1 (1986) [hereinafter STANLEY COMMISSION REPORT], available at http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/Stanley_Commission_Report.authcheckdam.pdf (“Has our profession abandoned principle for profit, professionalism for commercialism?”).

22. See STANLEY COMMISSION REPORT, *supra* note 21, at 3.

nonrandom survey which evidenced that only 6% of corporate users of legal services rated “aft or most” lawyers as deserving to be called “professionals.”²³ Only 7% saw professionalism increasing among lawyers, with 68% saying it had decreased over time.²⁴ Similarly, 55% of the state and federal judges questioned in a separate poll contained within the Commission report said lawyer professionalism was declining.²⁵

Subsequent data confirm the sentiment of these statistics. For example in a national survey conducted on behalf of the ABA Section of Litigation in 2008, consumer confidence in the legal profession ranked second to last: only above the media, with less than one in five (19%) of consumers saying that they were “extremely” or “very confident” in the legal profession or lawyers.²⁶ In a 2013 Gallup Poll, lawyers ranked near the bottom regarding honest and ethical standards of different occupations, garnering a mere 20% of the public vote; well below nurses, doctors, teachers and policemen; tying with television reporters; and just barely ranking above lobbyists and car salesmen.²⁷ One state survey showed that 44 % of people had little or no respect for lawyers; a 19% increase from 25% eight years earlier.²⁸ Some attorneys themselves believe that the public has an even worse view of them. One poll conducted of New Jersey attorneys, indicated that 86.2 % believed the public is becoming more anti-lawyer; only 12.1 % believe that the image of lawyers was not deteriorating.²⁹

These statistics paint a dismal picture of the public’s perception of lawyers. It is apparent that the public does not believe it is receiving the expected ideals from lawyers: both substantively and professionally. As the Stanley Commission

23. *Id.* (citing G. Shubert, *Survey of Perceptions of the Professionalism of the Bar* (1985) (unpublished)). The survey was a nonrandom sample of 234 corporate executives and judges.

24. *Id.*

25. *Id.*

26. See A.B.A. SECTION OF LITIG., *Public Perceptions*, *supra* note 8.

27. *Honesty/Ethics in Professions*, GALLUP, <http://www.gallup.com/poll/1654/Honesty-Ethics-Professions.aspx> (last visited Sept. 17, 2014).

28. See Peter Wallsten, *Commission Aims to Help Lawyers Be More Appealing*, ST. PETERSBURG TIMES, Oct. 2, 1996, at 10B.

29. See Rocco Cammarere, *How Lawyers See Their Image: From Bad to Worse*, N.J. L., Apr. 29, 1996, at 1.

report notes, “[t]he citizens of this country should expect no less than the highest degree of professionalism when they have entrusted administration of the rule of law - one of the fundamental tenets upon which our society is based - to the legal profession.”³⁰ Indeed the public expectation of effective lawyering presumes a high degree of professionalism.³¹ Unfortunately, the public does not appear to believe that they are receiving the degree of professionalism required from the legal profession.

Recognizing the importance of professionalism, legal organizations both on a local and national level have undertaken a number of initiatives to dilute these unfavorable views and assuage concerns about the integrity of the judicial process and the rule of law. A number of states in addition to adopting the Model Rules of Professional Conduct in some form, also have codes of professionalism³² or local rules that specifically address issues of professionalism.³³ Simultaneously, sources providing examples of lawyers behaving badly have been sensationalized by media outlets effectively undermining the attempts to improve public

30. STANLEY COMMISSION REPORT, *supra* note 21, at vii.

31. *See generally id.* (noting that clients and other lawyers perceive a lawyer who lives a high degree of professionalism as an effective lawyer).

32. For example, the Alabama State Bar members take a “Pledge of Professionalism” stating in part:

I believe that our judicial system binds together the fabric of our democracy. I believe that, in order to maintain our judicial system, lawyers must maintain a high degree of professional courtesy and decorum. I believe that every lawyer has a professional duty to maintain a courteous and collegial atmosphere in the practice of law. I believe that a courteous and collegial atmosphere begins with me.

For this pledge and a complete updated list of states with professionalism codes and/or creeds, see A.B.A., PROFESSIONALISM CODES (last updated Mar. 2015), *available at* http://www.americanbar.org/groups/professionalism/responsibility/resources/professionalism/professionalism_codes.html.

33. For example, the Florida Supreme Court adopted the Florida Bar’s “Local Professionalism Panel Plan” to receive and resolve professionalism complaints informally where possible. *See generally In re Code for Resolving Professionalism Complaints*, 116 So. 3d 280 (Fla. 2013).

perception. Attorneys falling asleep in court,³⁴ outrageous deposition behavior,³⁵ disrespectful behavior in³⁶ and out of³⁷ court (even in their capacity as elected officials³⁸), contributes to the negative perception of lawyers held by the public. In similar fashion, instances of lawyers behaving badly on social media will further increase unfavorable and adverse feelings towards lawyers and the justice system as a whole. The public

34. See *Burdine v. Johnson*, 262 F.3d 336, 357 (5th Cir. 2001) (holding that an accused murder suspect's attorney, Joe Frank Cannon, prejudiced the defendant's case by falling asleep during the capital murder trial).

35. See *Huggins v. Coatesville Area Sch. Dist.*, No. 07-4917, 2009 WL 2973044, at *1-3 (E.D. Pa. Sept. 16, 2009) (stating that counsel engaged in "incessant, insult exchanges and aggressive questioning" during the deposition. The court characterized counsels' exchanges as "heated, personal, rude and pointless" statements that included a "few choice epithets" and "foul language." The court found that both lawyers acted highly improperly, stating, "[C]ounsel's behavior falls short of that which lawyers are to exhibit in the performance of their professional duties. Treating an adversary with discourtesy, let alone with calumny or derision, rends the fabric of the law."). See also *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 53-55 (Del. 1994). See also *In re Golden*, 496 S.E.2d 619, 621 (S.C. 1998) (documenting an attorney's behavior after a deposition of his client's wife, the adverse party in a domestic proceeding. The grievance complaint alleged that after the deposition, the attorney stated to the estranged wife: "You are a mean-spirited, vicious witch and I don't like your face and I don't like your voice. What I'd like, is to be locked in a room with you naked with a very sharp knife." Thereafter, it is alleged that the attorney said: "What we need for her [pointing to estranged wife] is a big bag to put her in without the mouth cut out.").

36. See John G. Browning, *Legally Speaking: Lawyers Behaving Badly Part Three*, SE. TEX. REC. (Apr. 9, 2008), <http://www.setexasrecord.com/arguments/210542-legally-speaking-lawyers-behaving-badly-part-three> (providing one example in which, in response to a prosecutor's objection during trial, defense counsel made "a simulated masturbatory gesture with his hand while making eye contact with the Court.").

37. See *id.* (describing the case of a recent scuffle between attorneys David Lawrence and Aaron Matusick of Portland, Oregon, after leaving a court hearing in Multnomah County on a landlord-tenant case. Allegedly, "one of the lawyers slapped the other, and the attorney retaliated with a punch to the head.").

38. See *Clark v. Conahan*, 737 F. Supp. 2d 239, 256-58 (M.D. Pa. 2010) (refusing to grant defendants, then-judges Mark A. Ciavarella and Michael T. Conahan, immunity from their actions in connection with a scheme to divert juvenile offenders to a newly constructed, privately-owned juvenile detention facilities in return for kickbacks). See also *In re Cammarano*, 902 N.Y.S.2d 446, 446 (App. Div. 2010) (disbarring respondent, former mayor of the city of Hoboken, NJ, after he was convicted of conspiracy to obstruct commerce by extortion for taking bribes from an FBI informant).

desires that the legal profession “maintain its long-held professional ideals.”³⁹ However, incidences of “bad lawyer” social media behavior pose a threat to the disintegration of the public perception of lawyers by tainting the image of the legal community, and leading to diminished public confidence in legal and judicial institutions.⁴⁰ This threat underscores the importance for regulation and guidance of social media use by those in the justice system.

In order to accurately understand the interplay between social media and the effect on the legal system a cursory review of the unique characteristics of social media itself is warranted.

III. Social Media Use in General

To date no specific standard definition exists for “social media” in great part due to the rapid change of forums and applications.⁴¹ Merriam-Webster dictionary defines social media as “forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos).”⁴² In elementary terms, “social media” encompasses social interaction via technological means. These technological means allow users to interact with vast amounts of information in unprecedented ways, and allows for personalization as a result of the ability to control the flow of information.⁴³

39. STANLEY COMMISSION REPORT, *supra* note 21, at 20 (where evidence from testimony taken during bar committee meetings and from surveys examined further indicated that the “public wants the legal profession to maintain its long-held professional ideals.”).

40. *See generally* CONF. OF CHIEF JUSTICES, A NATIONAL ACTION PLAN, *supra* note 7 (noting that the unethical and unprofessional conduct of a small portion of lawyer has tainted the image of the legal community and diminished public confidence in legal and judicial institutions).

41. Susan C. Hudson & Karla K. Roberts (Camp), *Drafting and Implementing an Effective Social Media Policy*, 18 TEX. WESLEYAN L. REV. 767, 769 (2012).

42. MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/social%20media> (last visited Sept. 21, 2014).

43. This “personal yet inherently connected state,” in which individuals can dictate what they want to look at and where while largely remaining in public, is what Hampton and Gupta call “public privatism.” Eric Gordon et al., *Why We Engage: How Theories of Human Behavior Contribute to Our*

One of the primary appeals of social media lies in this ability to rapidly disseminate content to an infinite audience: content that is as diversified and varied as there are people to supply it. It has created an unprecedented participation culture where “we no longer merely watch and consume culture. We create, share and interact with it.”⁴⁴ This has rendered a collective impact on culture (oftentimes touted as “new media” or the “digital revolution”⁴⁵) with as one scholar colorfully noted, “. . . extraordinary communication and preservation tools brimming with fonts of incriminating, exculpating, and impeaching evidence.”⁴⁶ These “extraordinary communication” means have surpassed the television as the “most essential” medium in Americans’ lives.⁴⁷ Hardware and network accessibility provides the ability to access the Internet and check, comment and share information anywhere and anytime. This wireless portability leads to communication interaction that is no longer tied to a specific location.⁴⁸

Around the globe social media use has grown at an explosive rate allowing large numbers of users to instantly create and share content.⁴⁹ It promotes real-time

Understanding of Civic Engagement in a Digital Era (2013), <http://ssrn.com/abstract=2343762> or <http://dx.doi.org/10.2139/ssrn.2343762>.

