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The "Friend"ly Lawyer: Professionalism and Ethical Considerations of the Use of Social Networking During Litigation

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**THE “FRIEND”LY LAWYER: PROFESSIONALISM AND
ETHICAL CONSIDERATIONS OF THE USE OF SOCIAL
NETWORKING DURING LITIGATION**

*Nicola A. Boothe-Perry**

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PREFACE

On February 26, 2012, an unarmed 17-year-old African-American male, Trayvon Martin, was fatally shot in the chest at close range by George Zimmerman, a 28-year-old white-Hispanic male who was the community watch coordinator for the gated community where the shooting took place. Zimmerman claimed Martin attacked him and therefore he shot him in justifiable self-defense per Florida's "Stand Your Ground" law.¹ Zimmerman was taken to the Sanford Police Department where he was questioned and released. The police department's failure to arrest Zimmerman under the circumstances of Martin's death, the allegations of racist motivation, and the viability of the "Stand Your Ground" law received national and international attention. Public outrage and protest resulted in Florida appointing a special prosecutor who on April 11, 2012, filed charges against Zimmerman for murder in the second degree. Zimmerman was represented by Attorney Mark M. O'Mara, a criminal trial-specialist certified attorney in Orlando, Florida. In the wake of Zimmerman's arrest, Attorney O'Mara's team set up a Twitter account, a Facebook page and a website with a defense fund registered with the Florida Division of Consumer Services. O'Mara's website contended that because "social media in this day and age cannot be ignored [and] is now a critical part of presidential politics, . . . part of revolutions in the Middle East, and . . . is going to be an unavoidable part of high-profile legal cases . . . ;" it was his position that "it would be irresponsible to

1. FLA. STAT. § 776 (2012). The relevant sections of the law are found in Sections 776.012–776.032, which state in part:

776.012 Use of force in defense of person.—A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat if:

(1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony; or (2) Under those circumstances permitted pursuant to s. 776.013[provisions regarding use of deadly force in home protection].

776.032 Immunity from criminal prosecution and civil action for justifiable use of force. (1) A person who uses force as permitted in s. 776.012 . . . is justified in using such force and is immune from criminal prosecution and civil action for the use of such force

ignore the robust online conversation."²

In creating the Facebook "The George Zimmerman Legal Case" (GZLC) page, O'Mara's firm acknowledged that it is "unusual for a legal defense to maintain a social media presence on behalf of a defendant"³ but deemed it necessary in order to dispute misinformation, discourage speculation, raise funds, provide a "voice" for Zimmerman and "provide a forum for communication with the law firm."⁴ In a post made on May 1, 2012, the page administrator noted because "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 feels] about the case and topics surrounding the case, and . . . welcome support an . . . d (sic) criticism."⁵ On June 18, 2012, the firm determined that it would use its online presence to post public records, pleadings and reciprocal discovery that is relevant to the case.⁶ The GZLC page continued to provide open threads allowing and encouraging public comment, asking on July 6, 2012: "[w]e would like to know what questions you have today."⁷

Despite the stated reason for the creation of the Facebook page, it is questionable whether O'Mara's social presence on the Facebook page was simply a forum for open and constructive dialogue on *Zimmerman*; if the page was merely a conduit for public records information; or if there was some alternative motive, such as an attempt to sway the public opinion of Zimmerman's culpability in Martin's death. The legitimacy of the use of the Facebook page has been questioned. For example, in a May 4, 2012 posting on a different Facebook page, the moderator of "The State of the Internet vs. George and Shellie Zimmerman" posted the following comment:

[Attorney] O'mara (sic) is now asking [GZLC] supporters what forums on the web they are posting to in regards to their client. Watch out folks, O'mara and his team are trolling the net. You can rest assured that each of these forums, [O'Mara's] team has set up accounts to try and sway the conversation on those boards. O'mara (sic) and team, you are all a bunch of sick minds. Beware

2. *Why Social Media for George Zimmerman?*, GEORGE ZIMMERMAN LEGAL CASE, <http://gzlegalcase.com/index.php/8-press-releases/7-why-social-media-for-george-zimmerman> (last visited Feb. 12, 2013).

3. *Id.*

4. *Id.*

5. Post of the George Zimmerman Page, May 1, 2012, FACEBOOK, <https://www.facebook.com/GeorgeZimmermanLegalCase> (last visited Aug. 21, 2012).

6. *Id.*

7. *Id.*

folks . . . O'mara (sic) is gearing up to try and control the conversation on the net. You will never know you are debating with a paid operative . . . a percentage of them will be.⁸

Whether the basis for the page was as O'Mara stated or was just an attempt to "dress up" some other purpose, the public perception that this was just another "slick lawyer"⁹ ploy illustrates the already poor perception of lawyers held by many¹⁰ and raises the issue whether such use is in conformance with current ethical rules. Perhaps noting the potential violative behavior, the GZLC page was removed from Facebook by mid-August 2012.¹¹ In a press release dated August 22, 2012, O'Mara's firm indicated they were "inactivating" (sic) the Facebook page because it was leading to "unhelpful discussions."¹²

Although in this case, O'Mara recognized Facebook provided "diminishing returns [since creation of the page] and . . . increasingly [became] a concern,"¹³ the use, however temporary, of Facebook during the discovery period highlights the tension between the carefree climate of social networking sites (SNS) and the strict limitations of legal discourse grounded in the rules of professional conduct, and brings to the surface the question of whether or not there should be restrictions on attorney use of SNS during pending litigation without chilling the free-flow of information inherent in electronic media.

I. INTRODUCTION

Social media use has exploded around the world. The top social networking site, Facebook, reports that it has more than a billion¹⁴ members with approximately two million friend requests every twenty minutes.¹⁵ Coupled with the other top 15 social networking sites,

8. Mar. 3, 2012 Post of *The State of the Internet vs. George and Shellie Zimmerman*, FACEBOOK, <https://www.facebook.com/StateoftheInternetAndShellieZimmerman> (last visited Aug. 21, 2012) [hereinafter FACEBOOK].

9. *Id.*

10. See generally MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* (2006).

11. Press Release from Aug. 22, 2012, *Defense Closing the George Zimmerman Legal Defense Case Page on Facebook*, GEORGE ZIMMERMAN LEGAL CASE, <http://gzlegalcase.com/index.php/press-releases/45-zimmerman-defense-closes-the-george-zimmerman-legal-case-page-on-facebook>.

12. *Id.*

13. *Id.*

14. *Newsroom*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited May 26, 2012) (reporting more than a billion as of December 2012).

15. Facebook Statistics, available at <http://www.statisticbrain.com/facebook-statistics/> (last visited Apr. 30, 2013).

including LinkedIn, Google+, Twitter, and MySpace, the number of social networking users is estimated to exceed 2 billion.¹⁶ With billions of people producing and consuming media content through SNS, there has been a growing trend of law firms' use of SNS as a marketing tool and litigators' inclusion of discovery from SNS as a part of their discovery protocol.

The rapid growth of SNS have enabled large numbers of users to instantly create and share content and has simultaneously unveiled concerns regarding the ethical and professional liabilities of attorneys participating in such SNS.

O'Mara aptly noted the use of SNS during litigation is not presently a common occurrence. Recent legal scholarship has addressed potential for ethical violations that may *inadvertently* occur from a lawyer or law firm's use of SNS.¹⁷ The *intentional* dissemination and solicitation of information through SNS during litigation presents a novel question as yet unaddressed by the American Bar Association (ABA) or the courts. Attorneys in high-profile cases generally include management of their client's public relations as part of their representation.¹⁸ With the explosion of SNS there is a high probability that more lawyers will utilize SNS for litigation purposes. Like it or not, social networking is now a primary form of communication, and its positive benefits cannot be dismissed. For instance, many state court systems and bar associations' use of SNSs to communicate with lawyers and provide case updates, has provided the public with easier access to the intricacies of the wheels of justice.¹⁹ The implications of sharing case statuses, unveiling work-product, and soliciting thoughts and suggestions from SNS "friends" regarding case strategy and procedure, however, have not been addressed. The potential for ethical and

16. *Top 15 Most Popular Social Networking Websites*, Feb. 2013, EBIZ/MBA, <http://www.ebizmba.com/articles/social-networking-websites> (last visited Feb. 28, 2013).

17. 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 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); Melissa Blades & Sarah Vermylen, *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).

