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Article

**THE UNPROFESSIONAL SIDES OF SOCIAL MEDIA AND SOCIAL NETWORKING: HOW CURRENT
STANDARDS FALL SHORT**

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I. Introduction	242
II. The Intersection of Professionalism and Social Media	244
A. Professionalism and Ethics: Is Professional Optional?	245
B. The Unprofessional Side of Social Media	248
1. Social Media Primer	248
2. Social Networking at Work	251
III. Defining the Problem: A Framework for Analyzing How and When Social Media Is Unprofessional	253
A. Intrafirm Professionalism (The Duty of Loyalty Online)	254
B. Extrafirm Professionalism	257
1. Direct Postings: “Case and Client” and “Venting”	257
2. Indirect Postings: “Reputational”	260
C. Lawyer-Client Professionalism	261
D. Interlawyer Professionalism (Incivility Online)	262
IV. Expanding Standards: Rule-making & Norm-setting	266
A. Why More Regulation?	266
1. The Tradeoff Between Social Networking and Social Capital	267
2. Economic Incentives to Regulate	270
B. The ABA Model Rules of Professional Conduct	271
1. A Survey of Existing Approaches	274

2. An Outline of a Rule	278
a. Status Updates and Away Messages	278
b. Links, Comments, Articles, Invites	278
c. Posting Stories and Responsive Comments	279
d. Identifying Information	279
C. Teaching Social Media Norms	280
1. Pedagogy	281
2. Policy	283
V. Conclusion	284

***242 I. Introduction**

Facebook. Twitter. Google Chat. Above the Law. We are the information-sharing generation.¹ Social media and social networking are constant and ubiquitous.² The legal community has certainly not escaped this phenomenon. The Judicial Conference of the United States has characterized the “explosion in social media [and] . . . social networking” as “[t]he latest chapter in the evolution of online activities.”³ A 2010 American Bar Association (ABA) survey revealed that fifty-six percent of attorneys belong to at least one online social network.⁴ However, the practice of law seems at odds with this information-sharing revolution. Lawyers are ethically obligated to guard and filter the information provided to them.⁵ They are bound by duties of confidence and discretion.⁶ As a matter of decorum, a lawyer is expected to be thoughtful, reserved, and circumspect-- anything but information-impulsive.⁷ Given these tensions, the legal community faces a unique challenge to understand the relationship between professionalism and social networking.

***243** Though the issue has received some attention in bar journals and practice institutes, the legal scholarship has yet to consider in depth the professional implications of social media and social networking.⁸ The professionalism aspects of the challenge--which are separate and distinct from its ethical aspects--have been largely overlooked.⁹ The legal community would be well served by a dialogue on this topic that addresses how our norms of professionalism have changed, or have failed to change, in light of social media and social networking.¹⁰ This Article hopes to begin and to advance that conversation.¹¹

In this Article, I argue that the trend among young lawyers to share, and share alike, on the Internet requires the profession to revisit its standards of professionalism in light of the social media phenomenon. In so doing, the profession should consider not only how to regulate social networking and media, but also how to reshape professional norms. This Article contains three Parts. Part II discusses the distinction between professionalism and ethics and explains how social media relates specifically to professionalism. Part III defines the professionalism-related problems with social media. It provides a concrete framework for thinking about the professionalism pitfalls of these ***244** online technologies, explaining four types of unprofessional conduct that arise from social media and social networking. The framework illustrates how existing rules, standards, and analogies that may apply are inadequate to regulate social media use, as it affects professionalism specifically. Part IV argues that more regulation is needed because the current rules and norms fall short of addressing the sweeping implications for the social and economic health of the legal community. It then suggests a more unified approach to regulating social media use through the implementation of a Model Rule of Professional Conduct and argues that, in addition to rulemaking, it is important to establish professional norms regarding social media and social networking.

II. The Intersection of Professionalism and Social Media¹²

“Professionalism,” as distinct from ethics, is usually couched in terms of civility--issues of etiquette, demeanor, and conduct.¹³ Many of the recent conversations about professionalism have focused on the so-called decline in lawyerly civility, as it has been a topic of much concern by the bar and bench.¹⁴ Much of the literature on professionalism discusses four types of such incivility: overzealousness, discovery abuse, threats and insults, and bad faith litigation.¹⁵ However, “[a]lthough fairness and good manners are certainly part of professionalism, the notion of professionalism is a much broader concept.”¹⁶ This Part first explains why other types of putatively unprofessional conduct, such as social networking, have been overlooked, steering the professionalism conversation in a different direction.

***245 A. Professionalism and Ethics: Is Professional Optional?**

What does it mean to be professional? Dean Roscoe Pound of Harvard once characterized a “profession” as “pursuing a learned art as a common calling in the spirit of public service.”¹⁷ Professionalism--the conduct that characterizes a professional--“refers to a related set of values, ideas, and attitudes shared by a group of professionals that distinguishes the group from other professionals as well as lay persons.”¹⁸ In the legal field, one scholar described “[l]egal professionalism as a subject of inquiry focuse[d] on the inculcation of lawyering norms and values, as well as the shaping of lawyer behavior.”¹⁹ Our collective understanding of lawyerly professionalism includes certain general features: competency, etiquette, altruism, and “respect for the justice system and its participants.”²⁰ Professionalism standards are for the benefit of the public and clients, to gain and maintain their trust.²¹ Comporting ourselves professionally also benefits the profession at large, as it fosters respect and trust among colleagues and sustains commitment to self-regulation and continuing legal education.²²

These are all lofty ideals, but they are ephemeral. As the president of the Louisiana State Bar Association once noted, “[the] basic problem is in the use of the term ‘professionalism[,]’ . . . no standard definition is available.”²³ This is a common criticism leveled against the concept of professionalism.²⁴ The elusive quality of professionalism stands in contrast to our ethical obligations, which are codified in rules of professional conduct²⁵ and fleshed out by disciplinary and *246 advisory opinions by local bars, courts, and the ABA.²⁶ If legal ethics is the black and white of law governing lawyers, professionalism is the grey.²⁷ The ephemeral quality of professionalism makes it more difficult to sustain attention on the various types of conduct that might be unprofessional as distinct from unethical.²⁸

The aspirational quality of professionalism compounds this problem. As compared to the rules of ethics, professionalism, as it is often described, seems like an ethical “bonus”--do the best you can.²⁹ As one leading commentator on professionalism discussed, the difference between professionalism and ethics is that “rules of ethics tell us what we must do and professionalism teaches us what we should do. . . . [P]rofessionalism can be described as living by the ‘Golden Rule.’”³⁰ Views from the bench reinforce the aspirational quality of professionalism.³¹ For example, Justice Benham of the Supreme Court of Georgia stated that “ethics is that which is required and professionalism is that which is expected.”³² In similar spirit, the preamble to the civility code for the Seventh Circuit Court of Appeals caveats that its “standards shall not be used as a basis for litigation or for sanctions or penalties.”³³ Rather, they “serve as a valuable teaching and discussion guide.”³⁴ Indeed, of those jurisdictions that have adopted professionalism codes apart from their ethical codes, many have made them largely aspirational in nature.³⁵

*247 Given these qualities, the formal risks of noncompliance are basically nonexistent, barring truly egregious conduct that also rises to the level of an ethical breach. Mark Neal Aaronson recognizes problems with these civility codes:

Compliance with the new civility codes . . . is likely to be fairly problematic. The facial incentives to conform are especially weak--much weaker, for example, than those regarding conventional legal ethics or the disciplinary ambit of [Rule 11 of the Federal Rules of Civil Procedure](#). Unlike these now standard measures for regulating attorney behavior, civility codes are not necessarily intended to be formally enforced.³⁶

Consequently, the motivation to revise the definition of unprofessionalism, and consider what other types of attorney conduct might fall under its heading, is relatively low.³⁷

Similarly, there is little incentive to teach and learn professionalism as a subject apart from ethics and, as a result, professionalism is underemphasized in law school curricula.³⁸ A recent survey of law school courses on professionalism suggests that many focus on ethical issues and few exclusively treat the softer notions of conduct, decorum, and etiquette.³⁹

Deborah Rhode noted that the move in most states to adopt the Multistate Professional Responsibility Exam (MPRE) has prompted law schools to concentrate on objective rules and multiple choice testing.⁴⁰ “[I]n many institutions,” she writes, “professional responsibility has found its identity as a course in statutory analysis of ABA codes.”⁴¹ Thus, young lawyers, in law school and in preparing for the bar examination, learn their ethical obligations as mostly tied to concrete rules.⁴² These ethical obligations deal with, among others, the duties to maintain client confidences,⁴³ to be candid with the court,⁴⁴ and to avoid conflicts of *248 interest⁴⁵ and the comingling of funds.⁴⁶ However, these rules do not account for a broad swath of conduct that likely fits within the rubric of professionalism, which, because of the disincentives discussed above, is neglected.

