

FACEBOOK FRENZY AROUND THE WORLD: THE DIFFERENT IMPLICATIONS FACEBOOK HAS ON LAW STUDENTS, LAWYERS, AND JUDGES

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I. INTRODUCTION

Over the last decade the use of social networking sites has swept the nation by providing users with the ability to “interact, connect, reconnect, communicate, and collaborate in various ways—such as through audio, words, pictures, or video—with friends, family, acquaintances, professional colleagues, and others.”¹ Consequently, this new interactive way to communicate with others by posting personal information about one’s self on the Internet has made for a substantial impact on individuals working in the legal profession.² “As the relationship between social networking and

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1. Kathleen Elliot Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just “Face” It*, 41 U. MEM. L. REV. 355, 358 (2010).

2. *Id.* at 356.

members of the legal community continues to evolve, the boundaries between personal and professional worlds are often blurred, creating legal and ethical minefields.”³ Although the use of social networking offers an array of benefits for members of the legal community, it poses a huge risk for those who do not modify their use to comply with the ethical standards of the legal profession.⁴ Individuals enter the legal community the moment they enter law school, and from that very moment they must be cautious and aware of the negative implications social networking sites can have on their careers. Individuals born and raised in the Internet age are the ones who face the most risk since the use of social networking is second nature for those individuals.

In 2007, “60% of Internet users report[ed] that they [were] not worried about how much information about them is available online.”⁵ One can only imagine how difficult it would be to alert Internet users in 2012 of the consequences of their actions on social networking sites. This article focuses on alerting individuals entering the legal world of the implications that one of the most popular social networking sites, Facebook, can have on their careers.

Part I of this article will address the different ways in which Facebook affects law students, lawyers, and judges in the State of Florida as they work their way through the legal field. Part II of this Article will provide a brief history of the growth of Facebook and all the site has to offer several million users worldwide.⁶ Part III will examine the two most important ways in which Facebook can impact the life of a law student.

Part III will first discuss Facebook’s effect on a law student’s admission to the Florida Bar. Next, Part III will address the negative impact Facebook has on future employment opportunities for law students. Part IV will then discuss the new risks that Facebook presents once law students transition into practicing attorneys.

Part IV will first analyze privacy right issues and free speech issues that attorneys face when using Facebook. It will distinguish the ways in which attorneys can assert those fundamental constitutional rights, depending on whether the attorney works for the state government in the public sector, or whether the attorney works for a firm in the private sector. The second half of part IV will discuss how the use of Facebook has made

3. *Id.* at 357.

4. *Id.*

5. Dina Epstein, *Have I Been Googled?: Character and Fitness in the Age of Google, Facebook, and Youtube*, 21 GEO. J. LEGAL ETHICS 715, 724 (2008).

6. Vinson, *supra* note 1, at 361.

it more difficult for attorneys to adhere to the Model Rules of Professional Conduct, and will specify some of the rules attorneys should be aware of.

Part V of the article will address the implications Facebook has on judges in Florida; specifically, there are issues that arise when judges become Facebook friends with practicing attorneys. Part VI of the article will expand beyond the scope of Florida and briefly discuss the international view on the use of social networking sites in the legal profession and practice. Part VI will focus on the Canadian legal profession's outlook on the use of Facebook by lawyers in Canada.

Part VII of the article will offer advice to members of the legal community on how to balance their use of Facebook with their legal careers so as to avoid any negative repercussions.

II. THE FACEBOOK PHENOMENON

From all the social media sites available to Internet users, such as MySpace, LinkedIn, and Twitter,⁷ Facebook has by far become the most popular site, with currently over 500 million users.⁸ Founder and Chief Executive Officer of Facebook, Mark Zuckerberg, initially launched the site in 2004⁹ with a "mission [] 'to share and make the world more open and connected.'"¹⁰ The site allowed for college students to create pages on which they could list information about their personal lives, including their name, age, sex, relationship status, employment history, and education.¹¹ In 2005, the site expanded to include high school students, and by 2006, anyone over the age of thirteen could become a Facebook member.¹² Facebook's impact is not solely concentrated in the United States but rather it has gone global.¹³ Facebook has been "[t]ranslated into more than seventy languages, with 70% of user access occurring outside of the United States."¹⁴

Facebook members can utilize the site to "view and post content on other users' profiles, send messages, establish and join networks and

7. Vinson, *supra* note 1, at 359.

8. *Id.* at 361.

9. *Id.*

10. *Id.* at 362 (quoting *About, FACEBOOK*, available at <http://www.facebook.com/facebook?v=info> (last visited July 29, 2012)).

11. Amy-Kate Roedger, Commentary, *Wall Posts, Status Updates, and the Bar: How Social Networking Impacts Character and Fitness Requirements*, 35 J. LEGAL PROF. 145, 145 (2010).

12. Vinson, *supra* note 1, at 361.

13. See Karen Tanenbaum, Note, *Should the Default be "Social"? Canada's Pushback Against Over-Sharing By Facebook*, 40 GA. J. INT'L & COMP. L. 275, 277 (2011).

14. *Id.*

groups, invite members to events, and search for other members.”¹⁵ In order to connect, users must first send friend requests to other Facebook members who then may accept the request before being able to view and post content on the other’s profile page.¹⁶ Once the users become “Facebook friends,” they can look through each other’s pictures, “tag” one another in other users’ photos, write messages on each other’s “wall,” and get each other’s attention by using the “poking” feature.¹⁷ They can even post article links¹⁸ and YouTube clips on each other’s page. Friends also leave “comments” or “like” certain photos and wall posts that appear on each other’s profile page.

Facebook can be used as a means to present your thoughts and feelings on the Internet; “[a]dditionally, Facebook users can maintain an ongoing commentary about their own emotional and psychological state by constantly updating their Facebook ‘status.’”¹⁹ For example, a user can vent to the world about her horrible job by updating her status to the following: ‘what an awful day at work! In much need of cocktail!’

As Facebook continued to expand, so did its features such as the amount of personal information available about its users.²⁰ These settings expose the details of a member’s online activity. Facebook also allows users to protect themselves by utilizing privacy settings to regulate what personal information is visible to the public.²¹ For example, users can restrict anyone from finding them on Facebook, prevent anyone who is not their “friend” from viewing any of their wall posts and pictures, or even restrict their actual “friends” from posting any content on their page.²²

Unfortunately, individuals who grew up with Facebook “are less likely to question the appropriateness of their conduct because of a ‘reduced sense of personal privacy.’”²³ Consequently, young attorneys are unaware of the risks that they are exposed to when allowing the public to view their

15. *Id.* at 360–61.

16. Angela O’Brien, *Are Attorneys and Judges One Tweet, Blog, or Friend Request Away From Facing a Disciplinary Committee?*, 11 LOY. J. PUB. INT. L. 511, 513 (2010).

17. Samuel Vincent Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281, 284 (2011).

18. Jonathan Sabin, Comment, *Every Click You Make: How the Proposed Disclosure of Law Students’ Online Identities Violates Their First Amendment Right to Free Association*, 17 J. L. & POL’Y 699, 708 (2009).

19. *Id.*

20. Vinson, *supra* note 1, at 369.

21. *Id.* at 367.

22. *Id.* at 368.