18. See generally Lonnie T. Brown, Jr., "May It Please the Camera, . . . I Mean the Court"—*An Intrajudicial Solution to an Extrajudicial Problem*, 39 GA. L. REV. 83, 123 (2004) (noting that advocating in the court of public opinion has become far more prevalent and in some instances has even been viewed by courts as a necessary component of a lawyer's representation of a client, with lawyers expected to talk to the media).

19. See, e.g., Tennessee Supreme Court and Illinois Supreme Court's use of Twitter to give updates on opinions and time-sensitive issues, <https://twitter.com/TNCourts>, and <https://twitter.com/illinoiscourts>.

professionalism violations through SNS and other media avenues such as blogging is of concern and cannot be ignored.²⁰ O'Mara's use of SNSs to disseminate and solicit information regarding his high-profile case highlights the importance of uniform acceptable standards and/or limitations as such use becomes more commonplace.

This Article discusses whether current professional rules are sufficient or if new rules need to be established regarding use of SNS relating to active, pending²¹ cases to ensure compliance with ethical requirements and professional norms in an effort to strike a balance between the tension existing between the right to free access to SNS and potential ethical and professionalism concerns regarding such use.

In examining the use of SNSs, Part II of this Article discusses the current influence of social media on the legal field, discusses the concerns in prohibition of social media use, and suggests an alternative prescriptive measure. Part III of this Article addresses potential avenues to provide guidance in attorney use of SNS pending litigation by looking to the ABA, and the judiciary. Part IV of this Article discusses whether, in light of the avenues noted in Part III, promulgation of uniformed rules/procedures is necessary to ensure attorney use of SNSs pending litigation does not violate any ethical or professionalism concerns, addressing two main concerns: (1) preservation of the lawyer-client relationship; and (2) the responsibility of a lawyer to the profession.

II. SOCIAL MEDIA'S INFLUENCE—TIME FOR PROHIBITION OR PRESCRIPTION?

An evaluation of the need for regulation of SNS requires some attention to the fundamental characteristics of social media and its current influence on the legal field.

20. For a general discussion of the potential pitfalls of use of social media by lawyer, *see, e.g.*, Margaret M. DiBianca, *Ethical Risks Arising From Lawyers' Use Of (And Refusal To Use) Social Media*, 12 DEL. L. REV. 179 (2011) (cautioning that all lawyers should be careful to comply with their ethical duties in the context of social media); *see also* Kathleen Elliott Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just "Face" It*, 41 U. MEM. L. REV. 355, 405 (stating that "[t]hose in the legal field cannot afford to simply ignore or outright prohibit social networking, but should develop social network guidelines").

21. For purposes of this Article, the use of the term "pending litigation" refers specifically to the time period between the filing of an initial complaint in a civil case; of issuance of a formal indictment in a criminal case; through final disposition of the initial/trial phase of the case. This Article will not focus on time periods during any applicable appellate periods.

A. Influence of Social Media on the Legal Field

With the ever-changing nature of electronic and social media, a comprehensive assessment of the characteristics of social media is a daunting if not impossible task.²² This Part takes a non-specific, moderate approach to the basic aspects of social media.

The terms "social media," and "social network (or networking)," are generally used interchangeably to indicate

web-based services that allow individuals to: (1) construct a public or semi-public profile within a bounded system[;] (2) articulate a list of other users with whom they share a connection[;] and (3) view and traverse their list of connections and those made by others within the system.²³

Although upwards of 23 subcategories of social networks have been identified to date,²⁴ this Article briefly discusses the three most common categories of social media: blogs, microblogs, and SNS.

Blogs (a portmanteau of the words "web" and "logs") are maintained websites with regular posted entries of commentary, news, or other topics.²⁵ Microblogging is "a form of multimedia blogging that allows users to send and follow brief text updates."²⁶ The leading microblogging platforms are Twitter and Tumblr.²⁷ Twitter tags itself as "a real-time information network that connects you to the latest stories, ideas, opinions and news about what you find interesting."²⁸ Twitter

22. See Nathan Petrashek, *The Fourth Amendment and the Brave New World of Online Social Networking*, 93 MARQ. L. REV. 1495, 1497 (2010) (noting that "[t]he fluid nature of the Internet guarantees that, on any given day, any number of social networking web sites might pop into creation or wink out of existence," therefore making a "truly comprehensive review of the social networking phenomenon . . . impossible").

23. Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 11, para. 4 (2007), available at <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html> (last visited Mar. 31, 2013).

24. Linda Fulkerson, *23 Types of Social Media Sites*, ON BLOGGING WELL (Feb. 17, 2010), available at <http://onbloggingwell.com/23-types-of-social-media-sites/> (indicating subcategories that range from blogs and social networking sites to "content-driven communities" like Wikipedia).

25. Madeline Kriescher, *Professional Benefits of Online Social Networking*, 38 COLO. LAW. 61, 62 (2009).

26. Karen Salaz et al., *New Media and the Court: The Current Status and a Look at the Future*, CONF. OF CT. PUB. INFO. OFFICERS, at 38 (Aug. 26, 2010), available at <http://ccpio.org/wp-content/uploads/2012/02/2010-ccpio-report-summary.pdf> (last visited Feb. 13, 2013).

27. See Thomas Timely, *Top Ten Microblogging Sites*, GURUGROUNDS.COM, Apr. 18, 2013, available at <http://www.gurugrounds.com/marketing/social-media-marketing/top-10-microblogging-sites/> (last visited Feb. 13, 2013).

28. See *About Twitter*, TWITTER, available at <https://twitter.com/about> (last visited Feb. 13, 2013).

users are able to send messages (“tweets”) consisting of up to 140 characters.²⁹ Tumblr touts itself as a global platform for creativity and self-expression.³⁰ Tumblr lets you “effortlessly share anything” by posting text, photos, quotes, links, music, and videos from your browser, phone, desktop, email “or wherever you happen to be.”³¹ Another popular microblog is Instagram whose goal is for a “world more connected through photos;” describing its services as “a fun and quirky way to share your life with friends through a series of pictures.”³² Users are encouraged to “[s]nap a photo with [their] mobile phone[s], then choose a filter to transform the image into a memory to keep around forever.”³³

The third category of social media specific to this Article, and also the most popular social media with approximately 91% of adults using them regularly, are SNS.³⁴ In general, SNS are interactive websites that connect users based on common interests.³⁵ These web sites allow users to customize their own personal web pages (often known as “profiles”), post photographs or videos, add music, write journals or blogs, and facilitate interpersonal communications through email systems that allow users to exchange messages.³⁶ Users are also able to compile lists of “friends” who are part of one’s social network.³⁷ “Friending” or “liking” an individual’s profile, allows connected members to view one another’s online content without restrictions.³⁸ The current leading SNS are Facebook, Twitter, and new-comer, Pinterest.³⁹

29. *Id.*

30. See *Community Guidelines*, TUMBLR, available at <http://www.tumblr.com/policy/en/community> (last visited Feb. 13, 2013).

31. Tumblr, About, available at <http://www.tumblr.com/about>

32. See FAQs “What is Instagram?,” INSTAGRAM, available at www.instagram.com/about/faq (last visited Feb. 13, 2013).

33. *Id.*

34. Experian Marketing Services, *The 2012 Digital Marketer: Benchmark and Trend Report*, at 79 (Available for download at <http://digital.turn-page.com/i/60651> (reporting that social networking continues to reign as the top online activity and captured nearly 15% of all U.S. internet visits in December 2011).

35. See John S. Wilson, Comment, *MySpace, Your Space, or Our Space? New Frontiers in Electronic Evidence*, 86 OR. L. REV. 1201, 1204 (2007) (defining “social-networking sites” as “interactive web sites that connect users based on common interests and that allow subscribers to personalize individual web sites”).

36. *Id.* at 1220.

37. *Id.* (noting that often a user’s “friends list” includes many people with whom the user has little or no affiliation).

38. There are some specific privacy settings that individuals can employ to restrict access to certain individuals and for specific items on their profile. See, e.g., Facebook’s privacy policy, available at <http://www.facebook.com/policy.php>

39. The Experian Marketing Services 2012 Digital Marketer reported that Facebook captured the highest amount of SNS visits, with Twitter and new-comer Pinterest, a close second and third. See Experian Marketing Services, *supra* note 34 (The Experian Marketing

Social media, in general, has brought rapid change to professional and business development. The legal field is not immune to this effect. Social media is widely accepted for legal marketing and network development purposes. Recent years have seen an increase in books and websites dedicated to providing instruction regarding efficient use of social media.⁴⁰ 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.⁴¹ 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.⁴² Approximately 50% of firms have received leads from their blogs and/or social media; and over 40% received publicity and inquiries from journalists related to their blog.⁴³ Recognizing the utility of marketing through social media, firms hire full-time "social media specialists" on staff, and about 40% said blogging and social networking initiatives have helped the firm land new work.