For all of these reasons, the professionalism implications of a major new trend in attorney conduct--social media use and social networking--have been slow to percolate through the legal field. Though there has been some attention dedicated to the ethical concerns associated with social media,⁴⁷ there has been no discussion of related conduct that might not rise to the level of ethical breach but is, nonetheless, unprofessional.⁴⁸ But, the story is not all bad. Professionalism is a capacious concept and, as such, flexible enough to expand to address conduct that escapes the strictures of the ethical rules.⁴⁹ The balance of this Article demonstrates how social media and social networking, a new and rapidly evolving type of attorney conduct, falls squarely within professionalism’s bailiwick. To that end, the next Section provides a brief overview of social media and social networking and places it in the context of professionalism.

B. The Unprofessional Side of Social Media

As noted earlier, the types of unprofessionalism most frequently addressed are those related to litigation, such as the mistreatment or disrespect of opposing counsel or the court.⁵⁰ Though certainly troubling, the number of attorneys who behave in this fashion is probably low.⁵¹ In contrast, there is now one type of conduct that over half the profession engages in, which has the potential to be unprofessional in several respects: participation in social media and social networking.⁵²

1. Social Media Primer

Social media, also sometimes referred to as “Web 2.0,” is “the second generation of web design and software development, which places heavy emphasis on communication, collaboration, and sharing among Internet users.”⁵³ Social networks, which are one form of social media, “are Internet-based *249 meeting places where users with similar interests and backgrounds can communicate with each other.”⁵⁴ Users create profile pages with personal information and make connections with other users, which allow the sharing of profile information as well as the ability to comment or “post” on the information posted on another person’s page.⁵⁵ As Ted Ulyot, Vice President and General Counsel of Facebook, phrased it, social networking is all about “sharing and connecting.”⁵⁶

Facebook is probably the best known example of social networking, and it is the leading social networking site.⁵⁷ Facebook users make connections with “friends” with whom they share photos, videos, messages, weblinks, and news stories.⁵⁸ Users can post comments on the content of their friends’ postings (or uploads) and can also express a preference for, or “like” (denoted with a thumbs up symbol), certain postings, organizations, or stories.⁵⁹ MySpace is another social networking site that also allows users to create profiles and add content.⁶⁰ LinkedIn is a social networking site dedicated to developing professional connections.⁶¹ Users of LinkedIn can form a list of contacts, and any one user’s contacts can form connections with that user’s other connections and so on and so forth.⁶² Lastly, Google Mail’s (Gmail) chat feature (Gchat), which is used to chat with friends and coworkers throughout the workday, is also a means of social networking.⁶³

Blogging, a type of social media, is popular in the legal community.⁶⁴ One commentator described a blog as “an entry of commentary, description of an event or events, web link, graphics, or video posted on a website.”⁶⁵ Law blogs tend to comment on legal news and scholarly developments, or other relevant *250 events in the legal world.⁶⁶ Blogs are similar to social network sites in that readers can leave comments in response to blogged posts.⁶⁷ Of particular interest to this Article is the social media site Above the Law, which is part legal tabloid and part blog.⁶⁸ Most in the legal profession understand Above the Law to be the repository of legal gossip, ranging from risqué stories about associates, summer associates, partners, and law firms, to pay scales and the latest Supreme Court clerk hires.⁶⁹ Other blogs are more like “personal online diaries.”⁷⁰ As will be seen, some attorneys have these too.⁷¹ Twitter is also in the blog family.⁷² Twitter allows subscribers to “micro-blog” short, 140-character messages called “tweets,” which are blasted out to all of the user’s “followers.”⁷³ Interestingly, most Twitter activities occur during prime business hours of 11 am and 3 pm.⁷⁴

Finally, YouTube is a social media site that supports video sharing.⁷⁵ Users upload videos that can be searched and shared.⁷⁶ There are many YouTube clips created by law students, mocking or joking about some aspect of their legal education.⁷⁷

Social media is ubiquitous.⁷⁸ Facebook has over 600 million users.⁷⁹ It is also time-consuming. The average Facebook user spends seven hours a month *251 on that site.⁸⁰ Ethan Zelizer provides some other interesting statistics: “(1) three out of four Americans use social media; (2) two thirds of the global Internet population visit social networks; and (3) visiting social media sites is now the fourth most popular online activity-- ahead of personal email.”⁸¹ Attorneys are no exception. One commentator noted how these social media statistics relate to the legal profession:

In a 2009 survey by Leader Networks . . . , approximately three-quarters of lawyers reported that they are members of a social network such as MySpace, Facebook, or LinkedIn. Over a third of attorneys surveyed read and comment on articles, blogs, and other online content. Of those engaged in these online social networking activities, three-quarters do so on at least a weekly basis.⁸²

In 2011, given Facebook’s tremendous growth,⁸³ one imagines that these numbers have only increased.

2. Social Networking at Work

Though social media and social networking use smacks of personal playtime, most users do not draw the line at work.⁸⁴ Zelizer observed that employees view this as benign activity:

Most employees don’t think they are doing anything wrong when they access social media websites at work. Rather, they consider it a use of their break time or simply a quick way to update a friend or significant other about real life commitments without the need to pick up the phone.⁸⁵

*252 As evidence of that sentiment, “15% of all social media updates in the workplace come from employer-provided Blackberries or similar mobile devices.”⁸⁶

There is some anecdotal evidence of employees speaking inappropriately about their jobs on social networking sites. One article, entitled *Twitter Gets You Fired in 140 Characters or Less* described a tweet by a Cisco new hire: “Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work.”⁸⁷ The tweet prompted a response tweet from one of the company’s channel partner advocates, remarking, “Who is the hiring manager. I’m sure they would love to know that you will hate the work. We here at Cisco are versed in the web.”⁸⁸ The author of that article wryly concluded, “thanks to Twitter further eroding the wall between your big mouth and a moment required to download some good sense, the Internet is now empowered to get you fired faster than ever.”⁸⁹ In another news story, a stadium operator for the Philadelphia Eagles was so upset that the team let a player sign with another team that he posted on his Facebook page: “Dan is [expletive] devastated about Dawkins signing with Denver . . . Dam[n] Eagles [are] Retar[d]ed!!”⁹⁰ He was fired.⁹¹ Lawyers have also been known to cross the line. Take the Florida lawyer, for instance, who was sanctioned by the Florida Supreme Court for calling a judge before whom he had appeared an “evil, unfair witch” in a criminal defense lawyer’s group blog.⁹²

The penchant to share and connect is driven by the youngest generation of lawyers’ reduced notions of privacy, particularly on the web.⁹³ As one commentator notes, “some lawyers (just like people) are willing to share the most amazingly intimate details of their lives on Facebook and other social media.”⁹⁴ The propensity to “let loose” online is reinforced by the sense of anonymity that comes with online sharing and the misperception that one’s online conduct is above reproach.⁹⁵ It is “[d]ue to perceived anonymity, [that] an *253 employee may engage in conduct online that the employee might refrain from in person, without understanding that online communications may be traced to a particular user.”⁹⁶ Not only does this sense of anonymity or distance encourage indiscretion, but it has also created a “breeding ground for rude[ness]” in social media.⁹⁷ In sum, because these sites allow for the frequent and voluminous sharing of information with a user’s wide audience, social media both instigates inappropriate comments and serves as a conduit of these comments that might not otherwise have been made at all.⁹⁸ Thus, social media, though useful and entertaining in many ways, poses a real danger to professionalism in the legal field.⁹⁹

Part II.A suggested that the legal profession should devote more energy toward determining how social media and networking fit within the professionalism milieu. This Section made the case for that prescription by explaining how social networking has become a significant part of young lawyers' personal and professional lives. Taken together, one senses the gaping hole in professionalism standards that has left young lawyers to pursue their social networking endeavors at work just as they would at home. The next Part argues that the best approach to addressing this issue is to depart from the traditional standards of professionalism--those applied to the typical bad-mannered-litigator case--and develop new standards of professionalism that apply specifically to the social media context. I offer a four-part framework for thinking about what these standards should be.

III. Defining the Problem: A Framework for Analyzing How and When Social Media Is Unprofessional

As mentioned above, the social media and social network phenomena are fueled by individuals' desire to share and connect.¹⁰⁰ This Part suggests that there are four ways in which attorneys sharing and connecting via social media implicates their professionalism.¹⁰¹ Whether in a law firm or judicial chambers setting, in each area, I demonstrate how there is a considerable range of social *254 media and social networking conduct that is left unaddressed by existing rules of ethics or traditional thinking about professionalism, which should be circumscribed by more targeted standards of professionalism. Specifically, I provide examples of putatively unprofessional social media use, discuss analogies to existing rules, norms, or real world examples, and highlight the gap between them.

A. Intrafirm Professionalism (The Duty of Loyalty Online)

The first area of professionalism implicated by attorney social media use deals with the standard of decorum that attorneys owe to their law firms, and that law clerks owe to their judicial chambers.¹⁰² Social networking and social media use has introduced a variety of ways in which young lawyers can violate their organization's trust--that is, the trust that its lawyers will not air its proprietary information or "dirty laundry."¹⁰³ Here, when speaking about the type of respect one owes to an organization, there are few close analogues in the ethical rules and professional codes.¹⁰⁴ Because the gap between our current thinking on professionalism and lawyerly conduct seems widest in this area, I address it first.