23. O’Brien, *supra* note 16, at 529.

personal information, and the repercussions it might have on their careers. Although Facebook offers privacy settings for users to control what others see, it is not an absolute shield against exposing information that individuals may not want the world to see. Even if an inappropriate post or picture is deleted from Facebook, it does not mean that it is not still lurking on the Internet.²⁴ For that very reason, members of the legal community must be extremely cautious with how they utilize Facebook and be aware of the negative implications it might have on their futures.

III. THE BEGINNING OF THE END: FACEBOOK AFFECTING LAW STUDENTS

Just a few years ago, a law student's chief concerns were succeeding in the classroom and passing the state Bar exam. In 2012, times have changed. Although Facebook can benefit those law students who utilize it in a productive manner, such as a networking tool with other lawyers,²⁵ Facebook can also cause students substantial harm. "The use of social networking sites, [specifically Facebook] combined with the permanence and accessibility of the Internet, raises issues about the content that law students post on the Internet, as well as the character they display in doing so."²⁶ Even though students may filter their Facebook pages and delete inappropriate pictures, comments, or posts, there is still the possibility that the public will be able to access what has been deleted.²⁷ Consequently, one of the first things students in today's generation hear during law school orientation is to be wary of their facebook posts.

This vital warning ensures that law students realize that "their legal career and their reputations begin in law school, not when they graduate."²⁸ Facebook can thus have negative implications on their future.²⁹ As such, law students are well-advised to remove any and all inappropriate posts or pictures from their respective Facebook accounts.³⁰ When a student acts inappropriately by posting statuses, comments, and pictures involving drugs, alcohol, and sex,³¹ it can be "interpreted to mean that [the] individual cannot be trusted with confidential matters, or that he or she lacks the

24. Vinson, *supra* note 1, at 376.

25. *Id.* at 376.

26. Roedger, *supra* note 11, at 145.

27. Vinson, *supra* note 1, at 376.

28. *Id.* at 381-82.

29. *Id.* at 376.

30. See Roedger, *supra* note 11, at 151.

31. Vinson, *supra* note 1, at 377.

proper judgment to make sophisticated legal decisions.”³² Therefore, admonishments given to law students are proper because of the potential damaging effects on their future admission to the Bar.³³

A. The Florida Bar as an Example

Students must go through a crucial application process before they can be admitted to the Florida Bar. For years, American society has been skeptical of the legal profession and its reputation.³⁴ To address this societal concern about individuals admitted to work in the legal profession, the American Bar Association recommends character and fitness requirements that each applicant should meet.³⁵

[T]he ‘character and fitness’ screening is intended to evaluate the [character] elements as they ‘relate to the practice of law’ and is meant for ‘protection of the public and the system of justice’ so that those admitted are ‘worthy of the trust and confidence clients may reasonably place in their lawyer.’³⁶

Essentially, the purpose of setting forth such character and fitness requirements is to protect future clients from hiring attorneys who display a history of careless and unethical behavior.³⁷ The American Bar Association is confident that when states look into each applicant’s past contacts and conduct, the states could prevent individuals who are not ‘trustworthy, honest, diligent, and reliable’ from becoming members of the legal profession.³⁸ Upon completion, those deemed to have poor character will not satisfy the character and fitness requirements and shall be denied admission.³⁹

Today, the character and fitness portion of the Bar application provides law students the opportunity to be open and honest with the Bar examiners, and disclose any and all past misconduct and immoral behavior.⁴⁰ However, one of the biggest concerns for law students in the Internet age is that they will now have to additionally disclose information

32. Epstein, *supra* note 5, at 726.

33. Roedger, *supra* note 11, at 145–46.

34. Epstein, *supra* note 5, at 717.

35. *Id.*

36. Roedger, *supra* note 11, at 147.

37. *Id.*

38. *Id.* at 148.

39. *Id.*

40. *Id.*

pertaining to their online activity.⁴¹ Students are concerned that Bar examiners could potentially be allowed to search through an applicant's information on Facebook. With that information, the applicant might be denied admission to the Bar.⁴²

Those who are proponents of the disclosure of all online aliases view all Internet activity as public.⁴³ These proponents assert that since such activity is public, the public—which includes Bar examiners—should have the right to view and evaluate the activities as they see fit.⁴⁴ The Florida Board of Bar Examiners (FBBE) incorporated this view to some extent in their 2009 Facebook Policy.⁴⁵ The Policy “require[s] investigation into social networking use of certain ‘red flag’ Bar applicants”⁴⁶ in order to determine if those applicants display the proper character for Bar admission.

It is important to note that this investigation, which gives the FBBE access to sites like Facebook, is limited to only red flag applicants. However, whether an applicant is labeled as “red flag” is determined on a case-by-case basis.⁴⁷ Red flag applicants, whom the FBBE have deemed problematic,⁴⁸ generally fall within the following categories:

- a) Applicants who are required to establish rehabilitation under Rule 3-13 ‘so as to ascertain whether they displayed any malice or ill feeling towards those who were compelled to bring about the proceeding leading to the need to establish rehabilitation’;
- b) Applicants with a history of substance abuse/dependence ‘so as to ascertain whether they discussed or posted photographs of any recent substance abuse’;
- c) Applicants with ‘significant candor concerns’ including not telling the truth on employment applications or resumes; Applicants with a history of unlicensed practice of law (UPL) allegations;

41. Roedger, *supra* note 11, at 148.

42. *Id.*

43. *See id.* at 149.

44. *See id.*

45. *See id.* at 152.

46. Roedger, *supra* note 11, at 152.

47. Jan Pudlow, *On Facebook? FBBE may be planning a visit*, THE FLORIDA BAR NEWS, Sept. 1, 2009, available at <https://www.floridaBar.org/DIVCOM/JN/JNNews01.nsf/8c9f13012b96736985256aa900624829/d288355844fc8c728525761900652232?OpenDocument> (last visited Oct. 4, 2012).

48. Roedger, *supra* note 11, at 153.

- d) Applicants who have worked as a certified legal intern, reported self-employment in a legal field, or reported employment as an attorney pending admission 'to ensure that these applicants are not holding themselves out as attorneys; or
- e) Applicants who have positively responded to Item 27 of the Bar application disclosing 'involvement in an organization advocating the overthrow of a government in the United States to find out if they are still involved in any related activities.'⁴⁹

This new policy has faced much criticism from those who believe that the FBBE gains no advantage from investigating an applicant's Facebook page. Applicants are aware that they have been labeled as red flags because they have already disclosed the information regarding their improper activity.⁵⁰ Knowing that their Facebook page would then be investigated, red flag applicants would remove from their profiles any questionable pictures, posts, and statuses, thus making the investigation itself useless and a waste of time.⁵¹ Consequently, to require Facebook access would discriminate between red flag applicants and the rest of the applicants.⁵²

Critics of the policy further suggest that by having access to one's Facebook page, the FBBE could come across private, personal information regarding "religious affiliation and sexual orientation."⁵³ It would further allow Bar examiners the ability to view information about non-red flag applicants if they were to somehow appear on a red flag applicant's Facebook page.⁵⁴ This would put applicants who are friends with red flag applicants at risk of having the activity on their Facebook page scrutinized.

The most just and logical approach to dealing with the Florida Bar's Facebook Policy would be to follow the view of the critics and eliminate the policy altogether. If the FBBE is looking into an applicant's Facebook page, it is because they have already determined the applicant falls below the character and fitness requirements. If the applicant falls within one of the categories listed above, the investigation as to whether he or she meets the requirements for admission should stop right there.