Social media in all forms is not an avenue to create new violations of professional standards, but new opportunities for such violations in a manner that is more disseminated than ever before. In particular, the use of SNS which allows for real-time communication and ongoing dialogue is fertile ground for violation "opportunities." In order to stem the potential for ethical violations, rules and regulations need to provide guidance and boundaries related to SNS use.

B. Prohibition vs. Prescription

The rapid evolution of the dynamic environment caused by SNS presents a new set of challenges in policing and enforcing ethical

Services 2012 Digital Marketer: Benchmark and Trend Report reported that Facebook captured the highest amount of SNS visits, with Twitter and new-comer, Pinterest, a close second and third. However, the ranking and popularity of SNS themselves are amorphous. For example, less than five years ago, MySpace dwarfed Facebook in SNS popularity).

40. See, e.g., ADRIAN DAYTON & AMY KNAPP, LINKEDIN & BLOGS FOR LAWYERS: BUILDING HIGH VALUE RELATIONSHIPS IN A DIGITAL AGE (West 2012); Kevin O'Keefe, *Real Lawyers have Blogs: Law Blogs, Social Media, Twitter*, <http://kevin.lexblog.com>; David A. Barrett, *Legal Marketing Using Social Media: Ethical Online Marketing Seminars*, <http://legalsocialmedia.blogspot.com>; *Lawyer's Guide to Using Social Media for Professional and Client Development*, PRACTICING LAW INSTITUTE, <http://www.modernlegalmarketing.com/category/social-media/>.

41. Press Release, ABA, ABA Legal Technology Survey Results Released, ABANOW.ORG (Sept. 28, 2010), available at <http://www.abanow.org/2010/09/aba-legal-technology-survey-results-released/> (last visited Feb. 13, 2013).

42. *Id.*

43. Ryan Nelson, *Law Firms See Benefit for Social Media Marketing*, MOD. LEGAL MARKETING, Feb. 28, 2012, available at <http://www.modernlegalmarketing.com/author/ryan-nelson/>.

behavior and demands a quick response by the legal community. An elementary solution would be an outright ban or severe restrictions on the use of SNS during pending litigation. Any blanket prohibition raises concerns, however, regarding: (i) free speech protected by the First Amendment,⁴⁴ (ii) access to justice inherent in the Fourteenth Amendment; and (iii) adherence to social norms.

1. First Amendment Concerns

Any tension between constitutional doctrine and social norms as it relates to use of SNS by attorneys during the course of an active case has yet to play out in the courts. However, both the courts and Congress have evidenced hesitation and outright hostility to infringe on First Amendment rights through any “chilling effects” enacted on electronic media. For example, with the 2006 enactment of the Communication Decency Act (CDA), Congress espoused the “policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation.”⁴⁵ Courts have also invoked the “chilling effect” language in reference to any interference with internet speech,⁴⁶ and the U.S. Supreme Court has noted that since, as a general matter, “government has no power to restrict expression because of . . . message[s], ideas, subject matter, or content,”⁴⁷ whatever the challenges of applying the Constitution to ever-advancing technology, “the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary” when a new and different medium for communication appears.⁴⁸

Forbidding attorneys’ use of SNS relating to pending⁴⁹ litigation may be viewed as a toll upon attorneys’ First Amendment liberties. The argument could be made that such SNS restriction would constitute an

44. The First Amendment provides in part that no law shall be made “prohibiting the free exercise [of religion]; or abridging the freedom of speech; . . . or of the right of the people peaceably to assemble. . . .” U.S. CONST. amend. I.

45. Communications Decency Act, 47 U.S.C. § 230 (2006).

46. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997) (determining that imposing liability on an internet provider would have “a chilling effect on the freedom of Internet speech”).

47. *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (holding that reference to contemporary community standards in defining what was harmful to minors did not alone render Child Online Protection Act unconstitutionally overbroad under the First Amendment).

48. *Brown v. Entm’t Merch. Ass’n.*, 131 S. Ct. 2729, 2733 (2011) (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)) (discussing the application of First Amendment jurisprudence to violent video games).

49. The term “pending litigation” as used in this Article refers to any stage of an open case where the outcome of the case remains undecided or under consideration.

infringement of both the right to freedom of speech and the right to freely associate.⁵⁰ This type of "hybrid" First Amendment claim⁵¹ would be invoked as in similar situations involving restrictions on traditional forms of speech and association.⁵² In fact, scholars have argued that internet speech should be treated no differently and should be protected in the same manner as traditional avenues of speech.⁵³ This argument is supported by the prolific use of the internet and the current electronic climate.

However, as it relates to attorney speech during representation of a client, Chief Justice William Rehnquist noted in *Gentile v. State Bar of Nevada*, "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than the 'clear and present danger' of actual prejudice or imminent threat"⁵⁴ "standard established for regulation of the press during pending proceedings."⁵⁵ In the *Gentile* case, the day after his client Sanders was indicted on criminal charges, Petitioner Gentile, held a press conference.⁵⁶ Six months later, a jury acquitted Sanders.⁵⁷ The State Bar of Nevada subsequently filed a complaint against Gentile alleging that statements he made during the press conference "violated Nevada Supreme Court

50. Social networking facilitates a type of online "community" allowing individuals to associate with friends, family, business acquaintances and even strangers. The self-invention within these perceived communities has been discussed by scholars such as Patricia Sanchez Abril, *A (My) Space of One's Own: On Privacy and Online Social Networks*, 6 NW. J. TECH. & INTELL. PROP. 73, 74 (2007) (noting the "self-invention within a perceived community" that online social networking facilitates).

51. See, e.g., *Hudson v. Craven*, 403 F.3d 691, 693 (9th Cir. 2005) (calling plaintiff's claim a "hybrid claim" because it involved elements of both speech and associational rights under the First Amendment).

52. See, e.g., *Kissinger v. Bd. of Trs.*, 786 F. Supp. 1308 (S.D. Ohio 1992), *aff'd*, 5 F.3d 177 (6th Cir. 1993) (where veterinary student alleged that requirement to perform surgical procedures on live animals violated her religious beliefs and claiming First Amendment violations of free exercise, due process, free speech, and freedom of association, and equal protection clauses); see also *Jane L. v. Bangerter*, 794 F. Supp. 1537 (D. Utah 1992), *aff'd in part, rev'd in part on other grounds*, 61 F.3d 1493 (10th Cir. 1995) (abortion-providing physicians challenged the Utah Abortion Act, which set limits on abortions, alleging that the Act interferes with their Free Exercise rights, along with their right to freedom of speech).

53. See, e.g., Neil Weinstock Netanel, *New Media in Old Bottles? Barron's Contextual First Amendment and Copyright in the Digital Age*, 76 GEO. WASH. L. REV. 952, 953 (2008); Davis Walsh, *All a Twitter: Social Networking, College Athletes, and the First Amendment*, 20 WM. & MARY BILL RTS. J. 619, 626 (2011).

54. See, e.g., *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

55. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1074 (1991) (stating "[l]awyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct").

56. *Id.* at 2721.

57. *Id.*

Rule 177,” which prohibits a lawyer from making extrajudicial statements to the press.⁵⁸ The Nevada State Supreme Court affirmed the state’s Disciplinary Board finding that Gentile violated the rule and rejected his contention that the rule violated his right to free speech.⁵⁹ A narrowly divided U.S. Supreme Court held that while Nevada’s rule restricting attorney speech was void for vagueness, the standard employed by the rule did not violate the First Amendment.⁶⁰ The Court held that strict constitutional scrutiny, embodied in the clear-and-present-danger test, was not the appropriate standard of review for attorney speech restrictions; and upheld the less demanding standard based on the query whether the speech in question posed a “substantial likelihood of material prejudice.”⁶¹

Under this less demanding standard, prosecution of an attorney’s speech is increasingly probable.⁶² Moreover, a lawyer’s right to free speech is extremely circumscribed in the courtroom⁶³ and, in a pending case, is limited outside the courtroom as well.⁶⁴ Within those restrictions, the infringement of any First Amendment rights implicated by a systematic oversight on attorneys who use SNS during litigation appears slight as compared to the substantial interests at stake in preventing ethical violations and preventing further decay of the public perception of lawyers and the justice system as a whole.