Law firms and judges have certain types of information that, though perhaps not confidential per se, they expect to be kept in-house.¹⁰⁵ Of course, the amount of information a law firm considers private will vary depending on the culture of the firm, but a few examples might include pay scale and bonus data, embarrassing interoffice emails, or interoffice memoranda discussing firm policy.¹⁰⁶ Private firm information that is blogged about on Above the Law is perhaps the most troubling example. Above the Law posts information about associate bonuses¹⁰⁷ and salaries.¹⁰⁸ Though sharers of this information would argue that these posts increase transparency and improve the free market of young associate labor,¹⁰⁹ that is not a satisfying response to a professionalism complaint; at most, it suggests a need to weigh the good of social networking *255 against the bad when fine-tuning the appropriate standard. Aside from financial information, Above the Law also exposes law firms' snafus. The site has an entire thread dedicated to "Email Scandals,"¹¹⁰ and each summer there are inevitably a few posts about summer associates' inappropriate, and sometimes humiliating, behavior.¹¹¹ The potential for reputational harm to the firm from such sharing is obvious.

There is less sharing on Above the Law about inner-chambers workings.¹¹² The difference might be normative. Canon 3 of the Judicial Employee Code instructs law clerks to "adhere to appropriate standards in performing the duties of office,"¹¹³ which arguably include discretion. There is also an informal taboo against speaking about chambers-related issues.¹¹⁴ Breaking this taboo has met some criticism, especially when revealing information about the United States Supreme Court's inner sanctum.¹¹⁵ It is unclear, though, whether this taboo/norm has been extended to social media sharing. A more cynical view is that the difference is self-preservative and does not come from normative notions of discretion, at least where anonymous sharing or commenting occurs--on a blog like Above the Law. With only three or four law clerks per chambers, a post with any modicum of detail is likely to identify that clerk. The identity of a law firm associate-poster might be harder to peg. Whatever the reason may be, this type of improper sharing seems more pervasive at the law firm.¹¹⁶

However, beyond an individual firm's office policies, it is not clear that the broader legal community has considered the implications of sharing personal firm information on social media and social networking sites. Yet, basic principles of agency law suggest that sharing of this nature is unprofessional.¹¹⁷ The law firm and the lawyer, as employer and employee, have a

principal-agent *256 relationship.¹¹⁸ In agency law, an agent owes his principal a duty of loyalty.¹¹⁹ According to the Restatement (Third) of Agency, that duty requires “an agent . . . to act loyally for the principal’s benefit in all matters connected with the agency relationship.”¹²⁰ Similarly, the tentative draft of the Restatement (Third) on Employment Law includes a section entitled “Employee Duty of Loyalty.”¹²¹ The “core obligation” is that “[e]mployees owe a duty of loyalty to their employer in matters related to the employment relationship.”¹²² The duty of loyalty includes admonitions against use of the principal’s property and against communication of the principal’s confidential information for the agent’s own purposes.¹²³ With respect to the first obligation, the Restatement (Third) of Agency explains the principal’s right to this exclusive use:

The rule is . . . a corollary of a principal’s right, as an owner of property, to exclude usage by others. An agent is subject to this duty whether or not the agent uses property of the principal to compete with the principal or causes harm to the principal through the use.¹²⁴

With respect to the second obligation, the Restatement defines “confidential information” to include a broad range of private information:

Many employees and other agents are given access by the principal to information that the principal would not wish to be revealed or used, except as the principal directs. Such information may pertain to the principal’s business plans, personnel, nonpublic financial results, and operational practices, among a range of possibilities.¹²⁵

As such, agency law has obvious applicability to this area of social media use and social networking. Private law firm data, gossip, policy, or strategy is arguably the firm’s property, and sharing the information outside the firm could cause economic or reputational harm to it.¹²⁶ The firm has given its attorneys access to this information. If the firm does not wish for it to be shared to wide, public audiences via social media and social networking sites, then the duty of loyalty seems to prohibit such sharing. Though the duty of loyalty has yet to be *257 applied in this way, it certainly could be. Some participants in the Restatement project have decried the duty as “ill-defined.”¹²⁷ Professor Gordon Smith, however, has noted the benefits to an undelimited duty of loyalty because, as such, it remains unconstrained to account for new types of disloyal conduct.¹²⁸ To his point, the duty of loyalty could apply to attorneys sharing firm information through social media. Arguably, social media behavior that is fairly said to be disloyal should also be considered unprofessional, though it currently is not.¹²⁹

B. Extrafirm Professionalism

Facebook allows users to post where and for whom they work at the top of their profile pages.¹³⁰ Depending on one’s privacy settings, this allows other users who view the person’s Facebook page to immediately learn of his employer.¹³¹ The simultaneous sharing of this information together with the montage of photos, comments, and likes, reflects on a lawyer’s firm or judge.¹³² Because of this feature, not only do the lawyer’s “direct” postings--those about work--implicate professionalism, but likewise his “indirect” postings--personal postings that somehow suggest the lawyer’s competence, maturity, or discretion.¹³³ Next, I examine each of these facets of extrafirm professionalism in turn.

1. Direct Postings: “Case and Client” and “Venting”

Direct postings are those about work. While posting about confidential client matters is an obvious breach of a lawyer’s ethical duty of confidentiality,¹³⁴ it is less clear whether posting innuendo about clients or cases on Facebook in conjunction with one’s employment information is unprofessional.¹³⁵

*258 There are two types of direct postings: those about matters, “case and client posts,” and those about how much you like your job, “vent posts.” Recent scholarship and media reports have documented examples of both.¹³⁶ In one case, a Minnesota prosecutor made negative comments about Somalis on her Facebook page in connection with one of her cases.¹³⁷ Similarly, a Texas judge, Judge Criss,¹³⁸ reports that she saw a post from a lawyer who complained about having to handle a motion in front of her.¹³⁹ That Judge further commented that she “has seen lawyers on the verge of crossing, if not entirely crossing, ethical lines when they complain about clients and opposing counsel” online.¹⁴⁰ With respect to venting about one’s job on Facebook, it is more common than one would expect--as one observer wrote, “attorneys, like other professionals, vent about work and clients through social media.”¹⁴¹

Though most rules committees have said nothing concrete about social media,¹⁴² there is solid ground for expanding professionalism rules and standards to encompass both of these types of direct, work-related posts. The ABA has recently considered ethical questions in connection with lawyer websites.¹⁴³ A social networking site, like Facebook, is similar to the ABA's characterization of a website insofar as social networking sites, like websites, may also "provide biographical information about lawyers, including educational background, experience, area of practice, and contact information A website also may add information about the law firm, such as its history, experience, and areas of practice" ¹⁴⁴ The ABA points out that Rule 7.1, which governs any "communication about a lawyer or the lawyer's services,"¹⁴⁵ as well as Rules *259 5.1¹⁴⁶ and 5.3,¹⁴⁷ which obligate managerial lawyers to make efforts to ensure that the firm has measures in place that give "reasonable assurance" that firm lawyers comply with the rules, all apply to websites.¹⁴⁸

Arguably, Facebook posts, of both the client and case and vent varieties, fall within the broad heading of a "communication about the lawyer or the lawyer's services."¹⁴⁹ However, applying the Model Rules to these types of social networking behaviors is unlikely. Rule 7.1 technically applies only to "false or misleading communication[s] about the lawyer or the lawyer's services,"¹⁵⁰ which is too narrow to capture the social media conduct discussed here. Rule 8.4(d), which prohibits attorneys from "engag[ing] in conduct that is prejudicial to the administration of justice,"¹⁵¹ might apply, though many would no doubt argue that such a vague proscription could not be fairly applied to direct, extrafirm social networking conduct.¹⁵²

Current professionalism norms might not cover this conduct either. Commenting to a friend in person that you are working on a motion to dismiss is probably not unprofessional, even though that friend knows that you work for Smith & Jones law firm.¹⁵³ But, posting such a message on Facebook, even as an away message, is different--direct postings shared in the social media world pose much greater reputational risks than information shared offline.¹⁵⁴ A typical Facebook user has around 130 friends.¹⁵⁵ The viral capability of any one *260 comment posted on social media magnifies the risk of speculation--"she's probably working on the Johnson case"--the negative or incorrect inferences about one's work--"she seems not to be working on the Johnson case very hard" or "the Johnson case must be really tough"--or one's competence--"she must be distracted from the Johnson case because she is also on Facebook."¹⁵⁶ Herein lies the gap between existing ethical rules and vague professional norms in this area.

2. Indirect Postings: "Reputational"

It is well understood that a lawyer is expected to conform his behavior to the rules of professional conduct at all times, not just while at work.¹⁵⁷ Translated to the language of social media, this means that a lawyer should be mindful of his "indirect posts."