44. Karen North, *Steve Jobs and the Rise of Social Media*, CNN (Oct. 7, 2011, 8:32 AM), <http://www.cnn.com/2011/10/07/opinion/jobs-social-media/index.html>.

45. CONF. OF COURT PUB. INFO. OFFICERS, 2013 NEW MEDIA SURVEY 16 (2013), available at http://ccpio.org/wp-content/uploads/2012/09/2013-New-Media-Survey-Report_CCPIO.pdf (indicating that the term “new media” is . . . an umbrella term describing the current state of digital and Internet technology and its collective impact on culture, sometimes also referred to as the digital revolution).

46. Ken Strutin, *Social Media and the Vanishing Points of Ethical and Constitutional Boundaries*, 31 PACE L. REV. 228, 228 (2011).

47. Tom Webster, *The Infinite Dial 2010: Digital Platforms and the Future of Radio*, EDISON RES. BLOG (Apr. 8, 2010), http://www.edisonresearch.com/home/archives/2010/04/the_infinite_dial_2010_digital_platforms_and_the_future_of_r.php.

48. Gordon et al., *supra* note 43 (noting that wireless portability creates a type of situated personalization leading to communication being founded in “place to-place interaction rather than person-to-person interaction, as the ability to communicate is no longer tied to a specific location but the variable context of the user.”).

49. Nicola A. Boothe-Perry, *The “Friend”ly Lawyer: Professionalism and Ethical Considerations of the Use of Social Networking During Litigation*, 24

communication and ongoing dialogue that is unprecedented in scope and detail, and provides opportunities for vast consumption of content – including legal content - in a very short span of time. Facebook, one of the most popular social networking sites, recently reported that it has 1.28 billion users with approximately 864 million daily active users on average in January 2015.⁵⁰

By 2013, approximately 83% of Fortune 500 companies were using some form of social media to connect with consumers.⁵¹ The legal community has also joined the ranks of social media users in record numbers. An ABA survey of 179 attorneys, marketing partners and marketing directors, indicated that about 85% of attorneys are using social media in some form, and 70% are using a blog.⁵² A 2010 Legal Technology Survey Report noted that 56% of attorneys in private practice are on social media sites, up from 43% the year before.⁵³ In 2012 the ABA Legal Technology Survey Report noted that 55% of law firms surveyed had Facebook accounts, and 38% of lawyers had their own page on Facebook.⁵⁴ The professional social media networking service, LinkedIn, was reportedly used by 88% of firms and 95% of the individual lawyers surveyed indicating that they have accounts.⁵⁵ By 2013 the total percentage of law firms that are on any social

U. FLA. J.L. & PUB. POL'Y 127, 131 (2013) [hereinafter Boothe-Perry, *The "Friendly Lawyer"*] (noting that the rapid growth of social networking sites has enabled large numbers of users to instantly create and share content, and has simultaneously unveiled concerns regarding ethical and professional liabilities of such use.).

50. *Company Info*, FACEBOOK, <http://newsroom.fb.com/company-info/> (last visited Jan. 10, 2015).

51. Nora Barnes & Ava Lescault, *LinkedIn Rules but Sales Potential May Lie with Twitter: The 2013 Inc. 500 and Social Media*, U. MASS.-DARTMOUTH CTR. FOR MKTG. RES. (2014), available at <http://www.umassd.edu/cmr/socialmediaresearch/2013inc500/>.

52. A.B.A., A.B.A. LEGAL TECH. SURV. REP. (2010).

53. Press Release, A.B.A., A.B.A. Legal Technology Survey Results Released (Sept. 28, 2010).

54. Robert Ambrogi, *ABA Survey Shows Growth in Lawyers' Social Media Use*, LAW SITES (Aug. 16, 2012), <http://www.lawsitesblog.com/2012/08/aba-survey-shows-growth-in-lawyers-social-media-use.html>.

55. *Id.*

network was up to 59%.⁵⁶

The more use, the more exposure, the more opportunities presented for communication between the public and the legal profession. As such, the prolific use of social media is key to understanding the impact on the justice system. Research evidence indicates that social media affects the decision-making of the general public, which includes decisions regarding the use of legal services. In 2011 a survey was conducted of 169 representatives from 53 national advocacy/activist groups operating in the United States to assess the extent to which these groups perceive and use social media as tools for facilitating civic engagement and collective action.⁵⁷ Qualitative results suggest that groups believe that social media can facilitate civic engagement and collective action by strengthening outreach efforts, enabling engaging feedback loops, increasing speed of communication and by being cost-effective.⁵⁸

An independent study of online social networking groups and the correlation to offline political participation indicated similar results.⁵⁹ A survey conducted of 455 university undergraduates was conducted to assess the quality of online political discussion and the effects of online group membership on political engagement measured through political knowledge and political participation surrounding the 2008 election.⁶⁰ Using multivariate regression analyses, the researchers noted

56. Kit Kramer, *Highlights from the ABA's 2013 Legal Technology Survey Report*, LAWLYTICS BLOG (Aug. 26, 2013), <http://blog.lawlytics.com/highlights-from-the-aba-s-2-13-legal-technology-survey-report>.

57. Jonathan A. Obar et al., *Advocacy 2.0: An Analysis of How Advocacy Groups in the United States Perceive and Use Social Media as Tools for Facilitating Civic Engagement and Collective Action* 2 J. INFO. POL'Y 1 (2011), available at <http://ssrn.com/abstract=1956352>.

58. *Id.*

59. Jessica T. Feezell et al., *Facebook Is...Fostering Political Engagement: A Study of Online Social Networking Groups and Offline Participation* (Aug. 13, 2009), available at <http://ssrn.com/abstract=1451456> (where researchers employed a multi-method design incorporating content analysis of political group pages and original survey research of university undergraduates. The author's note that "[t]his work contributes to an active dialogue on political usage of the Internet and civic engagement by further specifying forms of Internet use and corresponding effects.").

60. *Id.*

that “participation in online political groups strongly predicts offline political participation by engaging members online.”⁶¹ The study concluded that “online groups perform many of the same positive civic functions as offline groups, specifically in terms of mobilizing political participation.”⁶²

In summary, knowledge acquisition through media use is positively correlated to an individual’s increased awareness of civic issues and increased probability of political participation.⁶³ Similarly, media-acquired knowledge has also proven to be instrumental in relationships in the medical field.⁶⁴ Studies in the healthcare arena evidence that an increase in information available to consumers directly changes the traditional bi-directional relationship between a patient and a health care provider, into a triangular relationship: the patient, the healthcare provider and information obtained online, including social media.⁶⁵ Consumers also increasingly turn to social media to learn more about brands, products and services.⁶⁶ The statistics reveal that the choices society makes regarding its leadership, health and consumer services is directly correlated to information consumed, including

61. *Id.*

62. *See generally id.*

63. Steven H. Chaffee, Xinshu Zhao, & Glenn Leshner, *Political Knowledge and the Campaign Media of 1992*, in COMMC’N RES. 21:305–24 (1994); William P. Eveland Jr. & Dietram A. Scheufele, *Connecting News Media Use with Gaps in Knowledge and Participation*, in 17 POL. COMMC’N 3 (2000); Kaid, L. L., McKinney, M. S., & Tedesco, J. C., *Political Information Efficacy and Young Voters*, 50 AM. BEHAVIORAL SCIENTIST 1093-1111 (2007); Jack M. McLeod, Dietram A. Scheufele, & Patricia Moy, *Community, Communication, and Participation: The Role of Mass Media and Interpersonal Discussion in Local Political Participation*, 16 POL. COMMC’N 315-36 (1999); STEVEN J. ROSENSTONE & JOHN MARK HANSEN, MOBILIZATION, PARTICIPATION AND DEMOCRACY IN AMERICA 13-17 (1993); M. Sotirovic, and J. M. McLeod, *Values, Communication Behavior, and Political Participation*, in POL. COMMC’N 18:273-300 (1994).

64. H.S. Wald et al., *Untangling the Web – The Impact of Internet Use on Health Care and the Physician-Patient Relationship*, PATIENT EDUC. & COUNSELING 68(3), 218–24 (2007).

65. *Id.*

66. *Social Media Explosion*, 23 CQ RESEARCHER 4, 88 (Jan. 25, 2013), available at http://ils.unc.edu/courses/2013_spring/inls200_002/Readings/CQResearcher_SocialMedia.pdf (finding that upwards of 70% of consumers use social media to learn more information about consumer products and services.).

information from social media outlets. In a similar fashion society's choices and attitudes regarding the provision of justice may also be influenced by activity and information on social media. If social media activity of those in the justice system carries negative connotations, a direct effect will be a decline in the public perception of the system.

IV. Social Media Use That Directly Impacts the Provision of Justice

Social media creates both opportunities and challenges for the legal system. For instance, the use of social media has become a widely accepted and efficient form of legal marketing.⁶⁷ Social media has also been recognized as important for networking, for accessing legal information, and for heightening awareness and promoting legal reform.⁶⁸ Lawyers have recognized the shift from optional use towards necessary use of social media in order to maintain a competitive edge in the legal marketplace. In fact, double-digit percentages reported they had clients who retained them directly or via referral as a result of the lawyers' use of online services.⁶⁹

Acknowledging the demand for lawyers adept in social media use, numerous books and websites dedicated to providing instruction regarding efficient use of social media are

67. See Stephanie L. Kimbro, *Practicing Law Without an Office Address: How the Bona Fide Office Requirement Affects Virtual Law Practice*, 36 U. DAYTON L. REV. 1, 1-2 (2010) (noting that effective use of Internet technologies is essential to developing business in a competitive legal market). See generally Vanessa S. Browne-Barbour, *A Fork In the Road: The Intersection of Virtual Law Practice and Social Media*, 52 WASHBURN L.J. 267 (2013) (noting that in the current competitive legal market, law practices utilize social media to assist in branding and business development.).