2. Fourteenth Amendment Concerns

The use of SNS by Attorney O’Mara’s firm in *Zimmerman* may do

58. *Id.* at 2723.

59. *Id.*

60. *Id.* at 2731.

61. *Id.* at 2745.

62. For a general discussion regarding the implications of the Supreme Court’s ruling in *Gentile v. State Bar of Nev.*, see Gregory A. Garbacz, *Gentile v. State Bar of Nevada: Implications For the Media*, 49 WASH & LEE L. REV. 671, 673 (1992).

63. See, e.g., *Sacher v. United States*, 343 U.S. 1, 8 (1952).

The nature of the proceedings presupposes, or at least stimulates, zeal in the opposing lawyers. But their strife can pervert as well as aid the judicial process unless it is supervised and controlled by a neutral judge representing the overriding social interest in impartial justice and with power to curb both adversaries. The rights and immunities of accused persons would be exposed to serious and obvious abuse if the trial bench did not possess and frequently exert power to curb prejudicial and excessive zeal of prosecutors. The interests of society in the preservation of courtroom control by the judges are no more to be frustrated through unchecked improprieties by defenders.

Id.

64. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966); but cf. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984).

nothing to enhance the public perception of lawyers. In fact, at least one segment of the population perceives the use as a "slick lawyer" ploy.⁶⁵ Yet, a blanket prohibition encompassing all other cases may serve a contrary purpose by stymieing justice and the sense of social good. The inability to engage the public through prohibition of social media with respect to cases in certain instances may prove to be detrimental particularly in cases involving human and civil rights. In those cases, the exposure that is a trademark by-product of social media could provide an avenue to level the legal playing field. Absent such exposure, opportunities for activists' input that could result in fair and socially acceptable outcomes may be summarily lost. This could potentially raise Fourteenth Amendment-related "access to justice" concerns.

3. Concerns Related To Social Norms

Restricting the use of SNS would also undermine the current social environment and risk further decay in the public's trust of the legal system and lawyers that comprise the system as a whole. Under any theory of deterrence, the legal community has to consider the current social and electronic environment. Based on the prevalent and ever-increasing use of SNS, to stem the use of SNS would be inconsistent with current community values and existing social norms. Enforcement laws and rules that do not support existing social norms lack legitimacy and respect and are therefore difficult to enforce or induce desired behavior.⁶⁶ As such, rule formation or enforcement must consider the current electronic environment taking into account any generation-specific factors⁶⁷ and adapt to the generation of lawyers who only know a life inundated with electronic media.

Young lawyers have grown up in the internet era with formative norms of communication vastly different from lawyers a mere two decades ago. The generational shift evidenced by these so-called digital natives⁶⁸ that make up Generation Y⁶⁹ must be considered with an eye

65. FACEBOOK, *supra* note 8.

66. See generally TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006) (making the startling conclusion that people obey the law if they believe it is legitimate, not because they fear punishment).

67. See Patricia Sanchez Abril, *A (My) Space of One's Own: On Privacy and Online Social Networks*, 6 NW. J. TECH. & INTELL. PROP. 73, 76, 78 (2007) (noting that social network privacy expectations "seem to be overwhelmingly generation specific").

68. JOHN G. PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 346 (2008) (defining "digital natives" as those born after 1980 and discussing their presence on the internet); see also Camille Broussard, *Teaching With Technology: Is the Pedagogical Fulcrum Shifting?* 53 N.Y.L. SCH. L. REV. 903, 911 (2008/2009) (noting that the term "digital natives" refers to the generation of young adults who

to balancing the expectations of both the old and the new guards of the law.

With valid constitutional and social climate concerns, a prohibitive approach to SNSs would be unrealistic and might even be considered draconian.⁷⁰ A wiser approach would be to take prescriptive measures to ensure unprejudiced proceedings, increase professionalism practice among lawyers, and subsequently increase the public opinion of the legal system. To determine appropriate and enforceable measures, guidance can be gleaned from the ABA, the Model Rules of Professional Conduct, and the judiciary.

III. INSTRUCTIVE SOURCES FOR MEDIA USE LITIGATION

A. *Guidance from the ABA*

At the 2012 ABA annual meeting, the House of Delegates⁷¹ approved Recommendation 501A sponsored by the ABA Commission on Ethics 20/20 amending the Model Rules of Professional Conduct and their related commentary.⁷² The changes enacted at the 2012 ABA meeting to the Model Rules are telling. The ABA clearly acknowledges the prevalent use of electronic media and recognizes the need to provide guidance to lawyers regarding the use of technology, specifically in the areas of confidentiality and client development.⁷³ However, to date, no specific guidance has been provided specifically related to use of social media within the confines of an active high-profile case. Keeping in mind the generalized sentiment of the Bar for less attorney regulation,⁷⁴

have come of age online and who are totally comfortable with emerging technologies.)

69. John G. Browning & Wendy Humphrey, *The Millennial Juror*, 75 TEX. B.J. 274, 275 (2012) (defining the members of Generation Y as those born between 1982 and 1995).

70. See Vinson, *supra* note 20, at 405.

71. The ABA House of Delegates is made up of 560 members representing state and local bar associations, ABA entities, and ABA affiliated organizations. ABA House of Delegates, General Information, available at www.americanbar.org/groups/leadership/delegates.html.

72. *ABA Division for Media Relations & Communication Services*, 105A, Amends the Black Letter and Comments to Model Rules 1.0, 1.6 and 4.4, 1.1 and 1.4, HOUSE OF DELEGATES RESOLUTION, <http://www.abanow.org/2012/06/2012am105a/> (last visited Mar. 7, 2013).

73. *Id.* (including advice to lawyers regarding the use of technology).

74. Self-regulation (including the purview of judicial regulation) of lawyers is a well-established principle. Many commentators and scholars have emphasized this independent nature of the profession. See, e.g., Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 483 (discussing the lawyer independence argument); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 6, 30 (1988) (discussing, in general, the independence of lawyer). Over the years, proponents of additional lawyer regulation has met strong objection. For

where needed to protect the integrity and credibility of the profession, regulatory presence must be responsibly addressed and promulgated. Potential violation of ethical rules is an area that cannot be ignored by the profession.

B. *Guidance from the Model Rules of Professional Conduct (Ethical Rules Implicated)*

The use of SNS may violate a number of ethical rules. For example, a lawyer may run afoul of the duties of competent representation⁷⁵ and confidentiality;⁷⁶ creation of attorney-client relationships;⁷⁷ avoidance of conflicts;⁷⁸ prevention of the unauthorized practice of law;⁷⁹ false, misleading or deceptive advertising;⁸⁰ solicitation of clients;⁸¹ prevention of prejudicial extrajudicial statements;⁸² and honesty in communications⁸³ by engaging in SNS communications. While fully appreciating the opportunity for a plethora of ethical violations, this Article focuses on the particularly concerning potential violations of confidentiality and a lawyer's duty to refrain from extrajudicial statements and engage in honest communications.⁸⁴

1. Confidentiality

A lawyer's duty of confidentiality is outlined in Model Rule 1.6(a), which prohibits the release of information "relating to the representation

example, the ABA issued a report concluding that there is "no basis" or any "persuasive evidence" that additional regulation (specifically legislative regulation) would be an improvement over self-regulation. See American Bar Association, *Lawyer Regulation for a New Century Report of the Commission on Evaluation of Disciplinary Enforcement, Regulation of the Profession by the Judiciary*, ABA-McKay Report Recommend. 1 (1992). See also Eli Wald, *Should Judges Regulate Lawyers?*, 42 MCGEORGE L. REV. 149, 150 (2010) (noting that "the legal profession has vigorously defended the regulation of lawyers" to prevent any undermining of self-regulation "by opening the door to external regulation of the practice of law.").

75. MODEL CODE OF PROF'L CONDUCT R. 1.1 (2002).

76. *Id.* R. 1.6.

77. *Id.* R. 1.18.

78. *Id.* R. 1.7.

79. *Id.* R. 5.5.

80. *Id.* R. 7.2.

81. *Id.* R. 7.3

82. *Id.* R. 3.6.

83. *Id.* R. 7.1.