There is no need to further inquire into the way one uses his or her Facebook account because once the applicant has reached that point of

49. Pudlow, *supra* note 47.

50. See Roedger, *supra* note 11, at 153.

51. *Id.*

52. *Id.* at 153–54.

53. *Id.* at 154.

54. *Id.*

investigation, it is clear that the FBBE finds the applicant problematic and will likely deny admission. It is therefore only putting other applicants in jeopardy because of their affiliation with red flag applicants.

Even if eliminating the policy altogether is not possible, then at least Bar examiners should not be allowed to consider any information that an applicant has under his or her privacy settings, or any information that is impossible to place within a privacy filter. Despite this logical notion, the FBBE still adheres to the 2009 Facebook Policy, indicating that an applicant's admission to the Florida State Bar is threatened by what may be lurking on Facebook. Unfortunately, students do not have a say as to what Bar examiners will deem socially unacceptable behavior found on Facebook; therefore, students must remain cautious at all times with what they post or with what is posted about them. Posting pictures and comments about drug use and alcohol may seem cool to a student at the time, but it is not worth the risk because the Bar examiners might view this as questionable character.

No law student wants to wake up one morning, after spending three years and over one hundred thousand dollars pursuing a law degree, to find that their actions have, unbeknownst to them, ruffled too many feathers of the character and fitness committee members and jeopardized or precluded their admission to the Bar.⁵⁵

B. Employment Opportunities

Law students must be aware that although they have grown up with Facebook and thus "have a reduced sense of personal privacy," they are entering the legal world which is based on much more conservative and ethical principles.⁵⁶ Most students do not realize that when they post personal details about their life on Facebook, they are essentially creating a permanent record of all their past indiscretions.⁵⁷ In addition to the possibility of not getting admitted to the Bar, law students today must be extra cautious that what is on Facebook will not harm future employment opportunities.

Because the use of Facebook has become a part of everyday life, it is becoming more common for employers to look into a job applicant's

55. Epstein, *supra* note 5, at 718–19.

56. Vinson, *supra* note 1, at 376.

57. Sabin, *supra* note 18, at 701.

Facebook page during the decision-making process.⁵⁸ In fact, there have even been reports of students being questioned during employment interviews about inappropriate pictures found on their Facebook page.⁵⁹ Employers are not only looking at what the job applicant makes available to the public on his or her Facebook page, but some employers are even requesting that prospective employees actually hand over their Facebook passwords.⁶⁰ Facebook's Chief Privacy Officer, Erin Egan, issued a statement regarding Facebook's opinion on this shocking practice by employers:

As a user, you shouldn't be forced to share your private information and communications just to get a job. And as the friend of a user, you shouldn't have to worry that your private information or communications will be revealed to someone you don't know and didn't intend to share with just because that user is looking for a job. That's why we've made it a violation of Facebook's State of Rights and Responsibilities to share or solicit a Facebook password. We don't think employers should be asking prospective employees to provide their passwords because we don't think it's the right thing to do.⁶¹

Based on what an individual posts on Facebook and what others post about him or her, employers can gauge the overall reputation of the individual. This might determine if he or she falls within the core values of the firm.⁶² Although many states prohibit employers from considering non-employment related activity they see on social media sites such as Facebook,⁶³ the restriction may not apply in every situation, such as where an applicant has pictures posted involving excessive drinking.⁶⁴

58. See Carlo Longino, *Law Students Say Messages Board Postings Are Costing Them Job Offers*, TECHDIRT (Mar. 7, 2007, 11:57 AM), <http://www.techdirt.com/articles/20070307/103126.shtml>; see also Sabin, *supra* note 18, at 701 ("[O]ver twenty-five percent of hiring managers perform Internet searches when vetting job applicants.").

59. Epstein, *supra* note 5, at 725.

60. Pauline T. Kim, *Electronic Privacy and Employee Speech*, 87 CHI.-KENT L. REV. 901, 914 (2012).

61. Memorandum from Erin Egan, Protecting Your Passwords and Your Privacy (Mar. 23, 2012) (<http://www.facebook.com/notes/facebook-and-privacy/protecting-your-passwords-and-your-privacy/326598317390057>).

62. Robert Sprague, *Invasion of the Social Networks: Blurring the Line Between Personal Life and the Employment Relationship*, 50 U. LOUISVILLE L. REV. 1, 4-5 (2011).

63. Carolyn Elefant, *The "Power" of Social Media: Legal Issues & Best Practices for Utilities Engaging Social Media*, 32 ENERGY L. J. 1, 15 (2011).

64. *Id.* at 16.

The rationale behind this suggests that since posts and pictures on an individual's Facebook page are potentially a true reflection of his or her character, any provocative photos publicly displayed on Facebook could indicate the applicant's lack of discretion.⁶⁵ Consequently, it could suggest to the employer that the potential applicant may not be the best choice for employment.⁶⁶

Even though it is increasingly common for employers to browse through a job applicant's Facebook profile when making hiring decisions, employers must also be cautious with what they take into account for their own sake.⁶⁷ What is available on a job applicant's Facebook page could include information regarding the individual's "race, family status, drug use, poor work ethic, or negative feelings about previous employers."⁶⁸ Such personal details of an applicant's life would normally not be accessible to employers when evaluating a prospective employee's application.⁶⁹ In fact, most employers are aware that "federal law prohibits expression of hiring preferences based on gender, race, national origin, religion, or age"⁷⁰

Although there is no telling whether an employer took into account such impermissible factors when choosing not to hire a prospective employee, the employer nonetheless runs the risk of violating discrimination laws when searching through an applicant's Facebook page.⁷¹ For example, an employer who looks through an applicant's Facebook page "merely to satisfy curiosity about an applicant's race or marital status could open the company up to liability."⁷² This is simply not a risk employers should be willing to take.

Unfortunately for law students, a 2010 survey by The Microsoft Corporation revealed that seventy percent of hiring professionals rejected job applicants based on information discovered online.⁷³ It is a chilling thought to process that what a student does during his or her spare time could subsequently be exposed to the public via Facebook pictures, posts, and status updates, and could consequently jeopardize employment opportunities.

65. *Id.* at 15.

66. *Id.*

67. *See id.* at 14.

68. *Elefant, supra* note 63, at 13.

69. *Id.* at 14.

70. *Id.* at 12.

71. *Id.* at 14.

72. *Id.* at 16.

73. *Sprague, supra* note 62, at 5.

Although what students post on Facebook may give off a certain impression to potential employers, it is not fair to say that what an individual displays on Facebook is always an accurate depiction of his or her character.⁷⁴ Students often use Facebook as a way to vent about a hard day or be silly with fellow classmates and friends. Therefore, the content that students may often display on Facebook could merely be a “misrepresentation[] of themselves or [an] attempt[] to be humorous.”⁷⁵ There is no way for employers to be one-hundred percent confident that what they see on Facebook is a true reflection of character. Several photos of a student holding an alcoholic drink does not mean that he or she is less qualified for a position and is likely too vast of an inferential leap for employers to take. Accordingly, employers should not be allowed to browse through a job applicant’s Facebook page to decide whether the applicant is right for the job.