Indirect posts consist of shared information or preferences that suggest something negative about a lawyer's reputation or integrity and, consequently, that person's professionalism. Many young associates and law clerks do not realize that their social networking conduct, particularly on Facebook, where real names and not screen names are used, creates an e-image of themselves for which they should also be professionally responsible.¹⁵⁸

Imagine a litigant's reaction to viewing the profile of a law clerk, which proudly lists him as "Law Clerk to U.S. District Judge John Smith at the United States District Court for Eastern Carolina." Below that biographical information is a picture of the clerk disheveled and disoriented, with alcoholic drinks in hand. What impression does that give, whether true or not, of that clerk, his work, and the judge for whom he works? That hypothetical is not at all far-fetched. Facebook gives lawyers the ability to list the court and judge or the name of a law firm in their profiles.¹⁵⁹ And, members of the bench and bar do look at profiles; Judge Susan Criss reported that she once saw on Facebook a lawyer's postings "detailing her week of drinking, going out and partying."¹⁶⁰

It is difficult to find a good ethical rule or professionalism norm analogy from which to extract any guidance in this area of social networking.¹⁶¹ Canon 4 of the Judicial Employee Code touches on it indirectly: "In engaging in outside activities, a judicial employee should avoid the risk of conflict with official duties, should avoid the appearance of impropriety, and should comply with the *261 disclosure requirements."¹⁶² The Judicial Conference has applied this Canon directly to social media¹⁶³ and suggests that the "posting [of] inappropriate photos or videos," which could detract from the dignity of the court, is an example of conduct falling under Canon 4.¹⁶⁴ It is unclear how widespread law clerks' knowledge of these Canons is and to what extent they are given firm instruction.¹⁶⁵ It is clear, however, that such a norm has not gained much traction amongst

law clerks and the same conduct of young associates is apparently not regulated, absent specific law firm policies and monitoring.¹⁶⁶

In terms of extrafirm social networking, the profession would be wise to differentiate its expectations for lawyerly conduct between online and offline and hold social media conduct to a higher standard of professionalism.¹⁶⁷ The next two parts of the framework deal with interpersonal professional relationships--those between the lawyer and client and those between same-level associates.

C. Lawyer-Client Professionalism

The third component of the framework touches on the professional relationship between an attorney and the client.¹⁶⁸ Many of the professionalism concerns in this area have been covered above in connection with intrafirm and extrafirm social media use.¹⁶⁹ Even so, it is worth carving out this third area to underscore that there are important norms of professionalism that govern the working relationship between lawyer and client that are different from the ethical obligations that flow from that relationship.

Sharing a post on Facebook that a lawyer is “working on a motion to dismiss for ABC case,” or even a more general “staying late to finish this brief on new case,” not only invites improper conjecture and reputational harm--a breach of extrafirm professionalism¹⁷⁰--but also, if brought to the client’s attention, *262 undermines the respect and trust the client has for his attorney. The same goes for any nonanonymous blog posts or tweets.¹⁷¹

There are material disclosure concerns as well. In civil or criminal matters where corporations are parties, implying or divulging any details about a suit, legal proceeding, or transaction from which information could be gleaned, presents risk of speculation about the financial health of that corporation.¹⁷² Indeed, many hedge funds are known for using this mosaic approach of piecing together tidbits of information to paint a picture of material activities that can affect securities pricing.¹⁷³ For example, sharing on Facebook that one is traveling to Minnesota for work, could lead other users to piece together the existence of a deal with one of the few major Minnesota-based corporations on one end, particularly if that lawyer is known to work in a mergers and acquisitions practice group.¹⁷⁴ Or, if that lawyer is known to work in a white-collar crime group and a local CEO is under suspicion for securities violations, one could surmise that a federal investigation has moved to the next level. Because a Facebook post is shared with so wide an audience,¹⁷⁵ if that company is publicly traded, there is a real possibility that it could cause movement in the stock market. An employee at an investment bank would surely be punished for such disclosure. To the extent that a lawyer’s cavalier social networking has the same effect, it too is, at a minimum, unprofessional.

D. Interlawyer Professionalism (Incivility Online)

Just as attorneys owe a duty of discretion to their law firms or chambers and clients, attorneys also owe a similar duty of tactfulness to one another.¹⁷⁶ Saying that we are obligated to be respectful to opposing counsel, clients, and witnesses *263 is, of course, nothing new.¹⁷⁷ Indeed, the notion of interlawyer unprofessionalism is probably closest to the classical conception of lawyerly unprofessionalism--incivility.¹⁷⁸ However, civility norms, heretofore focused on opposing or neutral parties in the litigation process,¹⁷⁹ leave us with little guidance on interlawyer social media norms.¹⁸⁰

Examples of incivility in the traditional sense are easy to find in the literature and case law. Some deal with insults. In *Nachbaur v. American Transit Insurance Co.*,¹⁸¹ for instance, a lawyer was sanctioned for sending a letter to the court insulting opposing counsel.¹⁸² Other lawyers have been criticized by local review boards for writing demeaning letters to opposing counsel, using adjectives such as “fool, idiot, punk, boy, honey, sweetheart, sweetie pie and baby cakes.”¹⁸³ “[R]acist,” “insulting,” and “degrading” remarks are readily labeled unprofessional.¹⁸⁴ Explosive behavior both in and out of court also grabs attention. An example of such behavior occurred in the *Saldana v. Kmart Corp.*¹⁸⁵ case before the Third Circuit. There, attorney Lee Rohn used the “F” word four times in two telephone conversations with other attorneys and in two asides to attorneys during depositions.¹⁸⁶ Related, are the vituperative attacks during depositions, which are similarly well documented. In *Carroll v. Jaques*,¹⁸⁷ attorney Jaques, being deposed as a defendant in the case, “verbally abused counsel for Plaintiff with profanity,” responding that “only an ass would ask those questions.”¹⁸⁸ Another famous example is the attorney for Paramount, in *Paramount Communications, Inc. v. QVC Network, Inc.*,¹⁸⁹ who attacked opposing counsel during a

deposition, lambasting his skill as a lawyer.¹⁹⁰ Surely, all would agree such uncivil conduct is unprofessional.

***264** However, the above conceptualization of interlawyer incivility is too narrow in the social media age, as it fails to imagine what incivility looks like online.¹⁹¹ In the era of social media, incivility increasingly happens on the Internet and comes in different forms.¹⁹² In general, Americans have sensed “[a] growing proliferation of incivility on the Internet.”¹⁹³ Studies report that mentions of “online incivility” grew sixty-three percent from 2008 to 2009, with social media contributing to this trend.¹⁹⁴ In 2010, fifty-one percent of Americans considered blogs the most uncivil, followed by social networking sites (43%) and Twitter (35%).¹⁹⁵ Though these figures reflect broad trends in American popular culture, they suggest that there is real risk that attorneys engage in social media and social networking behaviors that the legal profession should view as unprofessional.¹⁹⁶

The tendency among uninhibited and impulsive lawyers to share stories, pictures, or comments on Facebook, Gchat, or Above the Law risks the embarrassment and ire of one’s co-workers.¹⁹⁷ These harms from uncivil social media use do not directly disrupt the litigation process, but rather the relationships with one’s fellow associates and clerks, and the tenor of the office environment generally.¹⁹⁸ Such incidence of interlawyer incivility, which arises purely from social media use or social networking does not, therefore, fit the incivility typecast described above, which is focused on the litigation process and opposing or neutral parties.¹⁹⁹

Because unsocial media conduct falls outside the traditional incivility mold, it is unclear whether it would, or could fairly, be punished. Usually, in responding to incidents of incivility, courts and disciplinary committees seem to punish behavior that directly disrupts the litigation process because, though labeled “unprofessional” or “uncivil,” we also feel comfortable labeling it as “unethical.”²⁰⁰ With respect to the examples cited above, the attorney in ***265** Nachbaur was disbarred for actions separate from that case²⁰¹ and the attorney in Jaques was sanctioned for bad faith litigation.²⁰² The insulting letter-writers were admonished.²⁰³ Interestingly, in Rohn’s case, because the conduct “did not occur in the presence of the Court and there [was] no evidence that it affected either the affairs of the Court or the ‘orderly and expeditious disposition’ of any cases,” the court believed “that her use of language, while certainly not pretty, did not rise to the level necessary to trigger sanctions, at least under the Court’s inherent powers.”²⁰⁴

In fact, it is unclear whether codes of civility or professionalism even cover social media and social networking incivility.²⁰⁵ These codes also focus on litigation and the treatment of other players in the legal process.²⁰⁶ To the extent they address interlawyer incivility, they endeavor to stymie basic rudeness.²⁰⁷ The Virginia Bar Association Creed, for example, tells lawyers to “[e]xercise courtesy and civility in all communications and avoid rudeness and other acts of disrespect in all meetings, including depositions and negotiations.”²⁰⁸ The Delaware Code advises, “[a] lawyer should represent a client with vigor, dedication and commitment. Such representation, however, does not justify conduct that unnecessarily delays matters, or is abusive, rude or disrespectful.”²⁰⁹ The D.C. Bar’s general principles on civility reiterate their applicability to incidents affecting the legal process.²¹⁰ The Seventh Circuit’s Code, which admonishes its attorneys to “treat all other counsel, parties, and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications,”²¹¹ is one of the more general statements that this author has seen and would, arguably, capture social media activity. Then ***266** again, without explicit reference to social media, it remains unclear whether that jurisdiction could fairly hold accountable its attorneys for their social media use under its Code.²¹² In short, what is perhaps the most broadly addressed aspect of lawyerly professionalism--civility--offers very little instruction on what is civil in the social media space.