84. For an in-depth analysis of the awareness of ethical implications of using technology, see Bennett, *supra* note 17, at 114 (noting that "lawyers require at least a basic understanding of how social networking works and some awareness of the ethical implications of using such technologies," and briefly addressing ethical issues lawyers may face when using social networking).

of a client”⁸⁵ unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted under one of a handful of listed exceptions.⁸⁶ This requirement of confidentiality is the hallmark of the attorney client-relationship.⁸⁷

Model Rule 1.6 states in part: “A lawyer may reveal information relating to the representation of a client *to the extent the lawyer reasonably believes necessary*: . . .”⁸⁸ Recommendation 105A advises lawyers on the use of technology and client confidentiality, and as passed, amends rules including Model Rule 1.6(c). Pursuant to the recommendations, Rule 1.6(c) was amended to add the current language: “[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.”⁸⁹ The amendments to the Comment note the requirement that a lawyer safeguard information relating to the representation of a client against “unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.”⁹⁰

Particularly in high-profile cases, an attorney’s use of SNS while there is active, ongoing litigation may be seen as a threat to the duty imposed by this rule, and illustrates the inherent “tension between the duty of confidentiality and the [SNS] norm of enormously reduced, if not nonexistent, personal boundaries.”⁹¹ A large number of SNS users employ a pseudonym or choose to remain completely anonymous.⁹² As

85. MODEL CODE OF PROF’L CONDUCT R. 1.6(a).

86. *Id.*

87. *Id.* R. 1.6 cmt. 2 (noting that confidentiality “contributes to the trust that is the hallmark of the client-lawyer relationship”); *see also generally* Thomas G. Bost, *Corporate Lawyers After the Big Quake: The conceptual Fault Line In the Professional Duty of Confidentiality*, 19 GEO. J. LEGAL ETHICS 1089, 1131 (2006) (labeling the attorney-client privilege, the “hallmark of our jurisprudence.”) (citing *People ex rel. Dep’t of Corps. v. Speedee Oil Change Sys., Inc.*, 980 P.2d 371, 378 (Cal. 1999)).

88. MODEL CODE OF PROF’L CONDUCT R. 1.6(b) (emphasis added).

89. *Id.* R. 1.6(c).

90. *Id.* R. 1.6 cmt. 18.

91. Michael E. Lackey Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 156 (2012) (citing Leslie A. Gordon, *Why Can’t We Be Friends?*, A.B.A. J. (Jan. 1, 2010, 9:00 PM), http://www.abajournal.com/magazine/article/why_cant_we_be_friends/ (quoting legal ethicist, John Steele) (last visited Mar. 30, 2013)).

92. In recent years, the anonymity of SNS users has been attacked, giving rise to a number of cases seeking to determine the identity of anonymous bloggers. For a more detailed review of this rising area of social media law, see Hannah Rogers Metcalfe, *Libel in the Blogosphere and Social Media: Thoughts on Reaching Adolescence*, 5 CHARLESTON L. REV.

a result of anonymity, there exists the danger an attorney employing an SNS will unwittingly participate in conflicts of interest with parties whose interests are adverse to existing clients.⁹³

The opportunity to engage in real-time discussion with potential jurors, solicit the opinions of the general public in formulating defense strategy or providing "suggestions" regarding the attorney's position on the case could easily result in "inadvertent or unauthorized disclosure, or unauthorized access to" information relating to the representation of the client.⁹⁴ The speed of the use of the SNS also facilitates potential for prejudicial extrajudicial comments on the worldwide web.

2. Honesty in Communication/Extrajudicial Comments

ABA Model Rule 8.4 generally prohibits lawyers from engaging in any conduct that involves any "dishonesty, fraud, deceit or misrepresentation."⁹⁵

Under Rule 3.6(a), trial lawyers cannot "make extrajudicial statements that . . . will be disseminated by means of public communication,"⁹⁶ where such communications may "have a substantial likelihood of materially prejudicing" a legal proceeding.⁹⁷ Attorneys who blog about ongoing litigation have previously been reprimanded under the auspices of this rule.⁹⁸

The speed of SNS use facilitates mechanically simple, and rapid dissemination of information to the general public, with the ability to reach hundreds, if not thousands of people in record time. Soliciting and commenting on issues related to pending cases in real time through the use of SNS opens up a quagmire of potential Rule 3.6 violations. The Comment to Rule 3.6 recognizes the difficulty in striking a balance between "protecting the right to a fair trial and safeguarding the right of free expression."⁹⁹ Notwithstanding this difficulty, the comment notes that "the right to a fair trial necessarily entails some curtailment of the

481, 483 (2011) (citing cases and scholarly articles addressing the anonymity cases).

93. Lackey & Minta, *supra* note 91, at 163 (highlighting how the frequent use of anonymity and pseudonymity online also can give rise to inadvertent conflicts of interests as lawyers unintentionally develop relationships with parties who have interests that are adverse to those of existing clients).

94. *Id.*

95. *Id.* (providing examples of potential problems caused by the use of social media).

96. An "extrajudicial statement" is "any utterance made outside of the court." See BLACK'S LAW DICTIONARY 624 (8th ed. 1999).

97. MODEL CODE OF PROF'L CONDUCT R. 3.8 (2010).

98. See Richard Raysman & Peter Brown, *The Effects of Blogging on Legal Proceedings*, N.Y. L.J., May 12, 2009, at 1, 2 n.5 (noting a case where the court reprimanded a prosecutor for blogging about ongoing trial).

99. See MODEL CODE OF PROF'L CONDUCT R. 3.6(b) cmt. (2002).

information that may be disseminated about a party prior to trial, particularly where trial by jury is involved.”¹⁰⁰

In a high profile criminal case such as *Trayvon Martin/George Zimmerman*, the dissemination of information should, under Rule 3.6, be regulated. Comment 3 of Rule 3.6 notes that the rules general prohibition nevertheless recognizes that “the public value of informed commentary is great” and specifies that the rule does not apply to lawyers who are not involved in the proceeding, but instead “applies only to lawyers who are, or who have been involved in the investigation or litigation of a case.”¹⁰¹ For those lawyers, the guidance regarding the use of SNS in their advocacy for their clients is of great import.

Rule 3.6(c) provides those lawyers allowance for making statements “that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s clients.”¹⁰² In *Trayvon Martin/George Zimmerman*, O’Mara noted the primary reason for the creation of the GZLC Facebook page was to manage the high profile nature of the case (which had spurred “numerous FB impostors,” and other false information being disseminated on the worldwide web); and to “try and bring the [Martin/Zimmerman] conversation to a place where individuals could respectfully discuss the case” in a forum.¹⁰³ At first glance, this reasoning is precisely in the spirit of Rule 3.6(a). O’Mara’s digital marketing specialist recognized and fully appreciated the need for compliance with Rule 3.6(a) and acknowledged that despite the general guidance of the rule, there was no specific guidance regarding the use of social networking within the confines of the Model Rules.¹⁰⁴

When the ABA amended Rule 3.6 in 1994 in response to *Gentile v. State* it specified certain types of information that a lawyer may disclose in an effort to provide more guidance for lawyers.¹⁰⁵ Information within the dictates of the rule include the claim, offense, or defense involved; the identity of the persons involved; information contained in a public record; that an investigation of the matter is in progress; the scheduling or result of any step in the litigation; a request for assistance in obtaining evidence and information necessary thereto; and a warning of danger concerning the behavior of a person involved when there is reason to believe that there exists the likelihood of substantial harm to

100. *Id.* (emphasis added).

101. *Id.*

102. *Id.* R. 3.6(c).

103. Telephone Interview with Shawn Vincent, Internet Specialist, Mark O’Mara Law Firm, Orlando Fla. (Oct. 5, 2012).

104. *Id.*

105. MODEL CODE OF PROF’L CONDUCT R. 3.6.

an individual or to the public interest.¹⁰⁶ The guidelines address the propriety of disseminating the enumerated information; however, in practice, the Rules continue to provide only limited guidance as to an attorney's ethical obligations in communicating via electronic media. Any use of SNS as a vehicle for this form of client/case protection as allowed, cannot be allowed to be unfettered and unregulated. In addition, commenting on pending matters or matters that will soon appear before the court could present an undesirable "image of impropriety."¹⁰⁷

C. Guidance from Judiciary and other Judicial Employees

Currently, 27 states, the District of Columbia, the commonwealth of Puerto Rico, and the unincorporated, organized territory of Guam routinely use social media to disseminate information.¹⁰⁸ Almost all of the noted jurisdictions are on Twitter, with a sizeable group using Facebook on a regular basis.¹⁰⁹ A 2010 study by the Conference of Court Public Information Officers (CCPIO) showed that 40% of responding state court judges use SNSs.¹¹⁰ The CCPIO's 2012 survey concluded in part that the number of judges on social media profile sites continued to rise, with use being reported by 46.1% of judges, the majority of whom (86.3%) are on Facebook.¹¹¹

The courts have attempted to adapt to the rapidly evolving pace of technology and ever-increasing use of SNS through review of

106. *Id.*

107. See Lackey & Minta, *supra* note 91, at 187.

108. Social media is used mainly to connect with the public and collaborate with stakeholders. The states and territories currently using social media are Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Guam, Hawaii, Idaho, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Tennessee, Texas, Utah, Virginia, and West Virginia. National Center for State Courts (NCSC), *Social Media and the Courts*, available at <http://www.ncsc.org/Topics/Media/Social-Media-and-the-Courts/State-Links.aspx?cat=Social%20Media%20and%20the%20Courts#Florida> (last visited Feb. 26, 2013).