Even if the prospective employee consents to a Facebook search, no employer should ever be allowed to request to look beyond what is available to the public eye. A main feature of Facebook is the ability to send private messages to other users. As such, gaining access to an individual’s password would give employers access to private messages. This is analogous to an employer searching through an applicant’s private email account, demonstrative of an abuse of power over the applicant and a clear invasion of privacy. Nevertheless, law students will not know when potential employers will choose to browse through their Facebook and must therefore always be cautious with what is posted about them. After all, law firms do not want to hire individuals who would attract controversy.⁷⁶

IV. WHEN THE BALL KEEPS ROLLING: FACEBOOK AFFECTING LAWYERS

As law students transition into practicing attorneys their concerns regarding Facebook shift from attaining employment and admission to the Bar to whether or not something on their Facebook page could result in a disciplinary action and possible termination of employment. It is a universal concept that all employers want to ensure that their companies and firms maintain a positive reputation, and therefore, employers monitor their employees’ behavior.⁷⁷

74. Vinson, *supra* note 1, at 377.

75. *Id.*

76. Longino, *supra* note 58.

77. Kim, *supra* note 60, at 913.

Technological advancements have enabled employers a new way to observe the behavior of their employees.⁷⁸ An increasingly popular way for employers to do this is to check social networking pages.⁷⁹ Since Facebook has become increasingly popular, employers have become more concerned with what their employees are sharing on Facebook.⁸⁰ This has led some employers to utilize a Facebook monitoring software program called Social Sentry.⁸¹ Although it may seem invasive, this behavior monitoring ensures that nothing embarrassing to the firm is leaked onto the Internet.⁸²

Not only have employers begun to monitor employees' Facebook accounts, but they have asked current and prospective employees for their Facebook passwords.⁸³ Facebook, as a company, stresses that such an intimate request "undermines the privacy expectations and the security of both the user and the user's friend" and is a violation of its "Statement of Rights and Responsibility."⁸⁴ Facebook explains the reason for this policy: "[i]f you are a Facebook user, you should never have to share your password, let anyone access your account, or do anything that might jeopardize the security of your account or violate the privacy of your friends."⁸⁵ Granting an employer access to an employee's Facebook password is a huge risk to employees. This could potentially reveal personal and private information that would otherwise not be exposed to the employer. This practice has led to hundreds of recorded complaints to the National Labor Relations Board from employees that were fired due to posts on social networking sites.⁸⁶ Many terminations have resulted from posts inside the confines of an employee's own home.⁸⁷

78. S. Elizabeth Wilborn, *Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace*, 32 GA. L. REV. 825, 826 (1998).

79. See Kim, *supra* note 60, at 913.

80. Vinson, *supra* note 1, at 390.

81. Joshua Brustein, *Keeping a Closer Eye on Employees' Social Networking*, NYTIMES.COM (Mar. 26, 2010, 6:51 PM) <http://bits.blogs.nytimes.com/2010/03/26/keeping-a-closer-eye-on-workers-social-networking/>.

82. *Id.*

83. Egan, *supra* note 61.

84. *Id.*

85. *Id.*

86. Kim, *supra* note 60, at 913.

87. *Id.* at 902.

A. The Right to Privacy and the Right to Free Speech

When an employer searches through an attorney's Facebook profile and when an attorney is disciplined for what is posted on Facebook, two fundamental rights are called into question: 1) the right to privacy; and 2) the right to free speech.

The right to privacy, rooted in the Fourth Amendment,⁸⁸ includes an individual's "freedom from unwarranted and unreasonable intrusions into activities that society recognizes as belonging to the realm of individual autonomy."⁸⁹ Society has long valued the right to privacy and accordingly has considered it a fundamental right.⁹⁰ When employers use intrusive methods to monitor an employee's behavior, they essentially compromise the employee's right to privacy.⁹¹ Furthermore, the right to free speech, rooted in the First Amendment,⁹² affords individuals "the liberty to discuss publicly and truthfully all matters of public concern without restraint or fear of subsequent punishment."⁹³

This has been addressed by the Supreme Court; "[t]he Supreme Court has long recognized that 'it is a prized American privilege to speak one's mind,' although not always with perfect good taste, on all public institutions [including the judiciary]."⁹⁴ Despite this language by the Court, an individual is not beyond reproach for expressing himself or herself through speech, and cannot always be shielded by the protection of the First Amendment. Accordingly, the extent to which an attorney can assert the right to privacy and the right to free speech depends on whether the attorney is working for a private law firm or for the state government.⁹⁵

1. Public Sector Employment

Individuals employed in the public sector work for "local, state, or national government departments and their agencies."⁹⁶ Actions of employers working for the state government constitute state action and the

88. See U.S. CONST. amend. IV.

89. Wilborn, *supra* note 78, at 833.

90. *Id.*

91. See *id.* at 835.

92. U.S. CONST. amend. I.

93. Amicus Brief of the American Civil Liberties Union of Florida in Support of Respondent Sean William Conway at 8, *Florida Bar v. Conway*, 996 So. 2d 213 (Fla. 2008) (No. SC08-326) [hereinafter ACLU Amicus Brief].

94. *Id.* at 2-3.

95. See Wilborn, *supra* note 78, at 828.

96. *Id.* at 865.

Federal Constitution affords protection to individuals against state action.⁹⁷ As such, employees working for the state can bring an action against their employer if their employer's actions interfere with their constitutional rights.⁹⁸

Consider first the right to privacy for attorneys working in the public sector and take for example the following scenario: An employer is searching through an employee's Facebook account, browsing through whatever is available, including wall posts, pictures, and comments. Generally, the employee will be able to challenge the employer by arguing that such conduct "violate[s] constitutional provisions protecting the right to privacy."⁹⁹ However, such a challenge will be conditioned upon whether the conduct by the employer is an interference with an expectation of privacy that society has recognized as reasonable.¹⁰⁰ Unfortunately, Facebook posts made available to the public make it difficult to assert an expectation of privacy.¹⁰¹ Therefore, even though an attorney working for the state has the right to privacy, it will most probably not protect him or her from an employer who decides to invoke disciplinary action based on what was viewable on Facebook.

Next, consider the right to free speech as it pertains to attorneys working for the state. Although the First Amendment affords individuals the right to free speech,¹⁰² a court will balance the interest of a public sector employee against the states' interest to serve the public.¹⁰³ Specifically, the extent to which public employees can assert free speech rights depends on the context of what was said.¹⁰⁴ Since courts are part of the government, any speech involving court proceedings is considered "political speech."¹⁰⁵ When an attorney speaks about a judge or something involving a pending case, that speech is protected under the First Amendment.¹⁰⁶ Thus, an

97. *Id.* at 828.

98. *See id.*

99. *Id.* at 866.

100. Kim, *supra* note 60, at 905.

101. Paul M. Secunda, *Blogging While (Publicly) Employed: Some First Amendment Implications*, 47 U. LOUISVILLE L. REV. 679, 685 (2008).

102. U.S. CONST. amend. I.

103. Secunda, *supra* note 101, at 686.

104. *See id.* at 687.

105. Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L. J. 859, 863 (1998).