68. See Jan L. Jacobowitz & Danielle Singer, *The Social Media Frontier: Exploring a New Mandate for Competence in the Practice of Law*, 68 U. MIAMI L. REV. 445, 472 (2014) (noting that lawyers employ social media for marketing, accessing legal information, or heightening awareness and promoting legal reform.).

69. Joshua Poje, *Online Rain: Survey Says a Virtual Presence May Pay*, A.B.A. J. (Dec. 1, 2012), available at http://www.abajournal.com/magazine/article/online_rain_survey_says_a_virtual_presence_may_pay/ (discussing an excerpt from the ABA 2012 Legal Tech Survey Results).

marketed to lawyers.⁷⁰ Bar organizations around the country have also recognized the importance of providing guidance and information to the legal community regarding the use of social media.⁷¹ For example the State Bar of Texas has issued guidelines for attorneys regarding the proper use of social media and blogs.⁷² The Florida Bar has also provided guidelines for advertising on networking sites.⁷³

In addition to the voluntary use of social media by attorneys to promote their services, social media use has also drastically increased in the litigation of cases. The current social climate demands that the savvy lawyer include use of technology as an integral part of a successful practice, particularly as it relates to research and preparation for cases.⁷⁴ Since 2010, social media have been a key part of upwards of 700 cases with lawyers using social media profiles to reveal such things as a person's state of mind, evidence of communication, evidence of time and place, and evidence of

70. See, e.g., ADRIAN DAYTON & AMY KNAPP, LINKEDIN & BLOGS FOR BUILDING HIGH VALUE RELATIONSHIPS IN A DIGITAL AGE (2012); EVERYDAY LAW, <http://blog.rocketlawyer.com/> (last visited Oct. 21, 2014); Kevin O'Keefe, REAL LAWYERS HAVE BLOGS, <http://kevin.lexblog.com/> (last visited Oct. 21, 2014); LEGAL MARKETING USING SOCIAL MEDIA, legalsocialmedia.blogspot.com/ (last visited Oct. 21, 2014); MODERN LEGAL MARKETING, www.moderlegalmarketing.com (last visited Oct. 21, 2014).

71. For example, in March of 2010, the Young Lawyers Division of the Texas Bar published a landmark issue, which explored how the practice of law is changing because of social media and offered practical advice on ethically navigating the social media landscape. See Arden Ward, *TYLA Pocket Guide: Social Media 101*, TEX. B.J. (Nov. 2013), available at http://www.texasbar.com/AM/Template.cfm?Section=Past_Issues&Template=/CM/ContentDisplay.cfm&ContentID=24405.

72. For a detailed discussion of the Texas Bar's guidelines, see Dustin B. Benham, *The State Bar of Texas Provides New Guidance to Attorneys Regarding the Proper Use of Social Media and Blogs for Advertising Purposes*, 52 ADVOC. 13 (2010).

73. FLA. BAR, THE FLORIDA BAR STANDING COMMITTEE ON ADVERTISING GUIDELINES FOR NETWORKING SITES (Apr. 16, 2013), available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18BC39758B54A5985257B590063EDA8/\\$FILE/Guidelines%20-%20Social%20Networking%20Sites.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18BC39758B54A5985257B590063EDA8/$FILE/Guidelines%20-%20Social%20Networking%20Sites.pdf?OpenElement).

74. See Nicole D. Galli et al., *Litigation Considerations Involving Social Media*, 81 PA. B.A. Q. 59, 59 (2010) (discussing the fact that "jurors, judges, witnesses, clients and opponents all use social media, and so too must the savvy litigator, both to research and prepare their case.").

actions.⁷⁵ At the 2012 American Bar Association annual meeting, the House of Delegates⁷⁶ approved recommendation 501A sponsored by the ABA commission on Ethics 20/20 amending the Model Rules of Professional Conduct and their related commentary.⁷⁷ In Resolution 105-B, the ABA amended either the black letter rule and/or comments of Rules 1.18 (Duties to Prospective Client); 7.1 (Communications Concerning A Lawyer's Services); 7.2 (Advertising); 7.3 (Direct Contact With Prospective Client); and 7.5 (Unauthorized Practice of Law).⁷⁸ The changes enacted at the 2012 ABA meeting acknowledge the prevalent use of electronic media and recognizes the need to provide guidance to lawyers regarding the use of technology.⁷⁹

Social media is also a primary form of communication within the justice system, and between the justice system and the general public. For instance bar associations use social media to communicate with their members, some using full-time social media coordinators.⁸⁰ A number of state court systems also provide case updates accessible to the public via

75. See Drew Bolling, *How Lawyers Use Twitter, Facebook in Court Cases: Those Updates, They Could Land You in Trouble One of These Days* WEBPRONNEWS (Apr. 10, 2012), <http://www.webpronews.com/how-lawyers-use-twitter-facebook-in-court-cases-2012-04/> (discussing how courts have found uses for social media for everything "ranging from divorce proceedings to serving legal claims.").

76. The ABA House of Delegates is made up of 560 members representing state and local bar associations, ABA entities, and ABA affiliated organizations.

77. ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 105A (2012) (amending black letter law and Comments to Model Rules 1.0, 1.6 and 4.4, 1.1 and 1.4).

78. ABA, Resolution; Adopted by the House of Delegates, at 1 (2012) *available at* http://www.americanbar.org/content/dam/aba/administrative/law_national_security/resolution_105b.authcheckdam.pdf.

79. *Id.* (further providing guidance on the use of electronic media specifically in the areas of confidentiality and client development).

80. The Florida Bar recently hired a full-time social media coordinator to ensure information is reaching the 98,000 plus members of the Bar across social media platforms. The Bar reported that it has joined the 30 other state Bar organizations that are active on at least one social media channel. See Daniel Aller, *Bar Steps Up Its Social Media Outreach*, FLA. BAR NEWS, June 1, 2014.

social media.⁸¹ It has also become common practice for reporters to tweet from the courtroom,⁸² providing another avenue of public access to judicial proceedings. Social media is a practical tool for judicial election campaigns and also a means of public outreach.⁸³

Social media can be and currently is used to improve the justice system. However, misuse of that same social media by judges, jurors, and attorneys has proven to be problematic.

A. Judges

Courts and legal scholars have explored both practical and jurisprudential issues associated with judges' use of social media.⁸⁴ One specific issue regarding judicial social media "friendships" has garnered considerable media attention.⁸⁵ The lack of clarity regarding specific "friendships" (such as those between judges and attorneys on social media), and posting of comments on lawyers' social networking pages has resulted in issuance of opinions regarding questionable unethical judiciary behavior.⁸⁶ These 'friendships' have been deemed to be

81. See CONF. OF COURT PUB. INFO. OFFICERS, *supra* note 45.

82. See, e.g., Michael Lindenberger, *Twitter Moves to Federal Court*, DIGITAL MEDIA L. PROJECT (Mar. 2, 2009), <http://www.citmedialaw.org/blog/2009/twitter-moves-federal-court/>.

83. John G. Browning, *Why Can't We Be Friends? Judges' Use of Social Media*, 68 U. MIAMI L. REV. 487, 490 (2014) (noting that in the analysis of judge's social media use, the value of social media for judges to use in judicial campaigns, and as a means of public outreach about the role of the courts and judicial decisions, is often minimized or ignored).

84. See, e.g., Samuel Vincent Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281, 299 (2011) (exploring ethical risks judges encounter when using social networking sites, and positing that the Judicial Code contains adequate prohibitions to control any negative effects of such use on the judiciary).

85. For a state-by-state summary and analysis of judicial social media use, see Browning, *supra* note 83, at 510-27.

86. See, e.g., FLA. SUPR. COURT JUDICIAL ETHICS ADVISORY COMM., Op. 2009-20, (Nov. 17, 2009) [hereinafter JUDICIAL ETHICS ADVISORY COMM., Op. 2009-20], *available at* <http://www.jud6.org/legalcommunity/legalpractice/opinions/jecopinions/2009/2009-20.html> (stating that although a judge may post comments and other material on the judge's page on a social networking site, if the publication of such material does not otherwise violate the Code of Judicial Conduct' a judge may not add lawyers who may appear before the judge as "friends" on a

allowable in some instances;⁸⁷ yet, in some cases, courts and ethics advisory boards have cautioned that these contacts could be viewed as *ex parte* communications in violation of the canons of judicial ethics.⁸⁸ The various states handle judicial use of social media in different ways, from cautionary allowance⁸⁹ to express prohibition of such use. In expressly prohibiting such interaction on social media, the Supreme Court of the State of Florida noted the potential of creating an impression that certain lawyers have a “special position to influence the judge;”⁹⁰ an impression that would affect the public trust and confidence in the courts. As a result, it is grounds for automatic disqualification of a Florida judge if a lawyer for one of the parties is a Facebook “friend.”⁹¹ Other jurisdictions have

social networking site, and permit such lawyers to add the judge as their “friend.”). *See also In re Terry*, No. 17-2009 (N.C. Jud. Standards Comm’n, Apr. 1, 2009) (finding that the judge violated judicial standards by posting comments on an attorney’s Facebook “wall” during and regarding an active lawsuit).

87. *See, e.g.*, ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 462 (2013) (finding that, subject to the Judicial Canons, judges may participate in social media and the existence of a social media friend does not necessarily mean that the judge is inappropriately biased) [hereinafter ABA Comm., Formal Op. 462]. *See also* *Domville v. State*, 103 So. 3d 184, 185 (Fla. 4th Dist. Ct. App. 2012) (discussing whether a criminal defendant can disqualify a judge when the judge and the prosecutor assigned to the case are Facebook “friends” on the grounds that the relationship causes the criminal defendant “to believe that the judge could not ‘be fair and impartial.’”); Tenn. Judicial Ethics Comm., Advisory Op. No. 12-01 (2012), *available at* http://www.tncourts.gov/sites/default/files/docs/advisory_opinion_12-01.pdf (concluding that judges may use social media sites, but they must be cautious); S.C. Advisory Comm. on Standards of Judicial Conduct, Formal Op. 17-2009 (2009), *available at* <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009> (concluding that a judge may participate in social media but cannot discuss matters related to the judge’s position).