109. Arizona, California, Colorado, District of Columbia, Florida, Georgia, Hawaii, Kentucky, New Jersey, North Carolina, Ohio, Oklahoma, Puerto Rico, Texas and Utah all use Facebook. *Id.*

110. Christopher J. Davey et. al., *New Media Comm. Conference of Court Pub. Info. Officers, New Media and the Courts: The Current Status and a Look at the Future* 8 (2010), available at <http://www.ccpio.org/documents/newmediaproject/New-Media-andthe-Courts-Report.pdf> (last visited Feb. 26, 2013) (reporting the results of a survey of individuals in the court community that returned 810 complete responses and an additional 789 partially complete responses).

111. Regina Koehler et al., *A Report of the New Media Comm. Conference of Court Pub. Info. Officers, 2012 CCPIO New Media Survey 5*, available at <http://ccpio.org/wp-content/uploads/2012/08/CCOIO-2012-New-Media-ReportFINAL.pdf> (last visited Feb. 26, 2013).

applicable procedural and ethical rules and by addressing questions regarding the admissibility of evidence obtained from SNS.¹¹² In addition, the impact on SNS use as it relates to the judiciary is highlighted in two additional concerns: (1) the use of SNS by the judiciary and judicial employees; and (2) the use of SNS by attorneys to discuss judges and their employees. The handling of these concerns is instructive as it relates to appropriate guidelines for SNS use by attorneys during litigation.

Judicial use of SNS is most concerned with maintaining the appearance of impartiality, and prevention of security risks.¹¹³ To address security risks, most states have social media policies for judges and judicial employees barring posting of pictures of court events, judicial offices, and the courthouse itself.¹¹⁴ Ethical considerations vary by jurisdictions, with some offering very general guidelines regarding the use of SNS, such as “[t]hink before you post,” “[s]peak for yourself, not your institution,” and “[k]eep secrets secret,”¹¹⁵ to blanket prohibitions on use of SNS during work hours, and restrictions on such use even outside the workplace.¹¹⁶

112. Although rules of procedure and ethical rules require attorneys to adhere to specific behaviors during the course of litigation, the impact of the use of social-networking during litigation has been left mostly unaddressed to date. Courts have generally discussed the use of SNSs in the context of admissibility of evidence. For example, in *Saadi v. Maroun*, No. 4:09-MC-00018, 2009 WL 3428130 (N.D. Ohio Oct. 20, 2009), a defamation action, the U.S. District Court for the Middle District of Florida allowed the plaintiff to enter into evidence various postings he downloaded from a website that allegedly contained derogatory statements about him. Similarly, in *Dockery v. Dockery*, No. E2009-01059-COA-R3-CV, 2009 WL 3486662 (Tenn. Ct. App., Oct. 29, 2009), a family law case involving domestic violence, the victim’s husband purportedly exchanged messages with the victim’s cousin via MySpace, in an attempt to threaten and intimidate his wife. The Court of Appeals of Tennessee allowed the victim to present evidence of printed pages from the cousin’s MySpace page detailing the conversations because the cousin was also called as a witness and testified that the printouts showed exactly what the husband said, as well as what she said.

113. See generally Judicial Conference of the United States, Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees (2010) [hereinafter Judicial Employee Social Media Guidelines], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/SocialMediaLayout.pdf> (last visited Mar. 30, 2013).

114. See, e.g., U.S. District Court for the District of Rhode Island, Social Media Policy/Guidelines, at 1 (2010), available at <http://www.cacd.uscourts.gov/sites/default/files/documents/InternPacket.pdf> (last visited Mar. 30, 2013) [hereinafter District of Rhode Island Social Media Policy]; U.S. District Court for the Central District of California, Clerks Office Employee Social Media and Social Networking Policy, at 3; U.S. District Court for the Southern District of Indiana, Social Media and Social Networking Policy for Chambers’ Office Staff, at 1, available at <http://indylaw.indiana.edu/clinics/internships/SocialNetworkingPolicy.pdf> (last visited Mar. 30, 2013).

115. Lackey & Minta, *supra* note 91, at 168 (citing District of Rhode Island Social Media Policy, at 27–29).

116. See, e.g., Delaware County, Indiana Circuit Court, Social Networking Policy, available at <http://www.thestarpress.com/assets/pdf/C7178737830.PDF> (last visited Mar. 30,

Of much discussion are ethical considerations regarding use of SNS by judges themselves. Recent judicial ethics advisory committees have addressed issues regarding whether judges should be allowed to use SNS for campaign purposes¹¹⁷ or have a social media "friendship" with attorneys.¹¹⁸ In a highly publicized case, a North Carolina Judicial

2013). By Order dated August 29, 2011, the Delaware Circuit Court mandate that "no social network site may be accessed during work hours" by any Court employee. The Order further states that:

Even outside the workplace, no employee shall discuss or reveal on a social network site, any information related to a judge, co-workers, parties before the court, attorneys who appear before the Court, local law enforcement officials, and/or any information obtained through the employee's observation of and/or work with the Court. Employees shall never post publicly on any matter or issue before the court nor post about anything observed or learned through employment with the Court. Further, because gossip and negative relationships between peers impairs productivity and security in the workplace, no comments shall be made about or to other employees that are negative about another employee or might be perceived as negative. After leaving court employment, employees are still bound to uphold the independence, integrity, and impartiality of the Court. Therefore, employees should not reveal to third parties any observations made as an employee of the court. This prohibition includes blogging about working with the Courts. Posting hateful, discriminatory, and/or obscene material on a social network site may be grounds for terminating employment. Because the court must maintain a high standard of conduct, an employee who reveals her or himself to be prejudiced and/or who reveals her or himself as a person who does not maintain a prudent and judicious lifestyle may give rise to an appearance of impropriety.

Id. at 1–2.

117. *See, e.g.*, Fla. Judicial Ethics Advisory Comm., Op. No. 2009-20, paras. 5–8 (2009), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html> (last visited Mar. 30, 2013) (answering in the affirmative to questions regarding committee use of social network technology for election campaign purposes).

118. *See, e.g.*, California Judicial Ethics Committee, Op. 66 (2011), available at <http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf> (last visited Mar. 30, 2013) (answering in the affirmative to questions regarding whether a judge may be a member of an online social networking community, and whether a judge may include lawyers who may appear before the judge in the judge's online social networking. But stating that a judge may not include lawyers who have a case pending before the judge in the judge's online social networking); N.Y. State Advisory Comm. on Judicial Ethics, Op. 08-176 (2009), available at <http://www.courts.state.ny.us/ip/judiciaethics/opinions/08-176.htm> (last visited Mar. 30, 2013) (finding nothing "inherently inappropriate about a judge joining and making use of a social network," and noting that judges may generally socialize with attorneys that appear in the judge's courtroom, subject to the Judicial Code); Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119 (2010), available at http://courts.ky.gov/commissionscommittees/JEC/JEC_Opinions/JE_119.pdf (last visited Mar. 30, 2013) (noting that the mere designation of a friend online does not "in and of itself[] indicate the degree . . . of a judge's relationship with the person" and allowing judges, attorneys, and other court personnel to be friends on social media sites); S.C. Advisory Comm. on Standards of Judicial Conduct, Op. No. 17-2009 (2009),

Standards Commission reprimanded a judge for conducting *ex parte* communications with an attorney when the judge read and posted comments about a pending case on the attorney's Facebook page.¹¹⁹ Advisories on the issue vary by jurisdiction from complete bans on "friending" attorneys,¹²⁰ to less restrictive measures that provide limitations for SNS "friends,"¹²¹ with some states providing general cautionary advice on the use of SNS.¹²²

In addition to ethics committee advisories, the difficulty with legal ethics and judicial ethics keeping pace with modern technology has been discussed by both legal scholars¹²³ and judges.¹²⁴ The consensus is

available at <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009> (concluding that "[a] judge may be a member of Facebook and be friends with law [enforcement officers and employees . . . [so] long as they do not discuss anything related to the judge's position"); *but cf.* Fla. Judicial Ethics Advisory Comm., *supra* note 117, paras. 3–4 (disallowing judges and attorneys to be friends on SNSs); Mass. Comm. on Judicial Ethics, Op. No. 2011-6 (2011), available at <http://www.mass.gov/courts/sjc/cje/2011-6n.html> (last visited Mar. 30, 2013) (prohibiting judges "from associating in any way on [SNSs] with attorneys who may appear before them," and indicating that a Massachusetts judge may friend an attorney only when that judge would recuse himself if the friended attorney were to appear before her), and *In re* Judicial Ethics Op. 2011–3, 261 P.3d 1185, 1186 (Okla. Jud. Ethics Advisory Panel 2011) (prohibiting judges from identifying court staff, law enforcement officers, social workers, attorneys, and others who may appear before the judge in court as "friends" on their account.)