Overall, the examples and analogies above confirm that our traditional thinking on professionalism provides inadequate guidance. The framework demonstrates why it is important to regain our grasp on professionalism and develop clear standards of conduct as they relate to social media that are separate, and probably more expansive, than the existing ethical rules. With a tangible framework in mind, the conversation might avoid some of the qualities that have heretofore shackled professionalism from advancing beyond the hortatory.²¹³ Moreover, with the problem already defined, the legal community might dedicate more energy to designing a solution. The next Part is a start in that direction.

IV. Expanding Standards: Rule-making & Norm-setting

Resolving the professionalism questions set out above requires some movement away from the aspirational and elusive qualities of professionalism discussed in Part I. A model rule, together with a normative reorientation, could accomplish this shift. This Part first answers why social media should be regulated by a separate rule. It then considers what a model rule on

social media and social networking use might look like. Part IV ends on a pedagogical note, and suggests that teaching the appropriate social media and social networking norms in law school should be a key component of any approach to the problem.

A. Why More Regulation?

Some might be skeptical that more regulation is needed and believe that the current rules and standards are enough, or that even if they are not, more regulation is undesirable for some other reason.²¹⁴ As this Article has argued throughout, much social media use and social networking conduct falls between the cracks of ethical rules and other professional codes and creeds. To the extent the current rules apply, they do not apply with any specificity;²¹⁵ thus, guidance *267 is lacking regarding behavior that is not obviously unethical but which is probably unprofessional. For the continued skeptics, however, I offer the following two-fold response.

1. The Tradeoff Between Social Networking and Social Capital

Perhaps the best insight into the potential harm from unprofessional social media use is gained from existing literature on civil society and social capital. Robert Putnam, one of the seminal thinkers on social capital theory,²¹⁶ explains that “social capital refers to connections among individuals--social networks and the norms of reciprocity and trustworthiness that arise from them.”²¹⁷ In general, social capital is built up through individuals’ interactions with one another, through which relationships develop.²¹⁸ Trust is the byproduct of these relationships.²¹⁹ Putnam identifies the “positive consequences of social capital,” and the norms that it engenders as, “mutual support, cooperation, trust, [and] institutional effectiveness.”²²⁰

Social capital theories have been used to understand community cohesiveness, as well as civic participation and engagement.²²¹ In his empirical research, Putnam found that greater levels of social capital are correlated with more active, engaged, and civic-minded citizens.²²² However, social capital theory applies with equal force to organizations,²²³ such as law firms.²²⁴ It suggests that healthy relationships between law firm associates indicates norms of trust and reciprocity between them, which, in turn, affects the level of social capital in the firm community.²²⁵

*268 Based on this understanding, improper social networking behavior could deplete social capital in a few ways. For one, it could damage trust between associates.²²⁶ The fear that one’s comments or mistakes will be shared online could very well stiffen interlawyer relationships, weakening the workplace bonds between associates.²²⁷ Moreover, as attorneys spend more of their downtime at work turned inward and online--to the social networking world--they spend less energy outward, toward strengthening their personal relationships with other associates.²²⁸ Facebook time has replaced water cooler time.²²⁹

This is problematic because a firm’s social capital is valuable to the firm.²³⁰ A solid supply of social capital is key to a productive law firm culture.²³¹ If unprofessional social media use reduces social capital, the firm’s working environment could become less efficient.²³² As Putnam writes, “Trustworthiness lubricates social life.”²³³ Applying that idea to the law firm setting, Kay and Hagan have found that “[i]n the practice of law, trust serves as a social lubricant in the work relations of firm lawyers.”²³⁴ Trust, after all, is the fabric of reciprocity, which establishes norms of mutual expectation and obligation in any community.²³⁵ At a firm, reciprocity can be specific, between individual attorneys,²³⁶ or generalized, between one attorney and the unknown other, encountered in the office sometime down the road.²³⁷ Related, are the concepts of thick and thin trust. Thick trust is “trust embedded in personal relations that are strong, frequent, and nested,” as compared to thin trust, which is “trust in the *269 ‘generalized other.’”²³⁸ Arguably, if the associate-to-associate bonds of thick trust are strong, then the firm community will also follow principles of generalized reciprocity or thin trust.²³⁹

Both types of bonds are important for maximizing firm productivity,²⁴⁰ though generalized reciprocity is perhaps the most valuable. Putnam notes, “A society characterized by generalized reciprocity is more efficient than a distrustful society” because “social networks and norms of reciprocity can facilitate cooperation for mutual benefit.”²⁴¹ Generalized reciprocity could also boost the firm’s competitive advantage. In Putnam’s view, communities that follow principles of generalized reciprocity have a “measurable economic advantage” over those that do not, due to the concomitant reduction in the “transaction costs” of life and business.²⁴² Thus, a combination of thick and thin trust, which flows horizontally and vertically in the firm hierarchy, will keep the firm humming.

Social capital is also important for a happy law firm culture.²⁴³ In the law firm setting, “[t]rust builds personal commitment to

the organization, and this in turn produces longer term loyalty.”²⁴⁴ It is also “an anchor for the cultural solidarity of the firm.”²⁴⁵ Trust, as a feature of social capital, is, therefore, critical to a law firm’s high morale and attorney retention. Research suggests that social capital might be particularly important for associate happiness and work satisfaction.²⁴⁶ As Kay and Hagan hypothesized, “The underlying foundation and durability of trust within firms may be particularly important in the career development of junior associates.”²⁴⁷ More empirical research would be needed to bear this out, but it is reasonable to conjecture that a firm with a *270 culture of trust and reciprocity is also one that is eager to mentor young attorneys and otherwise invest in their success.

Beyond the firm, behavior that depletes social capital between lawyers could ripple out to the public in general, diminishing its trust in the administration of justice.²⁴⁸ Just as bad manners disrupt the justice system--and so we punish or frown upon them²⁴⁹--so too does improper social media use.²⁵⁰ In fact, the risks that social networking misconduct poses to the justice system and the legal community at large exceed those posed by litigation related incivility.²⁵¹ Offline incivility-- attorneys’ rancorous conduct--is both “a public relations headache for the legal profession” and also threatens to “undermine public trust in the administration of justice.”²⁵² The same is true of unprofessional social media use, but the risks are magnified.²⁵³ Sharing negative or embarrassing comments about one’s co-workers on the Internet makes the profession look petty and impulsive, just as temper tantrums and hurling insults do.²⁵⁴ Yet, social media sharing, unlike explosive or insulting behavior, “can never truly be erased or deleted.”²⁵⁵ Further, “[t]he ability to preserve and replicate an Internet message or image for many years exacerbates the potential risks”²⁵⁶ of a deteriorating public image and an erosion of public trust that follows.²⁵⁷

2. Economic Incentives to Regulate

There are also strong economic reasons why the legal community, and law firms especially, should devote their attention to developing concrete guidance on social media use. The legal economy has undergone a “sea change” in the last several years, marked by a decline in demand for legal services and resulting layoffs.²⁵⁸ A 2011 report on the future of the legal profession by the New York State Bar Association stated that “[s]ince 2009 . . . the demand for legal services has been stagnant or has decreased. Many large law firms laid off attorneys, the average size of associate classes has decreased, and fewer associates have been promoted to the status of equity partner.”²⁵⁹ The year 2010 marked the second *271 consecutive year of a declining headcount in the National Law Journal annual survey of the nation’s 250 largest firms, at a 1.1% decline--an improvement over 2009’s reported 4% decline, but nonetheless the biggest two-year decline in the history of the National Law Journal survey.²⁶⁰

Admittedly, these economic trends are the product of a recession and will probably neutralize over the next few hiring cycles.²⁶¹ Even so, there are lasting impacts from the recession that seem here to stay.²⁶² Firms have come under pressure to trim excess, and clients are unlikely to accept the same number of hours billed to their accounts.²⁶³ To the extent that improper social media and social networking use decreases a lawyer’s productivity and dredges law firm resources, law firms will remain concerned about these issues.²⁶⁴ Associates should be equally keen to ensure their online activity is professional, not only to avoid layoff in the near term, but also to demonstrate their long-term value to the firm.

B. The ABA Model Rules of Professional Conduct

A good starting place for regulation is the Model Rules of Professional Conduct.²⁶⁵ A rule that is specific to social media and addresses the types of behavior outlined above could go far in filling the vacuum of guidance in these areas. It is important for the ABA to take the lead in rulemaking.²⁶⁶ Though the organization has addressed law firm websites and email through advisory opinions, it has not yet addressed social media.²⁶⁷ Others have expressed a similar hope for ABA guidance. Ross Fishman, CEO of Fishman Marketing, commented that “[t]he old rules should cover new media tools like Facebook and blogs, but it would be helpful if the ABA clarified this point directly.”²⁶⁸ Without a model rule to spur action, many state bars have similarly been slow to *272 provide clarification on social media and social networking issues, and merely tell their attorneys that the “regular rules still apply.”²⁶⁹ For example, when the new edition of the New York Rules of Professional Conduct went into effect on April 1, 2009, it did not mention social networking or any of its related problems.²⁷⁰ It is unclear whether social media will be included in newer versions of other states’ ethical codes without some impetus from the ABA.