88. *See, e.g.*, N.C. JUD. STANDARDS COMM’N, PUBLIC REPRIMAND BY B. CARLTON TERRY, JR., DISTRICT COURT JUDGE, INQUIRY NO. 08-234 (Apr. 1, 2009), *available at* <http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf> (publicly reprimanding a judge for violating the canons of judicial ethics by having *ex parte* communications with the attorney of a party in a matter being actively tried before him).

89. *See* *Browning*, *supra* note 83 (noting that “[i]n a nutshell, most states looking at the issue have adopted an attitude of, “it’s fine for judges to be on social media, but proceed with caution.”).

90. *See supra* note 85 and accompanying text.

91. *See id.*; Gena Slaughter & John G. Browning, *Social Networking Dos*

refrained from complete restriction on the issue of social media “friendships” by more narrowly interpreting the meaning of “friend” in the context of the potential judicial influence. One court noted that the “friend” label may in fact mean “less in cyberspace than it does in the neighborhood . . . the workplace . . . the schoolyard . . . or anywhere else that humans interact as real people.”⁹²

Problematic itself is that we do not have a clear definition of “friend” as it relates to social media use, leaving courts grappling with determinations of actions surrounding these relationships. However “friend” is defined,⁹³ it is evident courts are concerned about the effect of these “friendships” with judges and the subsequent effects on the public perception of the provision of justice.

The Conference of Court Public Information Officers (“CCPIO”) expressed its concern over this detrimental effect on the public perception in its 2010 report on “New Media and the Courts . . .”⁹⁴ In its report the CCPIO noted Standards 5.2 and 5.3 of Trial Court Performance Standards and Measurement System (established and implemented by NCSC and the Bureau of Justice Assistance of the U.S. Department of Justice),⁹⁵ which require that the public believe that the trial court “conducts its business in a timely, fair, and equitable manner . . . [employing] procedures and decisions [that] have

and Dont’s for Lawyers and Judges, 73 TEX. B.J. 192, 194 (2010) (cautioning judges to “[d]o (sic) be careful about having a social networking profile if [he/she] is a judge in certain jurisdictions.”) (emphasis in original).

92. *Williams v. Scribd, Inc.*, No. 09cv1836-LAB, 2010 U.S. Dist. LEXIS 90496, at *14, (S.D. Cal. June 23, 2010) (differentiating between the meaning of “friends” in mainstream society versus “friends” online, and stating that the mere label of “friends” on a website did not mean that an individual “was helping, approving of, and encouraging” another’s uploads of copyrighted material to the website.).

93. See Browning, *supra* note 83, at 491-97, for a more detailed discussion of the “true meaning” of “friendship in the digital age.”

94. See *generally* CONF. OF COURT PUB. INFO. OFFICERS, NEW MEDIA AND THE COURTS: THE CURRENT STATUS AND A LOOK AT THE FUTURE (Aug. 26, 2010), available at <http://www.kms.ijis.org/db/attachments/public/4338/1/New-Media-and-the-Courts-Report.pdf>.

95. See U.S. DEPT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE ASSISTANCE, TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY (1997), available at <http://www.ncjrs.gov/pdffiles1/161570.pdf>.

integrity.”⁹⁶ The report further stated that the standards in the areas of expedition, timeliness and equality, fairness and integrity are required of the trial court to ensure “effective court performance.”⁹⁷

In similar fashion the ABA standing committee on Ethics and Professional Responsibility issued a formal opinion addressing Judges’ use of electronic social networking media.⁹⁸ The opinion reminds judges of their responsibility to “maintain the dignity of the judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives [including connections and information shared] via social media.”⁹⁹ The opinion provides reminders to judges to exercise caution in their social media interactions to ensure that relationships with persons or organizations are not formed that may “convey[] an impression that these persons or organizations are in a position to influence the judge” or constitute “ex parte communications.”¹⁰⁰ The opinion demonstrates the danger that even casual communication between a judge and lawyer can affect the dignity of judicial office as it is perceived by the public.

The publication of the CCPIO report and the ABA opinion indicate recognition of the need for guidance and oversight of judge’s “friend”ships to prevent the portrayal of a sense of impropriety they may spawn. Otherwise, the public’s perception that unscrupulous or unprofessional behavior has occurred may stir beliefs that justice is not being conducted in a timely, fair or equitable manner, thus undermining the public’s confidence in the justice system.

B. *Jurors*

Another area of concern has been the use of social media by jurors. A 2010 Reuters report noted, the “explosion of blogging, tweeting and other online diversions has reached into U.S. jury boxes, raising serious questions about juror

96. *Id.* at 21.

97. *Id.*

98. *See* ABA Comm., Formal Op. 462, *supra* note 87.

99. *Id.* at 1.

100. *Id.* at 1-2.

impartiality and the ability of judges to control courtrooms.”¹⁰¹ This poses a real threat of undermining the fundamental fairness of trial proceedings.¹⁰² In cases where they are serving as jurors, individuals have the ability to use the internet and social networking sites to research relevant issues and interact with others.¹⁰³ Judges have long dealt with juror misconduct.¹⁰⁴ Now with the widespread use of social

101. Brian Grow, *As Jurors Go Online, U.S. Trials Go Off Track*, REUTERS (Dec. 8, 2010, 3:23 PM), <http://www.reuters.com/article/2010/12/08/us-internet-jurorsidUSTRE6B74Z820101208>.

102. Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1, 9 (2012) (citing *United States v. Fumo*, 655 F.3d 288, 305 (3d Cir. 2011)) (discussing prejudice that may arise from jurors’ use of the Internet during trial). The authors cite to a number of publications which document past and current problematic issues with juror use, evidencing an effect on the justice system. See also Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1590 (2011) (quoting statement of state supreme court justice that the Internet is “one of the biggest concerns that we have about fair trials in the future”) (quoting Laura A. Bischoff, *Courthouse Tweets Not So Sweet, Say Judges*, DAYTON DAILY NEWS (Feb. 12, 2010), <http://allbusiness.com/legal/trial-procedure-judges/13916591-1.html>); Dennis Sweeney, *Social Media and Jurors*, 43 MD. B.J. 44, 46 (2010) (“While these new social media phenomena are very recent—for example Facebook was created in 2005 [sic] and Twitter in 2006—they along with the older processes of e-mail messages and texting have already generated troubling issues for trial courts trying to assure fair trials for the parties before them.”); Steve Eder, *Jurors’ Tweets Upend Trials*, WALL ST. J. L. BLOG (Mar. 5, 2012, 8:10 PM), <http://online.wsj.com/news/articles/SB10001424052970204571404577255532262181656> (“Courts are concerned about what users might say online, because it could be construed as having a bias about the case or reveal information about a trial or deliberations before they becomes public.”).

103. See Jason H. Casell, *To Tweet or Not to Tweet: Juror Use of Electronic Communications and Social Networking Tools*, 15 J. INTERNET L. 1, 1 (2011) (noting that “[a]s we enter the next decade of the 21st century, the ubiquity of instant electronic communication and mobile applications for social networking sites such as Facebook, Twitter, MySpace, and LinkedIn allow jurors to research the issues in the cases for which they serve, as well as to immediately interact with others.”).

104. See, e.g. *Tanner v. United States*, 483 U.S. 107, 110 (1987) (holding that juror use of alcohol or drugs did not present an “outside influence ... improperly brought to bear upon any juror”); *United States v. Beltempo*, 675 F.2d 472, 481 (2d Cir. 1982) (stating juror wrote love letter to prosecutor, sent her a picture of himself, and invited her to dinner); *Lee v. United States*, 454 A.2d 770, 773 (D.C. 1982) (rejecting a motion for mistrial but agreeing to dismiss an intoxicated juror or to recess the trial for three days); see also Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 322 (2005) (examining the case law in which

networking sites, such as Twitter and Facebook, risk of such misconduct has “exponentially increased . . . [from the potential for] prejudicial communication amongst jurors and opportunity to exercise persuasion and influence upon jurors.”¹⁰⁵ Uses of “tweets” or “comments” by jurors can lead to “serious complications” for the courts,¹⁰⁶ causing ethical problems and even leading to mistrials.¹⁰⁷ In the publicized “Google trial”¹⁰⁸ a juror’s use of Twitter during deliberations led to a murder conviction being overturned.¹⁰⁹ The impact of social media use

criminal defendants have challenged their convictions on the basis of juror misconduct); Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796-1996*, 94 MICH. L. REV. 2673 (1996) (providing an exposition of historical trends concerning juror misconduct); Robert P. MacKenzie III & C. Clayton Bromberg Jr., *Jury Misconduct What Happens Behind Closed Doors*, 62 ALA. L. REV. 623 (2011) (discussing instances where juror misconduct can be grounds for a new trial); Jack Pope, *Jury Misconduct and Harm*, 12 BAYLOR L. REV. 355 (1960) (for a discussion of the materiality and probable harm requirements for a new trial because of jury misconduct.).

105. St. Eve & Zuckerman, *supra* note 102, at 2. *See generally* David Goldstein, *The Appearance of Impropriety and Jurors on Social Networking Sites: Rebooting The Way Courts Deal With Juror Misconduct*, 24 GEO. J. LEGAL ETHICS 589 (2011) (for a detailed discussion of the threat that jurors use of social media poses to juror secrecy and the judicial system); Amanda McGee, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301 (2010) (providing a background on juror misconduct and the standards courts use to determine when a mistrial is warranted).

106. *See, e.g.*, *United States v. Fumo*, 655 F.3d 288 (3d Cir. 2011) (where the Court was required to hear arguments and issue a separate order addressing a juror’s actions of posting comments about the trial on his Facebook and Twitter accounts that were picked up by the local media).