106. *Id.*

employer can only restrict such speech if he or she can prove that it is “necessary to achieve a compelling purpose.”¹⁰⁷

The constitutional right of free speech under the First Amendment is not an absolute shield for attorneys working for the state.¹⁰⁸ A public employer may still be able to “discharge [an employee] for inappropriate conduct or speech that damages or interferes with workplace relationships.”¹⁰⁹ Although what an employee posts on Facebook might ostensibly be his or her own business, employers nonetheless have the right to interfere and even terminate their employment.¹¹⁰ However, this will often be utilized only when the speech is directly work-related.¹¹¹ When the speech is both non work-related and done during non-working hours, it is usually protected.¹¹² As a general rule, public employees are afforded free speech protection. However, when the speech is correlated to the work, the speech is afforded less protection.¹¹³

2. Private Sector Employment

On the other end of the spectrum are individuals who work in the private sector.¹¹⁴ Since the Constitution does not provide protection to individuals from actions by private entities,¹¹⁵ such employees are “immune to constitutional considerations.”¹¹⁶ Unfortunately, employees in the private sector do not have free speech protection.¹¹⁷ At most, private sector employees have protections from invasions of privacy.¹¹⁸ Even so, the invasion of privacy must be outrageous to a reasonable person.¹¹⁹ To avoid such an invasion, it is becoming increasingly common for private sector employers to attach policy forms to employee contracts that explain that employers can monitor or choose to terminate employment based on

107. *Id.* at 881.

108. *Elefant*, *supra* note 63, at 18.

109. *Id.*

110. *Id.*

111. *See Secunda*, *supra* note 101, at 685.

112. *Id.* at 688.

113. *Id.* at 692.

114. *Wilborn*, *supra* note 78, at 865.

115. *Id.* at 829.

116. *Id.* at 865.

117. *Secunda*, *supra* note 101, at 679.

118. *Id.* at 681.

119. *Id.*

inappropriate social media use.¹²⁰ These policy forms are to ensure that private employees understand that they “have no legitimate expectation of privacy in their phone calls, e-mails, and Internet activities.”¹²¹ Consequently, unless faced with an extremely offensive intrusion of privacy, private employees cannot assert any rights if terminated.¹²²

B. Model Rules of Professional Conduct

“[A]s early as 1871, the Supreme Court of the United States held that lawyers have an obligation to refrain from making statements attacking the integrity of the judiciary.”¹²³ Although lawyers may feel that the protections afforded to them under the First Amendment allow them to speak openly and criticize other attorneys and judges on Facebook, “[t]heir freedom to gripe is [nonetheless] limited by codes of conduct.”¹²⁴ Attorneys must still be cautious when dealing with Facebook to ensure that what they write and post will not subject them to violations of the Model Rules of Professional Conduct (Rules).¹²⁵ By creating the Rules, the American Bar Association established a “framework for the ethical practice of law.”¹²⁶ Some of the Rules become a concern for attorneys who use social networking sites such as Facebook.¹²⁷

Model Rule 7.1 states that “[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.”¹²⁸ When a lawyer posts information on Facebook about himself or herself and the services he or she offers, it has the potential to be seen by future clients.¹²⁹ Once it is seen, these posts constitute lawyer-client communications.¹³⁰ Such Facebook posts can subject the lawyer to disciplinary action by the Bar for violating Model Rule 7.1.¹³¹ Consider the

120. *See id.*

121. *Id.*

122. *Secunda, supra* note 101, at 681.

123. Angela Butcher & Scott Macbeth, *Lawyers’ Comments About Judges: A Balancing of Interests to Ensure a Sound Judiciary*, 17 GEO. J. LEGAL ETHICS 659, 661 (2004).

124. John Schwartz, *A Legal Battle: Online Attitude vs. Rules of Bar*, N.Y. TIMES, Sept. 13, 2009, at A1.

125. *See O’Brien, supra* note 16, at 514.

126. MODEL RULES OF PROF’L CONDUCT Scope §16 (2010).

127. O’Brien, *supra* note 16, at 529.

128. MODEL RULES OF PROF’L CONDUCT R. 7.1 (2010).

129. Vinson, *supra* note 1, at 393.

130. *Id.*

131. *Id.*

following example: A lawyer updates his or her status on Facebook stating that he or she just won a huge case for his or her client or the status says that the lawyer is guaranteed to win all his cases in front of a particular judge. Such misleading information could influence potential clients into hiring that lawyer and the lawyer would then be in violation of Model Rule 7.1.

Model Rule 3.6(a) states that “[a] lawyer . . . shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”¹³² This Rule should caution lawyers from posting information on Facebook about any pending or ongoing cases that could be viewed as influential on court proceedings.¹³³ By limiting attorneys’ speech, the Rule not only protects the “integrity and fairness of [the] judicial system,”¹³⁴ but protects attorneys from undesirable situations. For example, an incident occurred where an attorney “posted derogatory comments on Facebook about people from Somalia and a comment about a juror during trial; after the defendant—a Somali man—was convicted of attempted murder, he moved for a new trial on the grounds of prosecutorial misconduct.”¹³⁵ As a direct consequence of not adhering to the Rule, a new trial was conducted—a clearly undesirable situation.

Model Rule 8.2(a) states that “[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.”¹³⁶ Jurisdictions are split as whether to apply this rule to an attorney’s speech objectively or subjectively.¹³⁷ The subjective standard looks at “whether the lawyer in question knew his statements about the judiciary were false or acted with reckless disregard to their truth.”¹³⁸ Conversely, the objective standard examines whether a “reasonable attorney” would think the statements were false.¹³⁹ The jurisdictions applying the objective standard essentially believe that when attorneys become members of the Bar, their First Amendment rights take a back seat.¹⁴⁰ Those in support of the

132. MODEL RULES OF PROF’L CONDUCT R. 3.6(a) (2010).

133. Vinson, *supra* note 1, at 395.

134. Butcher & Macbeth, *supra* note 123, at 664.

135. Vinson, *supra* note 1, at 395.

136. MODEL RULES OF PROF’L CONDUCT R. 8.2 (2010).

137. Butcher & Macbeth, *supra* note 123, at 668.

138. *Id.*

139. *Id.*

140. *Id.* at 670.

subjective standard, however, endorse the public's right to know about the judiciary over chilling the attorney's right to free speech.¹⁴¹ This particular Rule caused quite the stir in Florida when an attorney posted negative and derogatory remarks on his blog about a judge he appeared before in court. The attorney was consequently charged for violating the Rule.¹⁴² On the blog, the attorney made remarks referring to the judge as an "evil unfair witch," that was 'seemingly mentally ill', [and] possessed an 'ugly, condescending attitude.' [Also,] that 'she is clearly unfit for her position and knows not what it means to be a neutral arbitrator,' and that 'there's nothing honorable about that malcontent.'"¹⁴³

Although the Florida Bar and the Supreme Court of Florida followed the objective standard and sanctioned the attorney for his posts,¹⁴⁴ the American Civil Liberties Union (ACLU) maintained the position that such punishment should not have been rendered.¹⁴⁵ The ACLU urged that the comments made were a matter of "opinion rather than false statements of fact," and thus those opinions fell under the protection of free speech afforded by the Constitution's First Amendment.¹⁴⁶ The ACLU argued that personal opinions are merely ideas that cannot be proven to be true or false;¹⁴⁷ thus, unless the opinion suggests a "false assertion of fact,"¹⁴⁸ it is not punishable.¹⁴⁹ The ACLU's position therefore supports the notion that "[a]ttorney comments are afforded protection when they are clearly the opinion of the speaker."¹⁵⁰

To become a part of the legal profession is a privilege since "as an officer of the court, a member of the Bar enjoys singular powers that others

141. *Id.*

142. O'Brien, *supra* note 16, at 521. Posts on a blog are analogous to posts on Facebook because they are essentially just different forms of social media use utilized by lawyers.