An ABA rule is preferable to leaving regulation to individual firms and judges who could otherwise reprimand or fire wayward employees.²⁷¹ A Model Rule that is specific to social media use, but still broadly worded, will gain content as it is applied. These applications will generate fodder for advisory opinions, which local jurisdictions can then use to guide their

own applications of analogous rules.²⁷² Thus, a Model Rule and the local rules it inspires will not only set uniform expectations but also will clarify these expectations both now and over time as social media and social networks evolve.²⁷³ The effect is a profession-wide perspective shift toward viewing certain social media uses as unprofessional.²⁷⁴ By contrast, a micro, firm-level approach would create uneven standards across the profession, as policies would no doubt differ by firm culture, creating confusion for associates who move laterally and a weaker sense of what is unprofessional about social media use.²⁷⁵

In fashioning a model rule, there are some general points to bear in mind. First, the rule must be a compromise between the old and new generation of lawyers.²⁷⁶ Given the degree to which social media sites have permeated ***273** popular culture, an outright ban of them would be untenable and perceived as draconian.²⁷⁷ The drafters must consider the modern legal environment:

[T]oday's new lawyers have grown up with different expectations of privacy, and as a result have different reactions to how information is communicated online; [the ABA and] state bars will need to take this generational shift in thinking into account when considering whether new rules are necessary to cover the brave new world of social media.²⁷⁸

Another blogger cautions against implementation of social media policies by older generation lawyers "who have never used social media," and who may "write absurd policies that would be impossible to enforce in any event."²⁷⁹ It also bears emphasis that Facebook and Gchat are one of the main ways that people now stay in touch with friends and loved ones.²⁸⁰ Firms that expect employees to work lengthy hours should also allow for the appropriate work-life balance by accommodating attorneys who need to keep in touch while at the office.²⁸¹ A feasible rule, therefore, should reflect a balance of these interests.

Interest balancing is not only realistic, but will also account for the upsides to social media use and social networking,²⁸² which the ABA should not chill. For one, through social media participation, many lawyers have become more active in the legal community and their communities more generally.²⁸³ Jayne Navarre, a marketing expert who works with attorney websites, explains that employees like social media because "[i]t gives them a voice, one that used to be only available via a one-on-one conversation."²⁸⁴ Further, as their names suggest, the sites are, in fact, often good for professional development--"attorneys can build potential networks they could never hope to do in person through cocktail parties and receptions."²⁸⁵ Finally, properly consulted, social media is a good educational tool. Twitter is an example of this:

It's a way that, if you are the first to know about a legal development, the passage of legislation or a decision in a case and you post a Tweet about it, then your followers will say, "Hey, [she] is the first to know ***274** about this case. Let me call her and see if she knows how our company should react to this new legislation."²⁸⁶

The profession already uses social media and social networking sites for productive ends. As just a few examples, the Tennessee Supreme Court uses Twitter to give updates on opinions and other time-sensitive issues.²⁸⁷ The Tennessee Bar Association also uses Facebook to communicate with its lawyers.²⁸⁸ The Illinois Supreme Court also has a Twitter feed.²⁸⁹ As for blogging from the bench and bar, the New York State Bar Association Journal has a blog,²⁹⁰ and apparently even Justice Kennedy of the Supreme Court looks to law blogs for the latest legal scholarship.²⁹¹

1. A Survey of Existing Approaches

With these points in mind, we can gain perspective on the idea of a new model rule from various corners of the legal and professional communities. To begin, the approaches that law firms have taken, or have been advised to take, are instructive.²⁹² My sense is that, while most experts and firm managers believe that firms should have a policy in place,²⁹³ many firms still lack one. However, those policies that do exist, and are findable, address some of the professionalism concerns identified above.

The managerial and marketing community has voiced an urgency to develop policies.²⁹⁴ One professional notes this necessity:

If your law firm does not yet have a social-media policy, shame on your law firm. Law firms, like any other business, are accountable for the conduct of their employees. And employees are using social media. Ignoring this reality will not reduce your firm's exposure to risk. The only way to manage

exposure is to tackle it head on. And the best way ***275** to tackle social media is to educate employees about the firm's expectations with a well-drafted policy.²⁹⁵

Mayer Brown has likewise impressed this notion:

Organizations need to get on top of this trend now, rather than waiting for circumstances to force the issue. As with all new technologies, communications via Web 2.0 systems like social networking sites will be used by your organization, will be recognized by the courts, will be subject to regulation and will be sought in discovery. The best strategy for any organization is to proactively adapt to this evolution and invest in the proverbial "ounce of prevention."²⁹⁶

There are only a few publicly available firm policies or statements suggesting what the policy might be. Hogan Lovells acknowledges that "[c]ertain social media activities of employees create risks that may be unforeseen by the employee," including discussion of the company, if perceived to have the company's imprimatur, complaining about one's job, and inappropriate statements about other employees.²⁹⁷ One blogger, who does not identify her firm, reports that it has a policy that "concentrates . . . on making sure we comply with ethics standards for our jurisdictions when using these mediums."²⁹⁸ She describes a few highlights of her firm's policy:

1. The Internet is not anonymous, nor does it forget.
 2. There is no clear line between your work life & your personal life in these mediums. Always be honest & respectful in both capacities.
 3. Avoid hazardous materials--defamatory, harassing or indecent statements.²⁹⁹
- In general, therefore, although firms might not have a solid understanding of how to regulate social media use, they do sense the risks involved.³⁰⁰

***276** We can also gain insight from the judicial community. Judges have scrutinized the propriety of their own use of social media, blogs in particular, and have converged around the following principles: do not comment on pending matters or express opinions on issues that could lead to recusal, do not mix personal and professional, adhere to the ethical canons, and be mindful of security and safety issues.³⁰¹ A recent panel on Ethics in the Digital Age at the Third Circuit Judicial Conference provoked some discussion in the blogosphere about if, and how, law clerks should use social media and social networks.³⁰² One blogger had some comical advice, to which there is considerable truth. This person, a self-described judicial hopeful, said that he plans to tell his future law clerks the following:

I feel a little sorry for you. I came up just when e-mail and the Internet became established, we didn't have these social media tools, and unless someone saved your e-mail they would not be able to track you down the rest of your life. But this is an important moment in your transition from student to professional. It will certainly not be the last time you have to subordinate what you want to do online to what an employer-or CLIENT-would want to see. And you also need to think of it like this. If YOU are doing something online, to litigants before the court, it's like-I-am doing it.³⁰³

The Judicial Conference of the United States has also provided some useful social media specific hypotheticals. Under Canon 3 of the Code for Judicial Employees, which governs confidentiality, the Conference notes that a "status update" that "hints at the likely outcome in a pending case" or "comment[ing] on a blog" to the same effect would run amiss of that Canon.³⁰⁴ Under Canon 1, "A judicial employee should uphold the integrity and independence of the judiciary and of the judicial employee's office."³⁰⁵ Here, the Conference suggests that posting messages or comments that are unfavorable to or negative about a law firm or counsel's competence could suggest special access or favoritism.³⁰⁶

***277** The District of Rhode Island has issued a policy specific to that court, which offers employees some "broad guidelines" to follow.³⁰⁷ One such guideline advises employees to use common sense and to "[t]hink before you post," keeping in mind that nothing is really private.³⁰⁸ It proposes a "simple rule: if you are not speaking to someone directly or over a secure

landline, you must assume that anything you say or write is available for public consumption.”³⁰⁹ Court personnel are also reminded to speak for themselves, not the institution.³¹⁰ Specifically, the policy notes that listing your employment underscores that you are a representative of the Court and, therefore, you should not “bring[] embarrassment upon yourself and/or the Court” with pictures and posts.³¹¹ The general message of the Rhode Island policy is to behave appropriately and with dignity, which means not speaking about internal processes, including those of a nonconfidential nature, and refraining from political or partisan activity that could raise questions about the court’s independence.³¹²

Finally, there is value in considering how other sectors have handled employees’ use of social media and social networking.³¹³ Of particular note is the media industry, where confidentiality has a similarly strong influence on the rules of ethics and norms of professionalism.³¹⁴ The Wall Street Journal recently gave its staff social networking rules.³¹⁵ These include prohibitions on disparaging “the work of colleagues or competitors,” or aggressive self-promotion, and “[a]ll postings on Dow Jones sites that may be controversial or that deal with sensitive subjects” before clearing the post.³¹⁶ They urge that “[c]ommon sense should prevail, but if you are in doubt about the appropriateness of a Tweet or posting, discuss it with your editor before sending.”³¹⁷ In a similar vein, Reuters’s 2010 social media policy proscribes their journalists from breaking news on Twitter.³¹⁸

***278** These approaches, considered together with the four aspects of the professionalism problem identified in Part III, provide a solid basis for outlining the contours of a model rule.