107. Emily M. Janoski-Haehlen, *The Courts Are All a ‘Twitter’: The Implications of Social Media in the Courts*, 46 VAL. U. L. REV. 43, 45 (2011) (noting that the use of social media in the courtroom leading to mistrials has an impact on the integrity of trials and the right to a fair trial).

108. *See, e.g.*, Julie Blackman & Ellen Brickman, *Let’s Talk: Addressing the Challenges of Internet-Era Jurors*, JURY EXPERT (Mar. 30, 2011), available at <http://www.thejuryexpert.com/2011/03/lets-talk-addressing-the-challenges-of-internet-era-jurors/> (noting the “new and costly term in the legal lexicon: The “Google mistrial”); Daphne Drescher, *Tweeting Jurors and the “Google Mistrial”*, DRESCHER PROPARALEGAL (2011), available at <http://theparalegalsociety.wordpress.com/2013/09/23/tweeting-jurors-and-the-google-mistrial/>.

109. *See generally* *Dimas-Martinez v. State*, 385 S.W.3d 238 (Ark. 2011) (where defendant’s conviction for murder and aggravated robbery was overturned in part due to the finding that a juror’s posts to micro-blog in defiance of court’s specific instruction not to make such Internet posts denied defendant a fair trial).

on the capital murder “Google trial” case may be an extreme and rare example. It is illustrative, however, of the devastating potential that can arise from inappropriate juror use of social media.

In addition to the significant potential for actual prejudice to the parties, juror communications about the trial through social media could also undermine the integrity of the judicial system. Our system of justice “depends upon public confidence in the jury’s verdict.”¹¹⁰ Jurors using social media to discuss their jury service may “spawn public doubt about the capacity of the modern jury system to achieve justice.”¹¹¹ A doubting public could compromise the probity of the justice system.

C. Attorneys

The current climate of society dictates that social media be recognized as a “requisite component of competent legal practice.”¹¹² The use of this component – both in and outside the courtroom – by attorneys has garnered comment and criticism.¹¹³

As discussed *supra*, attorneys use of social media for marketing and related purposes has become commonplace.¹¹⁴

110. *United States v. Siegelman*, 640 F.3d 1159, 1186 (11th Cir. 2011); *see also Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (discussing and emphasizing the “fundamental integrity of all that is embraced in the constitutional concept of trial by jury”); *United States v. Atkinson*, 297 U.S. 157, 160 (1936) (noting the significance of “the integrity of public reputation of the judicial proceedings”); *United States v. Thomas*, 116 F.3d 606, 618 (2d Cir. 1997) (“It is well understood, for example, that disclosure of the substance of jury deliberations may undermine public confidence in the jury system”). *Cf. Johnson v. Duckworth*, 650 F.2d 122, 125 (7th Cir. 1981) (“[I]f an intrusion into the jury’s privacy has, or is likely to have, the effect of stifling such debate, the defendant’s right to trial by jury may well have been violated.”).

111. *St. Eve & Zuckerman*, *supra* note 102, at 12 (noting that the “unseemliness of jurors using Facebook or Twitter to discuss their jury service may spawn public doubt about the capacity of the modern jury system to achieve justice.”).

112. *Jacobowitz & Singer*, *supra* note 68, at 447.

113. *See generally* Boothe-Perry, *The “Friend”ly Lawyer*, *supra* note 49 (discussing potential ethical violations that can arise from attorneys’ use of social media during pending litigation).

114. *See id.* at 135.

With social media use being the new normal for attorney marketing and information dissemination, the potential for ethical pitfalls through such use has become more apparent. Issues related to duties to clients (including prospective clients), client confidentiality, and attorney advertising rules are highlighted when attorneys use social media tools for marketing practices.

Model Rule 1.18 provides that “a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter” is a prospective client.¹¹⁵ Communications via social media may create ethical obligations under the rules of professional conduct where a prospective client relationship is formed either directly or inadvertently. Bar organizations addressing the issue have all cautioned lawyers to ensure clarity between providing specific legal advice and simply providing general legal information.¹¹⁶

115. MODEL RULES OF PROF'L CONDUCT R. 1.18 (2013) (where comment 2 states, “[a] person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer’s advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer’s obligations, and a person provides information in response.”). See Peter A. Joy & Kevin C. McMunigal, *Ethical Concerns of Internet Communication*, 27 WTR CRIM. JUST. 45, 46 (2013) (asserting that, in determining whether someone becomes a prospective client over the Internet or via social networking, the key “is whether the lawyer makes a communication that is seen as inviting the submission of information.”).

116. See, e.g., State Bar of Ariz., Ethics Op. 97-04 (1997), available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=480/> (advising that “lawyers should not answer specific legal questions from lay people through the Internet unless the question presented is of a general nature and the advice given is not fact-specific”); D.C. Bar Ass’n, Ethics Op. 316 (2002), available at <http://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion316.cfm> (stating that “[t]o avoid formation of attorney-client relationships through such chat room conversations, lawyers should avoid giving specific legal advice.”); Fla. Bar Standing Comm. on Adver., Advisory Op. A-00-1 (2010), available at <http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+A-00-1+Revised!OpenDocument&Click=/> (stating in part: “[a]n attorney may not solicit prospective clients through Internet chat rooms, defined as real time communications between computer users. Lawyers may respond to

Questions regarding violation of the confidentiality provisions of the Model Rules via social media use have also arisen.¹¹⁷ In a much-publicized case, a former public defender's license to practice law was suspended by both the Illinois and Wisconsin Supreme Courts as she was found to have violated Rule 1.6 by publishing client confidences or secrets on her blog.¹¹⁸ Other disciplinary proceedings across the nation have placed attorneys on notice that use of social media, including personal social networking sites, to comment on clients and/or cases can subject them to disciplinary proceedings.¹¹⁹ Similarly, use of social media to make comments about a judge (especially derogatory comments such as “[e]vil unfair witch,” “seemingly mentally ill,” or “clearly unfit for her position”) can

specific questions posed to them in chat rooms. Lawyers should be cautious not to inadvertently form attorney-client relationships with computer users.”); N.M. Advisory Ops. Comm., Advisory Op. 2001-1 (2001), *available at* <http://www.nmbar.org/legalresearch/eao/2000-2002/2001-1.doc> (stating that lawyers on LISTSERVS “must avoid answering specific question of such a nature that they might create an attorney-client relationship and thereby trigger ‘representation.’”).

117. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013) (providing that “(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)”).

118. *See In re* Disciplinary Proceedings Against Peshek, 798 N.W.2d 879, 880-81 (Wis. 2011) (the attorney had authored a blog on which she commented about her clients' cases, referring to her clients by their first names, some derivative of their first names, or their jail identification numbers.); *In re* Kristine Ann Peshek, Disciplinary Comm'n M.R. 23794 (Ill. May 18, 2010), *available at* <http://www.state.il.us/court/SupremeCourt/Announce/2010/051810.pdf>.

119. *See, e.g.*, State Bar of Cal. Standing Comm. on Prof'l Resp. and Conduct, Formal Op. 2012-186 (2012), *available at* [http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202012-186%20\(12-21-12\).pdf](http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202012-186%20(12-21-12).pdf) (where the California State Bar considered whether a lawyer could use her personal Facebook page to talk generally about her cases and victories); Complaint at 21, 23, *In re* Matter of Tsamis, (Ill. Aug. 26, 2013) (No. 6288664), *available at* <http://www.iardc.org/13PR0095CM.html> (where an Illinois employment lawyer's AVVO to response to a comment posted by a former client has subjected her to disciplinary proceedings. The lawyer noted on AVVO, “I dislike it very much when my clients lose, but I cannot invent positive facts for clients when they are not there. I feel badly for him but his own actions in beating up a female co-worker are what caused the consequences he is now so upset about.”).

also give rise to disciplinary action.¹²⁰ Even where offensive and inflammatory comments on social media do not rise to the level of attorney discipline, the publication of such comments nevertheless effectively taint the image of the publishing lawyer, and the profession in general. When an assistant state attorney in Orlando posted Mother's Day comments on Facebook directed to "all the crack hoes (sic) out there"¹²¹ and made derogatory remarks about United States Supreme Court Justice Sonya Sotomayor calling her "[r]eason enough why no country should ever engage in the practice of Affirmative Action again,"¹²² his actions were publicly criticized,¹²³ and a request was made to review cases he previously handled for potential violations.¹²⁴ The attorney was able to avoid a reprimand from his office because there was no social media policy in the workplace.¹²⁵ His actions however, did not go without repercussion as his professional and personal reputations were called into question; and his employer, the State Attorney's Office was subjected to criticism.¹²⁶ This

120. Report of Referee at 3, Fla. Bar v. Conway, (Fla. Oct. 29, 2008) (No. SC08-326), *reprimand approved*, 569 So.2d 1282 (Fla. 2009), available at http://www.floridasupremecourt.org/clerk/briefs/2008/201-400/08-326_ROR.pdf/.

121. Jeff Weiner, *Prosecutor Says 'Crack Hoes' Facebook Post Was a 'Poor Choice of Words'*, ORLANDO SENTINEL (May 22, 2014), <http://www.orlandosentinel.com/news/local/breakingnews/os-prosecutor-controversial-comments-20140522,0,57354.story/>.

122. *Id.* ("[Lewis] posted an image of U.S. Supreme Court Justice Sonia Sotomayor with a message calling her 'Reason enough why no country should ever engage in the practice of Affirmative Action again.' 'This could be the result,' the post continued. 'Where would she be if she didn't hit the quota lottery? Here's a hint: 'Would you like to supersize that sir?'").

123. Matt Grant, *Prosecutor Says 'Crack Hoes' Facebook Post Was Misinterpreted*, WESH.COM (May 22, 2014), available at <http://www.wesh.com/politics/prosecutor-says-crack-hoes-facebook-post-was-misinterpreted/26124286#!PPMVb> (noting public protest and calls to fire Lewis as a result of the Facebook comments.).