119. Judicial Standards Comm'n of the State of N.C., Inquiry No. 08-234, at 2–3 (2009), available at <http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf> (last visited Mar. 30, 2013).

120. See Fla. Judicial Ethics Advisory Comm., *supra* note 117, paras. 3–4 (disallowing judges and attorneys to be friends on SNS).

121. See, e.g., N.Y. State Advisory Comm. on Judicial Ethics, *supra* note 118 (finding nothing "inherently inappropriate about a judge joining and making use of a social network," and noting that judges may generally socialize with attorneys that appear in the judge's courtroom, subject to the Judicial Code.); Ohio Judicial Ethics Advisory Opinion 2010-7 (2010), available at <http://www.ncsc.org/Topics/Media/Social-Media-and-the-Courts/State-Links.aspx?cat=Judicial%20Ethics%20Advisory%20Opinions%20on%20Social%20Media> (last visited Mar. 30, 2013) (finding that a judge may be a "friend" on a social networking site with a lawyer who appears as counsel in a case before the judge, but cautions, "[a]s with any other action a judge takes, a judge's participation on a social networking site must be done carefully in order to comply with the ethical rules in the Code of Judicial Conduct").

122. See, e.g., Maryland Judicial Ethics Committee Opinion 2012-07 (2012), available at <http://www.courts.state.md.us/ethics/opinions/2000s/2012-07.pdf> (last visited Mar. 30, 2013) (stating that a judge must "recognize that the use of social media networking sites may implicate several provisions of the Code of Judicial Conduct and therefore, proceed cautiously").

123. Samuel Vincent Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281 (2011) (introducing the concept of two approaches: integrative and restrictive, when addressing judicial use of Facebook).

124. See, e.g., Judge Craig Estlinbaum, *Essay, Social Networking and Judicial Ethics*, 2 ST. MARY'S L.J. LEGAL MAL. & ETHICS 2 (2012), available at SSRN: <http://ssrn.com/abstract=2120943>, and http://www.stmaryslawjournal.org/pdfs/Estlinbaum_Final.pdf (last visited Mar. 30, 2013) (discussing Judicial adherence to the Model Code of Judicial Conduct; and noting that "social media, like any public communication form, presents special ethical challenges for

that regardless of the restrictions or lack thereof, the status and the responsibilities associated with the judicial office apply both during the judge's professional activities and personal affairs;¹²⁵ and therefore, all judicial use of SNS must conform with ethical obligations while promoting the public confidence in the judiciary.¹²⁶

In a similar vein, attorneys' use of SNS by attorneys pending litigation should conform not only with ethical obligations, but also in such a manner as to enhance the waning public perception of lawyers. An attorney's status and responsibility to the profession, like judges, should apply both to personal affairs and professional activities, including those related to pending cases.

IV. RESPONSIBILITIES FOR REGULATION

A. *Responsibility to the Legal Profession*

In broad terms there is nothing inherently wrong with attorneys making relevant, accurate, and responsible public comments regarding pending cases. In fact such discourse may prove beneficial in certain circumstances, such as ensuring the perception and reality of a fair trial in criminal matters,¹²⁷ as well as educating the general public on human rights or other important issues. Advocacy in the court of public opinion is an important role for an attorney, particularly in circumstances where it is necessary to restore or maintain a client's position in the community.¹²⁸ However, it is unrealistic to think that without guidance, all attorneys will adhere to commentary within strict ethical and professionalism guidelines. Ethical rules and professionalism tenets dictate that a lawyer act in a manner that maintains and improves the fiduciary duty to the public.¹²⁹ However, the tone generated by

judges" requiring "particular attention to how [social media] use relates to the judge's particular ethical obligations regarding relationships and communication with others," as these issues raise "important ethical questions that directly impact how courts are perceived in the emerging media age").

125. Jones, *supra* note 123, at 299.

126. Estlinbaum, *supra* note 124, at 7.

127. Lonnie T. Brown, Jr., "May It Please the Camera, . . . I Mean the Court"—An Intrajudicial Solution to an Extrajudicial Problem, 39 GA. L. REV. 83, 126 (2004).

128. *Gentile v. State of Nevada*, 510 U.S. 1030, 1043 (Justice Kennedy noted that a "legitimate goal of extrajudicial advocacy may be to maintain—or restore—a client's position in the community."); see also GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 15 (2002) (contending that getting media attention for cases and the causes they represent is an important aspect of progressive lawyering).

129. The Preamble to the Model Rules of Professional Conduct states: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." MODEL RULES OF PROF'L

unfettered communication on SNS regarding pending cases does nothing to improve the public perception of lawyers or the perception of the fairness of justice.¹³⁰

In the National Institute for Trial Advocacy (NITA) handbook “Professionalism In the Real World: Lessons for the Effective Advocate,” authors, Lisa Penland, and Melissa H. Weresh advise that lawyers “should limit [their] participation in [blogs and electronic social networks]” in an effort to “maintain integrity and professionalism in the legal community.”¹³¹ Acknowledging this negative perception, prosecution attorneys in *Trayvon Martin* sought to bar George Zimmerman’s lawyers from blogging about legal issues on a website, as well as using traditional news and social media to comment about the case,¹³² claiming that Attorney O’Mara, Mr. Zimmerman’s lawyer, was jeopardizing the trial by making prejudicial statements in his comments to the traditional media, as well as on Twitter, Facebook, and a legal blog.¹³³ The State’s request for a bar on public comment made in April 2012 was denied, as was a subsequent second request made in October, 2012.¹³⁴ Despite these denials, the State’s request provides a window to the public’s perception regarding the use of SNS pending litigation. With the additional concerns of prejudicial statements, action needs to be taken to address the geometrical growth of SNS use by attorneys.

B. Prescriptions for Regulation

In an effort to harness or prevent SNS as a vehicle to transmit prejudicial extrajudicial statements, some judicial and professional regulation by way of an amendment to the comments embodied in the Model Rules may be appropriate to provide codification of standardized principles.

CONDUCT pmb1. (1) (2011) (emphasis added).

130. J. Cunyon Gordon, *Painting by Numbers: “And, Um, Let’s Have a Black Lawyer Sit at Our Table,”* 71 FORDHAM L. REV. 1257, 1257 (2003) (observing that “disrespect for and mistrust of lawyers translates into questioning the fairness and legitimacy of courts, court decisions and the rule of law”).

131. LISA PENLAND & MELISSA H. WERESH, NATIONAL INSTITUTE FOR TRIAL ADVOCACY, PROFESSIONALISM IN THE REAL WORLD, LESSONS FOR THE EFFECTIVE ADVOCATE 28 (2009).

132. See Debra Cassens Weiss, *Judge in Trayvon Martin Case Refuses to Ban Defense Lawyer’s Blog and Comments*, A.B.A. J., Oct. 30, 2012, available at http://www.abajournal.com/news/article/judge_in_trayvon_martine_case_refuses_to_ban_defense_lawyers_blog_and_commen/?utm_source=maestro&utm_medium=email&utm_campaign=tech_monthly.

133. *Id.*

134. In April 2012, the request was denied by Judge Kenneth Lester who was subsequently removed from the case. The subsequent Judge, Debra Nelson, denied the second request on October 29, 2012. Judge Nelson noted in the order “There has not been an overriding pattern of prejudicial commentary that will overcome reasonable efforts to select a fair and impartial jury.”