2. An Outline of a Rule

Based on the foregoing, there are four specific types of social media use or social networking conduct that should be addressed in any model rule: (1) status updates or away messages; (2) posting links or comments, sending articles, and sending event invitations; (3) publishing stories or ideas; and (4) sharing identifying information.

a. Status Updates and Away Messages

Facebook allows users to continuously update their “status,” a feature used to tell friends what the user is doing at any given time.³¹⁹ Similarly, people post “away messages” in Gchat for the same purpose.³²⁰ Because these constant updates have the potential to share matters being worked on-- cases under consideration, or a co-worker’s latest morning gaffe--the rule should address their use. Attorney-users should be warned that sharing work information, regardless of whether confidences are exposed, is unprofessional.³²¹ Innuendo about co-workers is similarly so, even if the brief message would only be considered mildly embarrassing.

b. Links, Comments, Articles, Invites

Here, the danger to professionalism is that a lawyer’s endorsement of events, organizations, or viewpoints could be attributed to the law firm or judge.³²² A firm associate should be careful not to suggest endorsement or communication with an adverse party or ruling.³²³ One can imagine a scenario in which a lawyer ***279** blogs a positive post about a recent opinion, much to the dismay of a firm client who was adversely affected by the ruling.

Federal judicial law clerks are not supposed to participate in partisan political activities.³²⁴ Accordingly, it seems inappropriate for a law clerk to post on Facebook both his position with a court and specific judge and his political party affiliation or position on the political spectrum--liberal or conservative. Likewise, endorsing candidates on Facebook or sending and posting invitations to partisan political fundraisers casts doubt on a chamber’s political independence.³²⁵³²⁷

c. Posting Stories and Responsive Comments

The concern with publication-type social media use and social networking is the divulgence of proprietary information, particularly that which is nonconfidential but sensitive and shared on the basis of firm-attorney trust.³²⁶ Additionally, lawyers should be admonished not to vent about work or air the firm’s problems. Gossip blogging should also be frowned upon.³²⁷

d. Identifying Information

The extent to which a lawyer may share the firm name, court, and judge for whom he works should be addressed. How much detail an attorney may share about his employer will likely be a function of how far the rule restricts the above forms of sharing and connecting.³²⁸

***280** In sum, the ABA's drafting, circulation, and implementation of a rule that targets the unprofessional ways in which lawyers use social media would serve an important gap filling function and halt the consequences of unprofessional social networking outlined above. Over time, the application of a model rule to specific scenarios and subsequent publication of advisory opinions would further solidify the lawyer's duty to use social media and social networks professionally. In addition to the rule-based approach, it is also important for the legal community to focus on norm-shifting. Where social media and social networking is concerned, that process should begin in law school.³²⁹

C. Teaching Social Media Norms

Professionalism standards are not comprised of rules alone--social norms are also an important part of them.³³⁰ Generally speaking, "[g]roups use norms to set a standard of ordinary or expected behavior."³³¹ As one scholar wrote, "social organization and, in particular, community norms are almost always more important influences on individual conduct than formal rules."³³²

For young lawyers, uninhibited social networking is currently the norm.³³³ The newest wave of attorneys to hit the legal market is the first to have gone through college with Facebook.³³⁴ Gmail and Gchat were also launched during these lawyers' college years.³³⁵ Young lawyers are therefore accustomed to the ***281** "casual, personal use"³³⁶ of social media and social networking and, at least according to one ethics professor, are "initially . . . unaware of the consequences of using social-networking sites and the responsibilities of a lawyer."³³⁷ The casual attitude toward social networking is left to thrive in law school, where there is often a lack of emphasis on professionalism in general.³³⁸

1. Pedagogy

Law schools could reverse the nonchalant attitude toward social media by incorporating social media issues into their professionalism curricula. One component of a norm-shifting strategy should, therefore, be pedagogical. That recommendation begs the question of how to teach professional norms of social networking.

Law schools have varied approaches to teaching legal ethics and professionalism, including clinical programs, mentor programs, lectures and seminars, and coursework.³³⁹ As one important scholar on the pedagogy of ethics and professionalism notes, nearly all professional responsibility training has two objectives:

1) [T]o increase students' understanding of ethical problems and of regulatory responses, including relevant codes, doctrine, and committee decisions.

2) [T]o broaden and deepen individuals' understanding of professional roles. . . . [t]hrough cross-professional, cross-cultural, and interdisciplinary materials [so that] students can explore the merits of particular occupational norms and regulatory structures.³⁴⁰

Because code-based guidance and regulatory responses have yet to develop in the area of social networking and social media use,³⁴¹ a good pedagogical starting point is with the second objective. Law schools should consider how they might create a more self-reflective sense among students of how social media use can be unprofessional.³⁴²

***282** Social media and social networking use pose a niche set of professionalism problems, so integrating these topics into schools' current professionalism training could prove difficult at first. In general, there are recognized challenges to the success of academic efforts to teach professionalism,³⁴³ and expanding programs seems an uphill battle at many institutions.³⁴⁴ One author wrote that "professional responsibility is the 'dog of the law school [curriculum]--hard to teach, disappointing to take, and often presented to vacant seats or vacant minds."³⁴⁵ However, instruction regarding professionalism in social media might be better received. The professionalism issues associated with social media and social networking use are relevant to law students' lives in ways that other legal ethics and professionalism issues are not yet.³⁴⁶ Students will more readily see the practical applications and find it easier to draw connections between the problem and the solution than they might in other

standard courses.³⁴⁷ New programs on social media use could, therefore, avoid some of the abstractness that has made teaching professionalism difficult in the past.³⁴⁸

Rather than rearranging current syllabi to address these topics, an alternative way to introduce the topic is through a mandatory orientation program.³⁴⁹ There is already some traction for such programs. As of 2006, eighty percent of schools had a professionalism orientation.³⁵⁰ Some used lecture format (85%), some small discussion groups (61%), and some used panels (42%).³⁵¹ Also, many schools use hypotheticals in their professionalism orientation and sixty-four percent distributed professionalism codes.³⁵² An orientation session in any of these formats, and probably most usefully with some use of hypothetical social networking issues, would raise awareness of the issue in the beginning of students' law school experience.³⁵³ As an isolated training session, an orientation program could be a smoother way of adding social media and social networking topics into the professionalism curricula. Orientation programs could also be more impactful than a one-off session on social media issues in a course otherwise dedicated to the rules of ethics or more traditional ethical dilemmas. Ideally, the program would be mandatory for all students.³⁵⁴ As Rhode noted, the benefit of mandatory training in professionalism is that it ***283** forces students to think about "what kind of [professionals] [they] want to be and what kind of profession [they] want to serve."³⁵⁵

2. Policy

A second component of a law school's norm-shifting strategy is applied through effective law school policies on professionalism.³⁵⁶ Developing, publishing, and enforcing policies that govern law students' use of social media and social networking is key.³⁵⁷ As the ABA noted in its survey of law school policies on conduct and integrity, "[i]t is important for students who are preparing to be part of the legal profession to learn to accept the full responsibilities that are entailed in such participation and the ramifications for not adhering to those responsibilities."³⁵⁸

The College of Law at West Virginia University has such a policy.³⁵⁹ It "encourage[s] students to use [social media] as a professional tool, [and] educate[s] them about etiquette, ethics and best practices. [The University] seek[s] to model how social networking can contribute to a professional public presence by using it to communicate with the world."³⁶⁰ Harvard Law School also has a policy in place, though its concern is more so with the use of the Harvard domain name for publishing blogs and websites and less so the question of whether social media use is professional.³⁶¹ Regardless of the policy, it should be applied and enforced through the use of review boards, which include student members, and be subject to an appeals process, to mimic the type of regulatory responses students will see as members of the professional bar.³⁶²

Overall, inculcating professional norms for social media use will, ideally, ease students' transition from academia to the regulated profession, avoiding incidence of misunderstanding or censure in their early careers.³⁶³ In those jurisdictions that adopt a rule without disciplinary capability, norm-shifting is an especially important goal for law schools because, with solid norms in place, the new attorneys that they train will be more likely to adjust their conduct. As with many social norms, actors might come to "obey [them] even when they would ***284** suffer no adverse consequences if they did not."³⁶⁴ If a lawyer "who violates a norm can expect to suffer a range of external but nonlegal sanctions, including loss of reputation as well as raised eyebrows, disparaging remarks, and other social 'punishments,'" then this could be an effective way to incentivize her to forgo questionable online behavior.³⁶⁵ Indeed, "[a]ttorneys and judges have a wide variety of tools for punishing norm violations. Negative gossip is invariably documented as a sanction."³⁶⁶ Because "[r]eputation and credibility are a form of social capital that can make a substantial difference to the attorney's material well-being,"³⁶⁷ such a soft sanction will go far in reining in unprofessional social media use.

V. Conclusion

This Article demonstrates how attorneys' use of social media and social networking implicates their professionalism. It argues that our current standards of professionalism, and the ethical rules on which they lean, are inadequate to curtail unprofessional social media use and social networking. But, for better or for worse, we live in the Facebook age. Unregulated, these tools pose risks to our professionalism. However, with proper guidance, they can be powerful and productive tools for the legal community.

Footnotes

^{a1} A.B. Princeton University, 2006; J.D. Yale Law School, 2010. Ms. Skinner was awarded the 2011 American Inns of Court Warren E. Burger Prize for this Article.

¹ See Press Release, Pew Internet & Am. Life Project, Social Media and Young Adults (Feb. 3, 2010), available at <http://www.pewinternet.org/Press-Releases/2010/Social-Media-and-Young-Adults.aspx> (“People under 30 have often been in the vanguard of internet and cell-phone use...” (internal quotation marks omitted)).