124. Weiner, *supra* note 121.

125. *See Attorney Apologizes for Facebook Post* (West Palm Television broadcast May 23, 2014), <http://www.wptv.com/news/state/kenneth-lewis-attorney-apologizes-for-crack-hoes-facebook-post> (reporting that "State Attorney Jeff Ashton said he is not reprimanding Lewis because his office doesn't have a social media policy and that he doesn't police the private thoughts, views or expressions of his employees").

126. Joe Kemp, *'Happy Mother's Day to All the Crack Hoes Out There': Florida Prosecutor Sparks Outrage Over Rude Facebook Rants*, N.Y. DAILY

public outcry is illustrative of the effect on the entire profession from a singular inappropriate social media use.

Another area that has garnered attention is the potential for ethical violations regarding advertising through presence on social media. In April 2013, the Florida Bar issued guidelines for advertising on networking sites.¹²⁷ The guidelines provide in part that:

[p]ages appearing on networking sites that are used to promote the lawyer or law firm's practice are subject to the lawyer advertising rules . . . [which] . . . include prohibitions against any misleading information, which includes references to past results that are not objectively verifiable, predictions or guaranties of results, and testimonials . . . [the rules] also include prohibitions against statements characterizing skills, experience, reputation or record unless they are objectively verifiable."¹²⁸

The guidelines are a direct result of queries regarding the ethics of lawyers being listed under headings of "Specialties" or "Skills and Expertise," since Bar rules prohibit lawyers from saying they are experts or have expertise or that they specialize in an area of law unless they are board certified."¹²⁹

In similar fashion, the New York State Bar issued a prohibition to its members against the use of the term "Specialists" on Social Media.¹³⁰ In the Comment to the

NEWS (May 22, 2014), <http://www.nydailynews.com/news/national/florida-prosecutor-sparks-outrage-rude-facebook-rants-article-1.1801757/> (labeling Lewis an "apparent bigot").

127. FLA. BAR STANDING COMM. ON ADVER. GUIDELINES FOR NETWORKING SITES (Apr. 16, 2013), *available at* [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18BC39758B54A5985257B590063EDA8/\\$FILE/Guidelines%20-%20Social%20Networking%20Sites.pdf?OpenElement/](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18BC39758B54A5985257B590063EDA8/$FILE/Guidelines%20-%20Social%20Networking%20Sites.pdf?OpenElement/).

128. *Id.* at 1.

129. *Board Wrestles with LinkedIn Issues*, FLA. BAR (Jan. 1, 2014), *available at* <http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/RSSFeed/EB2C0BD7998F316D85257C4A00487FD6/>.

130. N.Y. State Bar Ass'n Guideline No.1B, *Social Media Ethics*

guideline, the Bar explicitly stated that “if the social media network, such as LinkedIn, does not permit otherwise ethically prohibited ‘pre-defined’ headings, such as ‘specialist,’ to be modified, the lawyer shall not identify herself under such heading unless appropriately certified.”¹³¹

Recognizing that ethical issues can also arise when an attorney turns to social media platforms or online technology during a trial, bar associations throughout the country have established parameters for ethical online social media research at trial.¹³² This includes the discovery process and jury selection.¹³³

1. Attorney’s Use of Social Media During Discovery

The prevalent use of social media in litigated cases indicates that social media has indeed, “become a part of mainstream discovery practice.”¹³⁴ Attorney’s use of social media in pre-trial discovery has had serious implications in some cases. Courts and disciplinary agencies have in recent

Guidelines, at 6 (Mar. 18, 2014), available at https://www.nysba.org/Sections/Commercial_Federal_Litigation/Com_Fed_PDFs/Social_Media_Ethics_Guidelines.html/.

131. *Id.*

132. See e.g., N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Formal Op. No. 2012-2 (2012), available at <http://www.nycbar.org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02/> (addresses the ethical restrictions that apply to an attorney’s use of social media websites to research potential or sitting jurors. The starting point for this analysis was the New York Rules of Professional Conduct (RPCs) and in particular, RPC 3.5, which addresses the maintenance and partiality of tribunals and jurors. Among other things, RPC 3.5 states that “a lawyer shall not ... (4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order.”).

133. See, e.g., Boothe-Perry, *The “Friend”ly Lawyer*, supra note 49; JOHN G. BROWNING, *THE LAWYER’S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA’S IMPACT ON THE LAW* (2010); Hope A. Comisky & William M. Taylor, *Don’t Be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas--Discovery, Communications with Judges and Jurors, and Marketing*, 20 TEMP. POL. & CIV. RTS. L. REV. 297 (2011).

134. Steven S. Gensler, *Special Rules for Social Media Discovery?*, 65 ARK. L. REV. 7, 7 (2012).

years addressed issues ranging from admissibility of social networking information¹³⁵ to those dealing with ethical considerations when attorneys attempt to gain access to litigant's social media sites.¹³⁶ With regard to the admissibility of information gleaned from social media, most courts follow the holding in *Tompkins v. Detroit Metropolitan Airport* that "there must be a threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence."¹³⁷ This has created the additional challenge for lawyers to determine how to show that information obtained from social media is relevant and thereby making it discoverable.¹³⁸

Attorney's social media use has also come under scrutiny when used in the pre-trial process to garner public support, having a potentially indirect effect of tainting the jury pool. This is particularly crucial in high-profile cases. In 2012, when neighborhood watchman, George Zimmerman, killed unarmed Trayvon Martin, the defense counsel for George Zimmerman

135. The scope of discovery of information on social networking sites is outside the scope of the article. See *id.* at 13, for a more in-depth discussion on whether social media content is generally discoverable.

136. For a more in-depth discussion of the ethical implications of "friending" litigants, see John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 SMU SCI. & TECH. L. REV. 465, 465 (2011) (discussing case law regarding the use of social media during discovery and as evidence); Allison Clemency, Comment, "Friending," "Following," and "Digging" Up Evidentiary Dirt: The Ethical Implications of Investigating Information on Social Media Websites, 43 ARIZ. ST. L.J. 1021, 1027-39 (2011); Comisky & Taylor, *supra* note 133, at 302-08; Sandra Hornberger, *Social Networking Websites: Impact on Litigation and the Legal Profession in Ethics, Discovery, and Evidence*, 27 TOURO L. REV. 279, 285-92 (2011); Strutin, *supra* note 46, at 282-86; Shane Witnov, *Investigating Facebook: The Ethics of Using Social Networking Websites in Legal Investigations*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 31, 32-33 (2011) (examining "when and how lawyers, and those they supervise, may ethically and legally collect information on social networking websites, and in particular, when they may use undercover techniques and make friend requests to gain access to restricted information.").

137. *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 387 (E.D. Mich. 2012).

138. See Brian Wassom, *How Lawyers Get Their Hands on "Private" Facebook Posts*, WASSOM.COM (March 1, 2013), <http://www.wassom.com/how-lawyers-get-their-hands-on-private-facebook-posts.html/>, for a discussion on the different methods available for lawyers to use to prove relevance of social media information.

set up a Twitter account, a Facebook page, and a website.¹³⁹ The website noted that “it would be irresponsible to ignore the robust online conversation, and [so, the defense team, felt] strong[ly] about establishing a professional, responsible, and ethical approach to new media.”¹⁴⁰ The Facebook page created (“The George Zimmerman Legal Case” (GZLC) page), noted that although it was “unusual for a legal defense to maintain a social media presence on behalf of a defendant”¹⁴¹ the law firm deemed it necessary in order to dispute misinformation, discourage speculation, raise funds, provide a “voice” for George Zimmerman, and “provide a forum for communication with the law firm.”¹⁴² In a post made on May, 1, 2012, the page administrator noted that since “there is such strong public interest about the case, we felt it was appropriate to open a forum for conversation . . . and provide a proper means for [the public] to address the law firm.” The firm expressed its desire to allow the public to “express how [it felt] about the case and topics surrounding the case.”¹⁴³ On June 18, 2012, the firm determined that it would use its online presence to post public records, pleadings and reciprocal discovery that was relevant to the case.¹⁴⁴ The creation of the GZLC page came under scrutiny, with suggestions akin to the possibility that the defense was simply attempting to “control” and “sway” the conversation towards innocence of his client, via social media.¹⁴⁵

This use of social networking to disseminate and solicit information regarding this high-profile case highlighted the

139. See Boothe-Perry, *The ‘Friendly Lawyer*, *supra* note 49, at 128.

140. Fineman, *supra* note 5 (referencing George Zimmerman’s Facebook profile page).

141. *Why Social Media for George Zimmerman?*, GEORGE ZIMMERMAN LEGAL CASE (April 28, 2012), <http://gzlegalcase.com/index.php/8-press-releases/7-why-social-media-for-george-zimmerman/>.

142. *Id.*

143. See *George Zimmerman Case*, FACEBOOK (May 1, 2012), <https://www.facebook.com/GeorgeZimmermanLegalCase/>.

144. See *George Zimmerman Case*, FACEBOOK (June 18, 2012), <https://www.facebook.com/GeorgeZimmermanLegalCase/>.

145. *The State of the Internet vs. George and Shellie Zimmerman*, FACEBOOK (May 3, 2012), <https://www.facebook.com/StateoftheInternetAndShellieZimmerman>.

potential for ethical violations and ensuing public criticism.¹⁴⁶

2. Social Media Use During Jury Selection

Attorneys' use of social media during the jury selection process has also been subject to critical observation. Mounting evidence suggests that online personas via the social networking websites are accurate snapshots of a person.¹⁴⁷ As such, attorneys are turning more and more often to social media, considered somewhat of a "virtual gold mine" or "treasure trove" in search of information helpful in the jury selection process.¹⁴⁸ However, attorneys are cautioned to avoid

146. For a more detailed discussion of the use of social networking during pending litigation, see generally Boothe-Perry, *The "Friend"ly Lawyer*, *supra* note 49.

147. Stuart Simon et al., *Social Networking--Pinging, Posting, Picking Juries*, PROD. LIAB. CONF., AM. JURY CENTERS 111, 116 (2011).