143. *Id.*

144. Fla. Bar v. Conway, No. SC08-326, slip op. at 1 (Fla. Oct. 29, 2008) *available at* <http://www.floridasupremecourt.org/clerk/dispositions/2008/10/08-326.pdf#xml=http://199.242.69.43/texis/search/pdfhi.txt?query=No.+SC08-326&pr=Florida+Supreme+Court&prox=page&rorder=1000&rprox=1000&rdfreq=500&rwfreq=500&rlead=1000&rdepth=0&sufs=2&order=r&cq=&id=4d370e8e93>.

145. ACLU Amicus Brief, *supra* note 93, at 1.

146. *Id.* at 4 (quoting Standing Comm. On Discipline of U.S. District Court for Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430, 1438 (9th Cir. 1995)).

147. *Id.* at 5.

148. *Id.* at 7.

149. *Id.* at 4.

150. Butcher & Macbeth, *supra* note 123, at 675.

do not possess.”¹⁵¹ As such, practicing attorneys must always conduct themselves in a way that is worthy of remaining within the privileged circle of courts. Despite all the benefits Facebook has to offer, it can also be very damaging for attorneys.¹⁵² Thus, it is becoming increasingly more difficult for attorneys to avoid sanctions.

Attorneys are being disciplined in droves by the American Bar Association and by employers for information posted on Facebook. While it is understandable that employers want to protect their firm’s reputation, and even justifiable that firms compel employees to remove compromising information from Facebook, Facebook’s power over job security should still be subject to limitations.

If an attorney sets up privacy settings on his or her Facebook page, such information should be protected under an individual’s right to privacy. The privacy settings enable an attorney to keep certain information confidential. Therefore, to request an attorney’s Facebook password is an intrusive invasion of privacy. This practice takes employee monitoring too far.

On the other hand, any information that can be accessed without “friending” the attorney is essentially open to the public, and thus employers should be allowed to ask attorneys to remove such information if it is detrimental to the firm. There should not be a distinction between attorneys who work for private firms and attorneys who work for the state government. There should be a uniform system of monitoring behavior, protecting both groups’ constitutional rights.

Nevertheless, misleading and inappropriate posts and pictures on Facebook are simply not worth the risk of getting fired or sanctioned; therefore, attorneys should do their best to avoid posting any such content that could be viewed by the public. Attorneys should understand that “[b]y choosing to work within the legal system, [they] are held to a higher standard . . .”¹⁵³ and must sometimes surrender their constitutional freedoms.¹⁵⁴ Harm to attorneys, judges, and the public could result if an attorney’s speech goes unregulated, and consequently “a lawyer’s

151. *Id.* at 662.

152. See Vinson, *supra* note 1, at 394–95. For example, a lawyer may not want a client to know she is going on vacation because the client may think that the only reason the lawyer wants the client to settle is to get the case off her desk. Or, if a lawyer is supposed to be preparing a case over the weekend or has a trial on Monday, posts about the lawyer partying all weekend could be viewed negatively.

153. Butcher & Macbeth, *supra* note 123, at 672.

154. *Id.*

obligation to the legal profession [should] at times outweigh his own First Amendment right[s].”¹⁵⁵

V. IT’S NOT OVER YET: FACEBOOK AFFECTING JUDGES

Essential to our legal system is the role of the judiciary and “the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us.”¹⁵⁶ Just as lawyers are required to adhere to the Model Rules of Professional Conduct, judges in Florida are required to conduct themselves ethically according to the standards set forth in the Code of Judicial Conduct (Code).¹⁵⁷ Central to the Code is the principle “that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system.”¹⁵⁸ Accordingly, the Code benefits the public by functioning as an ethical guideline for judges, which in turn keeps society confident that justice is being served.¹⁵⁹ The Code consists of seven Canons which establish rules by which judges are obligated to follow.¹⁶⁰ When a judge’s actions constitute misconduct, it “has the potential to threaten the prestige and the authority of the judiciary.”¹⁶¹ Therefore, behavior that violates any of the Canons could result in disciplinary action.¹⁶²

Canon 2 states that “[a] [j]udge [s]hall [a]void [i]mpropriety and the [a]pppearance of [i]mpropriety in all of the [j]udge’s [a]ctivities.”¹⁶³ The purpose of this Canon is to ensure the public that the judge is both impartial and unbiased throughout all court proceedings.¹⁶⁴ Canon 2(b) of the Code states that a judge cannot “convey or permit others to convey the impression that they are in a special position to influence the judge.”¹⁶⁵

155. *Id.* at 662.

156. FLA. CODE OF JUD. CONDUCT pmbl. (2008).

157. *Id.*

158. *Id.*

159. Jones, *supra* note 17, at 286.

160. FLA. CODE OF JUD. CONDUCT pmbl.

161. Jones, *supra* note 17, at 286.

162. FLA. CODE OF JUD. CONDUCT pmbl.

163. *Id.* at Canon 2.

164. Fla. Sup. Ct. Jud. Ethics Advisory Comm., No. 2010-06, JUD6.ORG (Mar. 26, 2010), <http://www.jud6.org/Legalcommunity/Legalpractice/opinions/2010-06.html>. [hereinafter Ethics Advisory Comm. Opinion No. 2010-06].

165. FLA. CODE OF JUD. CONDUCT Canon 2(b).

Questions on whether judges violate this rule come into play when a judge's activity involves the use of Facebook.

As when they were lawyers, the use of Facebook still has the potential of harming a judge's reputation and negatively interfering with his or her public duties.¹⁶⁶ More specifically, controversy arises when judges become Facebook friends with practicing attorneys. The Florida Supreme Court Judicial Ethics Advisory Committee (Committee) issued an opinion on the question of whether a judge, who was Facebook friends with an attorney, was in violation of Canon 2(b).¹⁶⁷

In opinion No. 2009-20 the Committee advised that a judge who becomes Facebook friends with any attorney that may appear before him or her in court is in direct violation of Canon 2(b). The Committee further notes that this restriction on judges does not apply when a judge chooses to accept as a friend an attorney who does not appear before the judge.¹⁶⁸ The majority of the Committee believed that by accepting an attorney as a Facebook friend, an outside party may get the impression that the attorney may be in a "special position to influence the judge."¹⁶⁹ The opinion emphasized that whether the judge intends to convey this impression of improper influence is irrelevant.¹⁷⁰ The Committee's concern was that the impression nonetheless conveyed and consequently had the potential to influence the public's opinion on whether the judge could be impartial and fair during court proceedings.¹⁷¹

It was the majority's belief that the impression was conveyed based on societal understandings of friendships. Friendships can range from intimate, close relationships to mere acquaintances.¹⁷² There is no telling where in that range an attorney listed as a friend on a judge's Facebook page would fall. This ambiguity leaves the possibility that the attorney does in fact have a close relationship with the judge; it could be inferred that an individual judge will show greater favoritism toward his close friends. The mere possibility of this happening is sufficient for the public to question a judge's ability to rule impartially. The chance of

166. Jones, *supra* note 17, at 284–85.

167. Fla. Sup. Ct. Jud. Ethics Advisory Comm., No. 2009-20, JUD6.ORG (Nov. 17, 2009), <http://www.jud6.org/Legalcommunity/Legalpractice/opinions/2009-20.html>. [hereinafter Ethics Advisory Comm. Opinion No. 2009-20].