1. Judicial Regulation

Although courts have historically been reluctant to accept their position in regulating lawyer behavior,¹³⁵ the potential for multiple violations through SNS demands some regulatory action by the courts. One regulatory action could be for courts to embrace the use of gag orders regarding SNS use. Enactment of specific procedural or local court regulation in a form of such "gag orders" (particularly in high-profile criminal cases) would lessen the probability of violative behavior, and just as importantly, reduce the appearance of, and chances for impropriety.

Recent federal jury instructions highlight the recognition of the danger in SNS use during trials. In June 2012, updated jury instructions were issued to provide 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.¹³⁶ Per the updated instructions, federal jurors are banned from social media use to conduct research on or communicate about a case. The 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,"¹³⁷ read in part as follows:

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

135. See Susan P. Koniak, *When Courts Refuse to Frame the Law and Others Frame It to their Will*, 66 S. CAL. L. REV. 1075, 1079–91 (1993) (criticizing courts for refusing to declare concrete standards for attorney behavior).

136. *Judicial Conference Committee on Court Administration and Case Management Proposed Model Jury Instructions regarding The Use of Electronic Technology to Conduct Research on or Communicate about a Case*, LEGAL TIMES (2012), available at <http://legaltimes.typepad.com/files/model-jury-instructions.pdf> (last visited Mar. 30, 2013).

137. *Id.*

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.¹³⁸

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 anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case.¹³⁹

Adherence to the recommended jury instructions highlights for jurors the importance to refrain from social media use pending trial and illustrates for them the potential violations of a fair and unbiased decision necessary for the proper functioning of the wheels of justice. For attorneys involved in pending litigation similar restrictive guidelines noted in gag orders would be appropriate and would provide a framework within which meaningful regulation can occur.¹⁴⁰ A gag order could specifically ban attorneys in high-profile cases from the use of SNS to communicate about the case beyond full and unedited public record disclosure. Such gag orders may enhance accountability as lawyers will know that they are being closely observed and that there are consequences for non-compliant behavior. Any gag orders issued could incorporate by reference Model Rules, such as Rule 8.4(d) prohibiting conduct that is “prejudicial to the administration of justice.”¹⁴¹

138. *Id.* (emphasis added)

139. *Id.*

140. Brown, *supra* note 127, at 138 (noting that “although gag order, not infrequently, constitute an overreaction to extrajudicial speech by attorneys, they do suggest a framework within which meaningful regulation can occur.”).

141. MODEL RULES OF PROF'L CONDUCT R. 8.4(d).

2. Suggested Amendments to Model Rules Comments

Regulation of SNS use could also be accomplished by amendments to the Model Rules. Under newly enacted Model Rule 1.6 (c)¹⁴² the "unauthorized access to, or the inadvertent or unauthorized disclosure" of "information relating to the representation of a client" is no longer limited to disclosure of "confidential" information.¹⁴³ An additional comment to the rule as suggested below could be added:

Dissemination of any information relating to the representation of a client on the world-wide web using social media (including, but not limited to, blogs, microblogs, and/or other social networking sites), may be considered a violation of paragraph (c). Factors to be considered in determining whether any inadvertent or unauthorized disclosure has been made, include, but are not limited to, the frequency of information dissemination, the accessibility of public comment and response, the regulation of forum activity, the inflammatory nature of forum content, and the selective nature of audience publication and/or participation.

In essence, lawyers would be cautioned to abstain from any communications which would either: (1) advance any prejudicial facts or commentary, or (2) serve to reduce the public perception of attorneys.¹⁴⁴ Subjecting attorneys to enforcement mechanisms and providing concrete guidance in the use of SNS will provide meaningful constraints.

V. CONCLUSION

It is professional misconduct for an attorney to "violate or attempt to violate the Rules of Professional Conduct . . ." ¹⁴⁵ The majority of attorneys never commit ethical violations, but many exhibit unprofessional behavior that comes short of such violations.¹⁴⁶ Use of

142. *Id.* R. 1.6(c) (providing that "[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.").

143. *Id.* (striking "confidential" from language).

144. For a more detailed discussion of the declining public perception of lawyers, see generally Nicola A. Boothe-Perry, *No Laughing Matter: The Intersection of Legal Malpractice and Professionalism*, 21 AM. U. J. GENDER, SOCIAL POLICY & THE LAW 1 (2012).

145. MODEL RULES OF PROF'L CONDUCT R. 8.4(a).

146. This behavior which "toes-the-line" to unethical behavior has been used in defining professionalism. For a more in-depth definition of professionalism and its importance to the legal field, see generally, Neil Hamilton & Verna Monson, *The Positive Empirical Relationship*

SNS is fraught with both ethical and professionalism perils, and it does not appear that the pace set by the growth of these SNS can be adequately matched by rote enforcement of the Model Rules of Professional Conduct. The current climate of prolific social media use dictates increased participation on SNS. As such, blanket prohibition would be unrealistic, thus requiring a more prescriptive approach. Attorneys who choose to use SNS during litigation need to be provided with additional guidelines for such use. Particularly where such use involves a forum for two-way communication it is paramount to ensure that the use neither violates current ethical rules, nor casts an air of impropriety and lack of professionalism.

Legal scholarship has just now begun to grapple with the far-reaching power of SNS to reach large audiences that may include potential jurors in ongoing litigation. While appreciating the benefits to public discourse regarding matters of import, forums for extrajudicial commentary in connection with pending or anticipated cases must also be recognized for the threat posed to the impartial administration of justice. As such, despite any contributions to social discourse, the bar and bench should consider specifically regulating *ex parte* communications on SNS pending litigation particularly in high-profile cases.

Within the confines of courtrooms, an attorney's efforts to sway public opinion of his client's guilt or innocence are regulated by rules, procedures and judicial oversight. No similar oversight is currently available in the "court" of public opinion, leaving attorneys free to test the boundaries of ethical behavior and engage in unprofessional conduct.

The need for oversight and guidance is greatly highlighted in regard to criminal cases. With regard to attorney use of extrajudicial statements, both ethical rules and case law indicate crucial distinctions between criminal and civil cases.¹⁴⁷ All legal proceedings value the

of Professionalism to Effectiveness in the Practice of Law, 24 GEO. J. LEGAL ETHICS 137, 143 (2011) (indicating that there is a positive empirical relationship between professionalism and effectiveness in the practice of law and that with "ethical professional formation occur[ing] throughout a career . . . [a] highly professional lawyer is substantially more likely to be an effective lawyer"); Neil Hamilton, *Professionalism Clearly Defined*, 18 U. ST. THOMAS L.J. 4, 20–21 (2008) (deriving his model through an analysis and synthesis of various ABA reports, Chief Justice Reports, and the Preamble to the Model Rules of Professional Conduct); Nicola A. Boothe-Perry, *Standard Lawyer Behavior?: Professionalism as a Standard for ABA Accreditation*, 42 N.M. L. REV. 33 (2012) (enumerating a non-exclusive list evidencing professionalism characteristics).

147. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 6 (stating that the nature of the proceeding involved is a relevant factor to determining prejudice and that "civil trials may be less sensitive" than criminal jury trials to extrajudicial speech).

See also *United States v. Cutler*, 58 F.3d 825, 837, 840 (1995) (where the contempt conviction

impartiality and fairness of justice envisioned by the Constitution. However, it has been recognized that criminal cases "require even a greater insularity . . . [and that] the mere invocation of the phrase 'fair trial' does not as readily justify a restriction on speech when we are referring to civil trials."¹⁴⁸ *Trayvon Martin/George Zimmerman* was a highly publicized criminal case which provides a framework to address the novel issues involved with attorney use of SNS pending litigation.

The ABA and scholars have identified the risks associated with use of SNS by attorneys. Attorneys have been cautioned through newly amended comments to the Model Rules about the responsibility to keep abreast of technological advances that affect the profession. The next step is to incorporate specific rules and/or comments to provide guidance for attorneys practicing in this age of social media.

of mob boss, John Gotti's, attorney was upheld when the attorney ignored a gag order imposed in his client's criminal trial and told a television audience that his client was being persecuted and framed by the government. In noting that attorneys are held to a "higher standard" than laypersons, the courts stated that it was "not unaware that it has become *de rigueur* for successful criminal defense lawyers to cultivate cozy relationships with the media."

148. See *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 257–58 (7th Cir. 1975).