148. See Christopher B. Hopkins & Tracy T. Segal, *Discovery of Facebook Content in Florida Cases*, TRIAL ADVOC. Q. 14 (2012) (noting that "Facebook can provide a treasure trove of information in litigation"); Jacobowitz & Singer, *supra* note 68, at 472 (noting that social media "offers a virtual gold mine of information."); see also *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013) (where counsel filed a motion for sanctions related to opposing counsel's alleged destruction of evidence related to a Facebook account which indicated prior use of anti-depressants and defendant's medical history); *Levine v. Culligan of Fla., Inc.*, No. 50-2011-CA-010339-XXXXMB, 2013 WL 1100404, at *10 (Fla. Cir. Ct. Jan. 29, 2013) (finding that "the critical factor in determining when to permit discovery of social media is whether the requesting party has a basis for the request" and that "Defendant ha[d] not come forth with any information from the public portions of any of Plaintiff's profiles that would indicate that there [was] relevant information on her profiles that would contradict the claims in th[e] case"); *Beswick v. Northwest Med. Ctr., Inc.*, No. 07-020592 CACE (03), 2011 WL 7005038, at *4 (Fla. Cir. Ct. Nov. 3, 2011) (Defendants sought discovery of information Plaintiff shared on social networking sites concerning her noneconomic damages, and the court found this information to be "clearly relevant to the subject matter of the current litigation and reasonably calculated to lead to admissible evidence."); *People v. Harris*, 949 N.Y.S.2d 590, 591-92 (N.Y. Crim. Ct. 2012) (holding that "as a matter of first impression, non-content records of online social networking service provider, as well as user's postings for all but one day of relevant period, were covered by trial court's order upholding subpoena for that information."); *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650, 651 (N.Y. Sup. Ct. 2010) (granting motion for access to plaintiff's social networking accounts as being "material and necessary for defendant's defense."). For a more in-depth discussion of specific cases involving discovery gleaned from social media, see Evan E. North, *Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites*, 58 U. KAN. L. REV. 1279,

what the Federal Trade Commission (FTC) has coined as “pretexting.”¹⁴⁹ As defined by the FTC, “pretexting” is “the practice of getting your personal information under false pretenses.”¹⁵⁰ In law practice pretexting occurs when a lawyer friends someone on Facebook, or causes an employee or associate to friend the person, with the aim of gaining access to information about that person that the person has made available only to approved “friends.”¹⁵¹ The ethics of such lawyer pretexting is questionable, and has been addressed by both state bar associations and courts. More specifically, discussion and comment has centered around the query regarding the extent to which attorneys may research jurors on social media websites without violating the ethics rules.¹⁵² Stating that “standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case,” the New York State Bar Association (NYSB) cautioned lawyers to ensure that prohibited communications do not occur as a result of social media use.¹⁵³ A formal opinion issued by the NYSB in 2012 advised the following:

[i]f a juror were to (i) receive a ‘friend’ request (or

1286 (2010) (“As attorneys join social networks themselves, there is a growing awareness of the potential pitfalls-- and gold mines--to be found on these sites. In civil lawsuits for damages, especially in the personal injury and insurance litigation context, potentially relevant and discoverable information is often abundant on these sites.”).

149. *Pretexting: Your Personal Information Revealed*, F.T.C. FACTS FOR CONSUMERS (Feb. 2006), <http://www.reacttf.org/Prevention/pretexting.pdf>.

150. *Id.* (The term “pretexting” was coined by the Federal Trade Commission. Although the FTC does not regulate lawyer behavior, the term is nevertheless applicable to the practice of juror investigation).

151. *See* Helen W. Gunnarsson, *Friending Your Enemies, Tweeting Your Trials; Using Social Media Ethically*, 99 ILL. B.J. 500, 500–04 (2011), available at <http://www.isba.org/ibj/2011/10/friendingyourenemiestweetingyourtri> (discussing the rise of social media and its implications for the practice of law).

152. *See supra* note 132 and accompanying text.

153. *Id.* (A prohibited communication would occur if the juror: (1) received a “friend” request or a similar request to share information as a result of an attorney’s research or (2) otherwise became aware of an attorney’s deliberate viewing or attempt at viewing the juror’s social media page.)

similar invitation to share information on a social network site) as a result of an attorney's research, or (ii) otherwise to learn of the attorney's viewing or attempted viewing of the juror's pages, posts, or comments, that *would* constitute a prohibited communication if the attorney was aware that her actions would cause the juror to receive such message or notification.¹⁵⁴

The NYSB opinion, by proving explicit boundaries to the use of social media use for juror communication, leaves little room for erroneous and unethical behavior by its bar members. Provision of guidelines and regulation in all jurisdictions is imperative to reduce the possibility of the types of social media use that will undermine the public's confidence in the justice system.

V. Suggested Guidelines for Regulation of Social Media Use

As a self-regulated profession, the law's relative autonomous regulation carries with it the obligation to ensure that rules, regulations and guidelines are enacted in furtherance of both the profession's and the public's interest. With the prolific use of social media in the justice system, the legal community has a responsibility to provide guidelines that specifically address conduct within the social media stratosphere and to ensure both compliance with ethical considerations and protection of the public perception. Guidelines and regulations will initially serve a basic function of education and awareness within the legal profession, but will also be necessary for the critical systemic function of maintaining and strengthening the public's trust in the justice system.

In today's technological climate it may be standard that in order to efficiently and effectively present a case, the lawyers need access to their laptops and other information storage

154. *Id.*

devices.¹⁵⁵ This being the standard, court rules and procedures relating to technology in general, and more specifically social media use “need to be in place to protect the right to a fair trial, impartial jury, and the public trust and confidence in the judiciary.”¹⁵⁶ In an effort to ensure the efficient flow of the justice system and improve public confidence a balance must be found between competing factors such as protection of venire, people and jurors, and protection of the decorum of the courtroom.¹⁵⁷ In order to reach that balance, keen attention must be given to use of social media by judges, attorneys and jurors.

A. *Guidance for Judges*

Guidance for judges should be considered in two veins: 1) personal use of social media; and 2) use of social media within the purview of the judge’s courtroom. As it relates to personal use of social media, the states can use the paradigm provided by the ABA. In its Formal Opinion 462 on “Judge’s Use of Electronic Social Networking Media” issued in 2013, the ABA provides guidance to the judiciary regarding its responsibilities and requirements for use of social media.¹⁵⁸ This opinion reflects a continuing commitment to ensure judges’ compliance with the model rules by “maintain[ing] the dignity of [the] judicial office at all times, and avoid[ing] both impropriety and the appearance of impropriety in their professional and personal lives.”¹⁵⁹

Local judiciary should consider adoption of the provisions noted in the opinion or some amended version that reflects the

155. McGee, *supra* note 105, at 316 (“[I]n order to properly present their case, counsel must have stable access to laptops, cell phones, and other such technologies.”).

156. Janoski-Haehlen, *supra* note 107, at 68.

157. *See, e.g.*, United States v. Kilpatrick, No. 10-20403, 2012 WL 3237147, at *4 (E.D. Mich. Aug 7, 2012) (where trial counsel were “prohibited from conducting any type of surveillance, investigation, or monitoring (via the Internet or any other means) using juror information . . .”).

158. ABA Comm., Formal Op. 462, *supra* note 87.

159. ABA MODEL CODE OF JUD. CONDUCT, Preamble (2007), *available at* http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_M_CJC_approved.authcheckdam.pdf/.

spirit of the opinion: that “as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge’s independence, integrity, or impartiality, or create an appearance of impropriety.”¹⁶⁰ Guidelines created could be substantiated with additional language to protect against criticisms of vagueness. For instance, where the opinion notes that judges “must be very thoughtful in their interactions with others [on social media],” a guideline would specifically delineate the difference between private social networking versus professional networking. In order to have a clear delineation between the two, states should consider judicial guidelines akin to the State of Florida that restricts judges from online/social media communication or “friendships” with attorneys who practice in their courtrooms. The restrictive approach may seem harsh, but maintenance of the dignity and propriety of the judicial office may unfortunately necessitate some sacrifice. States that do not wish to completely prohibit judges’ social media friendships, should define the specific scope of permissive use. This could include instruction to “unfriend” “unfollow” or otherwise delete any connections with participants in cases pending before the court.

Social media guidelines should also be provided for use in the courtroom. A judge has a responsibility to use sound discretion in controlling his or her courtroom.¹⁶¹ Such control however is not without limitation; is generally guided by a structure of rules and procedural practices; and is subject to error for abuse of discretion.¹⁶² It would therefore be prudent

160. *Id.*

161. *See* Ryslik v. Krass, 652 A.2d 767 (N.J. Super. App. Div. 1995) (noting that the exercise of a trial judge’s authority, however, “is circumscribed by the judge’s responsibility to act reasonably and within constitutional bounds.”); Horn v. Village Supermarkets, Inc., 615 A.2d 663 (N.J. Super. App. Div. 1992), *cert. denied*, 133 N.J. 435 (1993) (stating that “[a] trial judge has the ultimate responsibility to control the trial in the courtroom and is given wide discretion to do so.”).

162. Carino v. Muenzen, No. L-0028-07, 2010 WL 3448071, at *10 (N.J. Super. App. Div. Aug. 30, 2010) (where the trial judge precluded counsel from using a laptop for research during jury selection, the court, although affirming that the trial judge “has discretion in controlling the courtroom,” noted that the judge acted unreasonably under the circumstances. Nevertheless as there was no prejudice to counsel from the preclusion of

to propose guidelines for social media use inside the courtroom (by jurors, attorneys, and spectators), and provide judges with direct authority to address and enforce specific guidelines within individual jurisdictions.¹⁶³ As the court in *United States v. Juror No. 1* stated, “[c]ourts must continually adapt to the potential effects of emerging technologies on the integrity of the trial and must be vigilant in anticipating and deterring jurors’ continued use of these mediums during their service to the judicial system.”¹⁶⁴

B. *Guidance Regarding Juror Use*

To address the concern of jurors’ use of social media during trials, the Judicial Conference Committee on Court Administration and Case Management proposed jury instructions providing detailed explanations of the consequences of social media use during a trial, along with recommendations for repeated reminders of the ban on social media usage.¹⁶⁵ Per the updated instructions, federal jurors are banned from social media use to conduct research on or communicate about a case.