168. *Id.*

169. *Id.*

170. *Id.*

171. *See id.*

172. Jones, *supra* note 17, at 287.

“compromis[ing] the public[‘s] confidence in the judiciary”¹⁷³ is not a risk the majority of the Committee was willing to take.

Furthermore, to allow judges to become Facebook friends with attorneys who appear before them creates the risk of having clients purposefully hire those attorneys because the prospective clients might infer that the judge will show favoritism towards that attorney.¹⁷⁴ This would not only give an improper benefit to any attorney listed as a Facebook friend with a particular judge but would also indicate “the judge’s potential for favoritism and partiality, which [in turn] threatens the public confidence in the judiciary.”¹⁷⁵

The minority of the Committee urges that an attorney who is friends with a judge on Facebook is not necessarily in any “special position to influence the judge.”¹⁷⁶ Further, the minority suggests that the term “friend” on a social networking site like Facebook does not hold the same meaning as “friend” within the traditional interpretation of the word.¹⁷⁷ Simply because an attorney is listed as a “friend” on Facebook is in no way indicative of the true relationship he or she has with the particular judge.¹⁷⁸ It is unreasonable to assume that a judge shares a special relationship with each “friend” he or she has on Facebook where the “friend” may have the ability to influence the judge in legal matters. Nearly half a billion people use Facebook and are familiar with its terms.¹⁷⁹ As such, there is a universal understanding that listing an individual as a “friend” on Facebook merely suggests that the individual is a contact or acquaintance.¹⁸⁰

Accordingly, the minority suggests that reasonable people using the site would understand that a judge listing an attorney as his or her Facebook friend would not mean that the two share a special relationship or that the attorney is any way influential over the judge.¹⁸¹ Further, there is nothing to suggest that a judge would have a greater bias toward a litigant he or she is friends with on Facebook than he would toward a litigant he or she has known since high school.¹⁸² To allow a judge to engage in social activity

173. *Id.* at 288.

174. *Id.* at 290.

175. *Id.*

176. Ethics Advisory Comm. Opinion No. 2009-20, *supra* note 167.

177. *Id.*

178. *See id.*

179. *See* Ethics Advisory Comm. Opinion No. 2010-06, *supra* note 164.

180. Ethics Advisory Comm. Opinion No. 2009-20, *supra* note 167.

181. Ethics Advisory Comm. Opinion No. 2010-06, *supra* note 164.

182. *See id.*

such as a friendly tennis match with a lawyer who appears before him in court but not to allow the two to be Facebook friends is an inconsistency.¹⁸³ Consequently, the minority of the Committee is of the opinion that a judge who chooses to have an attorney who appears before him as a Facebook friend is not a violation of Canon 2(b) because it does not create the impression that the attorney is in a “special position to influence the judge.”¹⁸⁴

The minority presents a logical opinion that should be adopted in Florida. More likely than not, judges who are friends with attorneys on Facebook have been friends with those attorneys long before they were appointed as judges. To follow the majority opinion essentially requires all judges to go through their list of Facebook friends and remove one by one every attorney that they could potentially see in court. To require this not only places an undue burden on judges, but also assumes that these judges would show favoritism towards those attorneys if in fact they did appear in front of the judge. In that sense, the judiciary is not placing confidence in its own system and in its own officials. All judges were either appointed or elected because the electorate or the person appointing them believed the judge was capable of acting impartially. Therefore, until there is any misconduct that would suggest otherwise, the Committee should not prevent judges from having lawyers as their Facebook friends to prevent future misconduct.

VI. INTERNATIONAL VIEWS ON SOCIAL NETWORKING IN THE LEGAL FIELD

The impact of online social networking on the legal profession has expanded far beyond the State of Florida and reached international levels.¹⁸⁵ The International Bar Association is comprised of over 45,000 lawyers and 200 Bar associations and law societies worldwide.¹⁸⁶ They too have addressed social networking; “[i]n March 2011, the International Bar Association’s (IBA) Legal Projects Team, based in London, took up an important global initiative to examine the presence and role of online social networking within the legal profession and practice.”¹⁸⁷ The Legal Projects Team of the IBA surveyed sixty of their international Bar associations from

183. *See id.*

184. *Id.*

185. International Bar Association, *The Impact of Online Social Networking on the Legal Profession and Practice*, IBANET.ORG, (Feb. 2012), http://www.ibanet.org/Committees/Divisions/Legal_Practice/Impact_of_OSN_on_LegalPractice/Impact_of_OSN_Home.aspx. [hereinafter International Bar Association].

186. *Id.*

187. *Id.*

forty-seven legal jurisdictions¹⁸⁸ on their views concerning topics, including but not limited to:

- a) The interactions between lawyers, judges, and jurors on online social networks;
- b) The posting of comments or opinions on online social networks by lawyers, judges, jurors and journalists about one another or the causes in which they are involved;
- c) The public perception of lawyers and judges and whether such is negatively affected by their use of online social networking; and
- d) The consideration by legal employers of the information found on online social networking pages in evaluating future candidates.¹⁸⁹

Although most countries took part in the survey, there were some that declined because the impact of social networking as it effects the legal profession has not yet arisen in their jurisdiction.¹⁹⁰ Most of Europe, Asia, and Africa agreed that there are several negative implications that social networking has on those involved in the legal field.¹⁹¹ For instance, those in Europe explain that the use of social networking sites can often conflict with ethical legal practices.¹⁹² Further, the East Africa Law Society reasoned that these implications arise because “the law is primarily a reflection of the social values of any society, and social networking also brings along with it aspects of communication, sharing information, etc. which the legal profession must understand.”¹⁹³

The IBA survey provides a global view on issues pertaining to judges and social networking. As in Florida, where controversy arose on the issue of whether judges could be friends with lawyers on social networking sites like Facebook, opinions on this matter are also split internationally.¹⁹⁴ When asked whether it was acceptable for lawyers and judges to be social networking friends, seventy percent of respondents in the survey said ‘yes’;¹⁹⁵ therefore, the majority of countries participating in the IBA survey

188. *Id.*

189. International Bar Association, *supra* note 185.

190. *Id.*

191. *See id.*

192. *Id.*

193. *Id.*

194. International Bar Association, *supra* note 185.

195. *Id.*

agreed with the minority opinion of Florida's Judicial Ethics Advisory Committee.