The suggested instructions to be provided to jurors “before trial, at the close of a case, at the end of each day before jurors return home, and other times, as appropriate,”¹⁶⁶ read in part as follows:

You, as jurors, must decide this case based solely
on the evidence presented here within the four

using the laptop, the trial judge’s ruling was affirmed.)

163. See Kathleen Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just ‘Face’ It*, 41 U. MEM. L. REV. 355, 410 (2010) (suggesting that state courts adopt juror instructions to grapple with juror’s use of social networking technology to communicate about a case.).

164. *United States v. Juror No. One*, No. 10-703, 2011 WL 6412039, at *6 (E.D. Pa. Dec. 21, 2011) (where the court acknowledged the judge’s right to control jury selection, but nevertheless concluded “that the [trial] judge acted unreasonably in preventing use of the internet” by counsel during voir dire.”).

165. *Proposed Model Jury Instructions the Use of Electronic Technology to Conduct Research on or Communicate About a Case*, JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT (2012), available at <http://legaltimes.typepad.com/files/model-jury-instructions.pdf>.

166. *Id.*

walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, *you should not* consult dictionaries or reference materials, *search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case.* Please do not try to find out information from any source outside the confines of this courtroom You *may not communicate with anyone about the case* on your cell phone, *through e-mail, BlackBerry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube.* You may not use any similar technology of social media, even if I have not specifically mentioned it here. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.¹⁶⁷

At the close of the case, the judge is instructed to advise the jury of the following:

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. *You may not use any electronic device or media, such as the telephone, a cell phone, smart phone, iPhone, BlackBerry or computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, YouTube or Twitter,* to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to

167. *Id.* (emphasis added)

anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case.¹⁶⁸

The instructions provided are sufficiently broad to encompass all communication and research “about the case,” but it does not specifically restrict jurors from using their electronic devices for other purposes while serving jury duty. General tweets and posts by jurors may create the impression that decorum in the courtroom is lacking. When comedian Steve Martin tweeted about his experience at jury duty, although he was not tweeting about any particular case, his tweet created fodder for decreased public confidence about the importance and seriousness of jury duty.¹⁶⁹ News and weather anchor, Al Roker, tweeted a photo he snapped of other potential jurors earning him a scolding from the court.¹⁷⁰ The social media use that subjected these individuals to criticism could have been avoided with specific instructions against use of electronic devices and accessing social media sites.

As such, it may be prudent to do two things 1) include voir dire questions of jurors regarding their normal use of social media, and specifically whether they believe they are able to refrain from social media use for an extended period of time (i.e. while they are actively serving jury duty in the courthouse or where sequestration is deemed necessary); and 2) add language to the jury instructions specifically restricting the use of social media for *any* reason during jury duty. Language could specifically dictate that jurors “(a)refrain from any and

168. *Id.*

169. The tweet read, “REPORT FROM JURY DUTY: defendant looks like a murderer. GUILTY. Waiting for opening remarks.” Later on, the 67-year-old actor wrote, “REPORT FROM JURY DUTY: guy I thought was up for murder turns out to be defense attorney. I bet he murdered someone anyway.” Martin later said his jury duty tweet rant was a reaction against being called several times. His publicist later said Martin’s tweets were just jokes and not actual observations from his time in court, and Martin himself said he was just “pretending” after being called for jury duty numerous times.

170. Benjamin Solomon, *John McCain Latest Celeb to Share from Jury Duty on Social Media*, TODAY NEWS (Aug. 12, 2013, 6:57 PM), <http://www.today.com/news/john-mccain-latest-celeb-share-jury-duty-social-media-6C10902053/>.

all use of, or communication through an electronic device or media at all times while court is in session, including, but not limited to jury deliberations,” and “(b) refrain from any and all communication on social media regarding their observations, opinions, or experiences regarding any aspect of jury duty, including but not limited to the jury selection process, courthouse and courtroom activity, and any specific or general information regarding a pending case.”

Application of these and similar jury instructions will have a two-fold effect: 1) to highlight for jurors the importance of refraining from social media use while serving jury duty, and 2) to illustrate to jurors the potential impact on fair and unbiased decisions necessary for the proper functioning of the wheels of justice. Although the enforcement of juror guidelines may pose practical difficulties in enforcement for judges, these guidelines are nevertheless necessary to maintain the features of our justice system. Without guidelines, judges are left with no citable authority for disciplinary or other action when social media use threatens the propriety of the courtroom.

C. *Guidance for Attorneys*

Structural guidance should also be provided for attorneys’ use of social media in the courtroom. Without some general guidelines at a bare minimum, disagreements and misunderstandings will occur between counsel and judges on the issue. Consider the following exchange that took place between plaintiff’s counsel and the judge in a medical malpractice case:

THE COURT: Are you Googling these [potential jurors]?

[PLAINTIFF’S COUNSEL]: Your Honor, there’s no code law that says I’m not allowed to do that. I — any courtroom —

THE COURT: Is that what you’re doing?

[PLAINTIFF’S COUNSEL]: I’m getting

information on jurors — we’ve done it all the time, everyone does it. It’s not unusual. It’s not. There’s no rule, no case or any suggestion in any case that says —

••••

THE COURT: No, no, here is the rule. The rule is it’s my courtroom and I control it.

[PLAINTIFF’S COUNSEL]: I understand.

THE COURT: I believe in a fair and even playing field. I believe that everyone should have an equal opportunity. Now, with that said there was no advance indication that you would be using it. The only reason you’re doing that is because we happen to have a [Wi-Fi] connection in this courtroom at this point which allows you to have wireless internet access.

[PLAINTIFF’S COUNSEL]: Correct, Judge.

THE COURT: And that is fine provided there was a notice. There is no notice. Therefore, you have an inherent advantage regarding the jury selection process, which I don’t particularly feel is appropriate. So, therefore, my ruling is close the laptop for the jury selection process. You want to — I can’t control what goes on outside of this courtroom, but I can control what goes on inside the courtroom.¹⁷¹

On appeal, plaintiff’s counsel argued that the judge abused his discretion by depriving him of “the opportunity to learn about potential jurors . . . one of the most fundamental rights of litigation.”¹⁷² The appellate court was “constrained in this case to conclude that the judge acted unreasonably in preventing

171. Carino v. Muenzen, No. L-0028-07, 2010 WL 3448071, at *4 (N.J. Super. App. Div. Aug. 30, 2010).

172. *Id.* at 9.

use of the internet by [plaintiff's] counsel[,]” noting that there was “no suggestion that counsel’s use of the computer was in any way disruptive. [T]hat he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of “fairness” or maintaining “a level playing field.”¹⁷³

Specific procedures and guidelines for social media use during jury trial may very well have avoided the resulting appellate issue in the *Carina* case. States should consider implementation of regulations that specifically define the scope of permissive use of social media during trial. Consideration should be given to guidelines that 1) prevent the use of social media use specifically for research of jurors during active voir dire (attorneys would remain generally unrestricted in research of potential jurors prior to the beginning of the voir dire process); and 2) dictate use of only approved researched sites during the voir dire process. Provision of procedures/guidelines regarding such use will promote the efficiency of courtroom proceedings, effectively preserving the decorum of the court.

In similar form, education and guidelines should be provided for practitioners (including all solo practices, law firms and governmental attorneys), regarding the implications of their use of social media on the justice system. Attorneys should be encouraged to have formal policies or guidelines regarding use of social media, including specifics on all aspects from use of equipment to content posted. Continuing legal education seminars should be provided on a regular basis to keep attorneys abreast of both advances in technology and any ethical or professional concerns arising therefrom.

Consideration should also be given to amendment of the Model Rules of Professional Conduct. When the ABA modified Model Rule 1.6 to include provision (c),¹⁷⁴ the accompanying

173. *Id.* at 10 (explaining where the court ruled that there was no abuse of discretion as plaintiff’s counsel failed to show any prejudice to the plaintiff as a result of being precluded from using his laptop for voir dire).

174. Rule 1.6(7)(c) provides: “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” MODEL RULES OF PROF’L CONDUCT R. 1.6(c) (2014).

comment indicated that this modification was to address protection of client confidences when engaging in all forms of electronic communication.¹⁷⁵ In addition to alerting attorneys to protect client confidences during online communications, a proposed modification would also specifically address potential client confidence violations on social media. Language could be added to the existing rule or provided in a comment to the rule advising that “[A] lawyer shall not reveal information relating to representation of a client [absent the current exceptions to the Confidentiality rule], including information shared on social media that directly relates to the representation of the client, or that could reasonably lead to the discovery of protected client information by a third person.”

VI. Conclusion

Social media use is not an esoteric pastime or fleeting trend.

It is mainstream, commonplace and inextricably interwoven into our society, both locally and globally. For the legal profession, social media is replete with both potentials and

175. *See id.* cmt. 19. This comment provides:

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

perils. The perils in particular have the powerful ability to affect the public's perception of the profession which can inevitably cause wariness and distrust of the entire justice system. It is imperative that the legal profession fulfill its responsibility to ensure that use of social media does not negatively affect the public perception of the profession and cause an asphyxiation of the flow of justice. Education and awareness are key to ensuring the profession stays abreast of technological changes and any potential ethical and social consequences social media use might foster. Judges, jurors and attorneys should all be reminded that they must be prudent and carefully consider all their social media communications because every comment, post, tweet, and friend request could effectively result in a detrimental impact to the public's perception and confidence in the justice system. Where appropriate, regulation and guidelines should be instituted and must be embraced.

As the Preamble notes, a lawyer is, among other things "a public citizen having special responsibility for the quality of justice."¹⁷⁶ A notable philanthropist once said "[e]very right implies a responsibility; every opportunity, an obligation; every possession, a duty."¹⁷⁷ The rights and opportunities provided to lawyers carry a duty to ensure that quality of justice is not besmeared by inappropriate social media use.

176. See the preamble and scope of the Model Rules of Professional Conduct.

177. John D. Rockefeller, *I Believe*, Transcript, (Jul. 8, 2014), available at <http://www.rockarch.org/inownwords/pdf/ibelievetext.pdf>.