More specifically, half of those who answered 'yes' also affirmed that the conduct would be acceptable even if the lawyer was going to appear in front of that particular judge.¹⁹⁶ The Law Society of Scotland argues that to not allow lawyers to be social networking friends with judges would "automatically assume that skilled professionals such as lawyers and judges would not strictly adhere to professional codes of conduct"¹⁹⁷ While the majority of Florida's Judicial Ethics Advisory Committee feels otherwise, the international community such as those in Indonesia and South Australia feel that a lawyer's use of social networking sites "does not necessarily or automatically impact the public perception of the legal profession."¹⁹⁸

The IBA survey next addresses concerns that attorneys face as active users on social networking sites. As previously discussed, attorneys should be cautious with what they post on their social networking sites, especially when posting comments about judges that they appear before. On an international scale, nearly ninety percent of the countries surveyed agreed that such conduct by attorneys is inappropriate and unacceptable.¹⁹⁹ So while befriending a judge may not violate professionalism, posting comments about judges on sites like Facebook "would amount to a clear breach of professional codes of conduct and also bring the legal profession into disrepute, particularly during live proceedings."²⁰⁰

Lastly, the survey provides insight as to the international view on whether Bar associations should take into account information found on the social networking profiles of applicants when deciding whether to admit them to the Bar.²⁰¹ The Tanganyika Law Society and the Japan Federation of Bar Associations agree with Florida that such information may be examined by the admissions board when it relates to the character and fitness of the applicant.²⁰² Such practices thus appear to be ones that cross international borders and law students must be cautious of what they post on social networking sites. Additionally, students must be cautious that what they post will not jeopardize potential employment opportunities. Seventy percent of the countries surveyed also noted that it is acceptable for

196. *Id.*

197. *Id.*

198. *Id.*

199. International Bar Association, *supra* note 185.

200. *Id.*

201. *Id.*

202. *Id.*

employers to search through social networking profiles when evaluating potential job applicants.²⁰³

The survey conducted by the IBA affirms that the use of social networking has negative implications for law students, lawyers, and judges. As such, individuals entering the legal profession must remain cautious of what is posted on their social networking sites, specifically Facebook.

A. A Canadian Outlook

The rapid and global spread of Facebook has reached new heights. Among the many countries with Facebook users, Canada remains one of the top, with over seventeen million users.²⁰⁴ Therefore, it is no surprise that much of the same issues Facebook users in the legal profession face in the United States have now also spilled over into Canada. This section addresses the Canadian view on some of the concerns law students, lawyers, and judges have when using social media sites like Facebook.

Despite an increasing concern for law students in the United States that potential employers may require applicants to hand over their Facebook passwords, “Canadians can rest a bit easier.”²⁰⁵ Legal precedent suggests that Canadian employers cannot generally force job applicants to turn over their Facebook passwords.²⁰⁶ One Toronto lawyer notes that “[i]n Canada we’ve always respected privacy rights, which means that the employer does not have, and should not have, access to personal information.”²⁰⁷ As a result, prospective employees in Canada are offered stronger protection against employers requesting Facebook passwords than employees in the United States.²⁰⁸ However, there is no bright line rule and there are employers in Canada who do look into prospective employees’ Facebook accounts; thus, Canadian job applicants need to continuously update their privacy settings and keep their profiles free from personal information.²⁰⁹

Although sometimes affording individuals more protection, privacy rights in Canada share a common basis with privacy rights in the United

203. *Id.*

204. *Canada Facebook Statistics*, SOCIALBAKERS, <http://www.socialbakers.com/facebook-statistics/canada> (last visited Aug. 28, 2012).

205. Brandon Miller, *Can Canadian Employers Force You to Hand Over Your Facebook Password?*, YOURMONEY.CA (Apr. 09, 2012), <http://careers.yourmoney.ca/2012/04/can-canadian-employers-force-you-to-hand-over-your-facebook-password.html>.

206. *Id.*

207. *Id.*

208. *Facebook-Snooping Employers Limited in Canada*, CBC NEWS (Mar. 26, 2012), <http://www.cbc.ca/news/technology/story/2012/03/26/technology-facebook-job-seekers.html>.

209. Miller, *supra* note 205.

States. United States privacy laws emerge from the notion of individual autonomy and freedom from governmental intrusion.²¹⁰ The Fourth Amendment protects individuals with a subjective expectation of privacy that society has valued and recognized as reasonable.²¹¹

Similarly, the “Canadian Charter of Rights and Freedoms (Charter)” affords individuals privacy protection based on a reasonable expectation standard.²¹² Furthermore, the Charter “seeks to protect the ‘dignity, integrity and autonomy’ of its citizens.”²¹³ Specifically, Section Eight of the Charter provides protection for individuals against invasions by the government, and Section Seven provides protection for the security of the individual.²¹⁴ Both protections foster the values of dignity, integrity and autonomy, protecting an individual’s intimate life from being exposed to others and controlled by the state.²¹⁵ Applying this principle to the concept of employers seeking to monitor or pry into the intimate Facebook profiles of prospective employees, it seems that Canadian law will continue to employ strong privacy protection for individuals against such conduct.

An additional concern that individuals in the legal profession face in Canada involves adhering to the Model Rules of Professional Conduct and ensuring the online social networking activity does not interfere with that ethical requirement. Specifically, Canadian lawyers, similar to those in the United States, should be cautious that their use of Facebook does not cause them to violate Rule 4.06, which states that “[a] lawyer shall encourage public respect for and try to improve the administration of justice.”²¹⁶ This rule emphasizes that the responsibility of a lawyer to the community is greater than that of a private citizen.²¹⁷ As such, “[a] lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations.”²¹⁸ Lawyers must be cautious with

210. Bryce Clayton Newell, *Rethinking Reasonable Expectations of Privacy in Online Social Networks*, 17 RICH. J.L. & TECH. 1, 4 (2011).

211. *Id.* at 5.

212. *Id.*

213. *Id.* at 40.

214. *Id.* at 41.

215. Newell, *supra* note 210, at 43.

216. Garry J. Wise, *Lawyers’ Ethics and Freedom of Speech*, WISE LAW BLOG (Dec. 20, 2007), <http://wiselaw.blogspot.com/2007/12/lawyers-and-freedom-of-speech.html>.

217. MODEL RULES OF PROF’L CONDUCT R. 4.06 (2000); *see also* Garry J. Wise, *Lawyers’ Ethics and Freedom of Speech*, WISE LAW BLOG (Dec. 20, 2007), <http://wiselaw.blogspot.com/2007/12/lawyers-and-freedom-of-speech.html>.

218. Wise, *supra* note 217.

every post, comment, and status update made on Facebook, especially when those remarks criticize the judicial system and members of the court.

It is vital that what is posted on Facebook for the public eye in no way destroys the confidence the public must maintain in the judicial system. Every attorney has a bad day in court, and, although attorneys have the right to speak freely and voice their opinions to the public, Rule 4.06 provides a balance to attorney speech. It sets forth a custom that encourages lawyers to “avoid criticism that is petty, intemperate, or unsupported by a bona fide belief in its real merit, bearing in mind that in the eyes of the public, professional knowledge lends weight to the lawyer’s judgments or criticisms.”²¹⁹

Although there is greater controversy surrounding the implications Facebook has on those in the legal profession in the United States, there is nothing to indicate that the controversy will not make its way up north to Canada shortly. Canada has yet to address the issue of judges befriendng attorneys on Facebook nor has Canada taken into account Facebook information affecting Bar applications. However, these concerns are likely to expand globally. As such, no matter where individuals choose to practice law, whether in the United States or Canada, individuals should monitor their Facebook accounts.

VII. CONCLUSION

As long as it continues to evolve and become more universal, Facebook will increasingly impact the future of the United States and international legal communities.²²⁰ Unfortunately for law students, lawyers, and judges both in Florida and the international community, “[t]he overall culture of the legal profession, including privacy, confidentiality, and conservatism, conflicts with the disclosure culture of Facebook.”²²¹ It is of great importance that law students, lawyers, and judges honor their roles within the legal profession by taking the appropriate steps to ensure that their Facebook activity does not compromise their ability to enter or remain within the field.

219. *Id.*

220. Vinson, *supra* note 1, at 405.

221. *Id.* at 376.