² See David Carr, Keep Your Thumbs Still When I’m Talking to You, N.Y. Times, Apr. 17, 2011, at ST1, available at <http://www.nytimes.com/2011/04/17/fashion/17TEXT.html?ref=fashion>.

³ See Judicial Conference Comm. on Codes of Conduct, Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees 5 (2010) [hereinafter Judicial Conference, Resource Packet], available at <http://uscourts.gov/uscourts/RulesAndPolicies/conduct/SocialMediaLayout.pdf>.

⁴ The Linked-in Lawyer: How Lawyers Are Using Social Networks, ABA Book Briefs Blog (June 11, 2010), <http://www2.americanbar.org/publishing/bookbriefsblog/Lists/Posts/Post.aspx?ID=161> (briefing results of the 2010 ABA Legal Technology Survey Report: Web and Communication Technology). Commentators have noted the coincidence between digital devices, social networking sites, and the general decline in American civility. See, e.g., Kerry Howley, Individualism Interrupted Your Speech, Taylor Swift!, Slate (Sept. 16, 2009, 10:53 AM), http://www.slate.com/blogs/xx_factor/2009/09/16/david_brooks_on_the_decline_of_civility.html (discussing the “death of all that is good and humble in this world” and the rise of “expressive individualism”). The professional community has not escaped this trend. See, e.g., Sue Shellenbarger, Texting During Meetings, the Decline of Civility, Wall St. J. The Juggle (May 24, 2010, 7:00 AM), <http://blogs.wsj.com/juggle/2010/05/24/texting-during-meetings-the-decline-of-civility> (discussing how constant texting and emailing has effected professional environments). Commentators have also discussed at length the decline of civility in politics. See, e.g., Barbara Basler, The Decline of Civility and Why It Matters, AARP Bulletin (Sept. 16, 2009), http://www.aarp.org/politics-society/government-elections/info-09-2009/the_decline_of_civility_and_why_it_matters.html (discussing civility in connection with Congressman Joe Wilson’s outburst of “You lie!” during President Obama’s speech to Congress on health care).

⁵ See Model Rules of Prof’l Conduct R. 1.6 & cmt. 2 (2010).

⁶ See id.

⁷ See id.

⁸ See, e.g., Steven W. Kasten, Professional Ethics and Social Media, Bos. B.J., Summer 2011, at 40, 40 (noting the application of professional ethics rules to social networking). Others have discussed the ethics of social networking. See, e.g., Steven C. Bennett, [Ethics of Lawyer Social Networking](#), 73 Alb. L. Rev. 113, 114 (2009) (discussing “ethics issues lawyers may face when they use social networking tools”); Angela O’Brien, Note, [Are Attorneys and Judges One Tweet, Blog or Friend Request Away from Facing a Disciplinary Committee?](#), 11 Loy. J. Pub. Int. L. 511, 512 (2010) (examining “the current ethics rules for attorneys and judges and explain[ing] why it is unnecessary to create new rules that address social media”).

⁹ See, e.g., Bennett, *supra* note 8, at 116 (focusing on the ethics of social networking but not the professionalism aspects).

¹⁰ See generally Shellenbarger, *supra* note 4 (discussing how social media has affected the way professionals act).

¹¹ The specific ethical issues implicated by social media, including discovery or investigation abuse, improper marketing and

advertising, and juror use, are beyond the scope of this paper. For a sampling of the scholarship on those issues, see Kathleen Elliott Vinson, [The Blurred Boundaries of Social Networking in the Legal Field: Just “Face” It](#), 41 U. Mem. L. Rev. 355, 389-93, 395-96, 402-04 (2010). Also, with respect to evidentiary issues, compare Ass’n of the Bar of the City of New York Comm. on Prof’l Ethics, Formal Op. 2010-2 (2010), available at <http://www.abcnyc.org/pdf/report/uploads/20071997-FormalOpinion2010-2.pdf> (finding that “a lawyer may not use deception to access information from a social networking webpage”), with Phila. Bar. Ass’n Prof’l Guidance Comm., Formal Op. 2009-2 (2009), available at http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf (finding that the use of social media by the third party’s inquirer to communicate with and obtain information from a witness’s social networking account is “deceptive”). With respect to advertising, the Wall Street Journal reported last year that “[l]aw firms, particularly those that represent plaintiffs, are increasingly devoting resources to developing a presence online, where consumers--and potential clients--congregate. And some of those firms are also creating news sites...with content created by employees.” Nathan Koppel, [Using Social Networking as Legal Tool](#), Wall St. J., June 15, 2010, at B4, available at <http://online.wsj.com/article/SB10001424052748704324304575306581598351>.

¹² Though I sometimes refer only to “social media” or “social networking” in the remainder of this Article, for ease of reference I generally use the terms interchangeably.

¹³ See James A. George, [The “Rambo” Problem: Is Mandatory CLE the Way Back to Atticus?](#), 62 La. L. Rev. 467, 472 (2002) (quoting Frank X. Neuner, Jr., [Professionalism: Charting a Different Course for the New Millennium](#), 73 Tul. L. Rev. 2041, 2042-43 (1999)).

¹⁴ See Judicial Conference, Resource Packet, *supra* note 3, at 5-6.

¹⁵ See *supra* note 11 and accompanying text; Catherine M. Stone et al., [Civility in the Legal Profession: A Survey of the Texas Judiciary](#), 36 St. Mary’s L.J. 115, 128 tbl. (2004). In general, there is much written “about the collapsing image of the legal profession.” George, *supra* note 13, at 483-84 (referencing examples, other scholarship, and ABA studies); see also Joseph J. Ortego & Lindsay Maleson, [Under Attack: Professionalism in the Practice of Law](#), Nixon Peabody (Mar. 20, 2003), http://www.nixonpeabody.com/publications_detail3.asp?ID=303#ref15 (discussing that incivility “comes in many different forms”). Bronson Bills gives as examples of unprofessional or uncivil behavior “foul and profane language,...dilatatory or ‘Rambo’ tactics, name-calling, and other belligerent behavior.” Bronson D. Bills, [To Be or Not to Be: Civility and the Young Lawyer](#), 5 Conn. Pub. Int. L.J. 31, 32 (2005). He notes that “[o]ther uncivil conduct includes sarcastic or terse questions by counsel or the judge; head shaking and pained facial expressions during opposing counsel’s arguments; hardball, slash and burn tactics; and sarcastic, vituperative, scurrilous, or other disparaging remarks.” *Id.* at n.4.

¹⁶ George, *supra* note 13, at 472 (quoting Neuner, *supra* note 13, at 2043).

¹⁷ Roscoe Pound, [The Lawyer from Antiquity to Modern Times](#) 5 (1953).

¹⁸ Philip C. Kissam, [The Decline of Law School Professionalism](#), 134 U. Pa. L. Rev. 251, 256(1986).

¹⁹ Mark Neal Aaronson, [Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism](#), 8 St. Thomas L. Rev. 113, 120 (1995).

²⁰ John E. Montgomery, [Incorporating Emotional Intelligence Concepts into Legal Education: Strengthening the Professionalism of Law Students](#), 39 U. Tol. L. Rev. 323, 331 (2008); see also W. Bradley Wendel, [Morality, Motivation, and the Professionalism Movement](#), 52 S.C. L. Rev. 557, 560 (2001).

²¹ See Montgomery, *supra* note 20, at 330 (quoting Am. Bar Ass’n Comm’n on Professionalism, [“...In the Spirit of Public Service:” A Blueprint for the Rekindling of Lawyer Professionalism](#) (1986), reprinted in 112 F.R.D. 243, 261-62 (1986)), available at

http://www.abanet.org/cpr/professionalism/Stanley_Commission_Report.pdf. [hereinafter ABA Comm'n on Professionalism].

- ²² See *id.* (quoting ABA Comm'n on Professionalism, *supra* note 21, at 261-62) (identifying self-regulation as one of the defining features of the profession “that is organized in such a way as to assure the public and the courts that its members are competent, to not violate the client’s trust and transcend their own self interest”).
- ²³ George, *supra* note 13, at 472-73 (quoting Michael H. Rubin, *Mistaking Professionalism for Something that It Is Not*, Paul M. Hebert Center Alumni Seminar 1-2 (Oct. 8, 1999) (transcript on file with James A. George)).
- ²⁴ See, e.g., Wendel, *supra* note 20, at 560 (noting that “professionalism is susceptible of a wide range of definitions”).
- ²⁵ See Model Rules of Prof'l Conduct Preamble P 7 (2010).
- ²⁶ See Neuner, *supra* note 13, at 2043.
- ²⁷ See *id.* at 2042 (“Professionalism is not comprised of a single trait or attribute, but is instead a combination of elements.”).
- ²⁸ See *id.* at 2042-43 (noting the distinctions between professionalism and ethics).
- ²⁹ See *id.* (describing professionalism as “what we should have learned in kindergarten”).
- ³⁰ *Id.*
- ³¹ See, e.g., *Evanoff v. Evanoff*, 418 S.E.2d 62, 63 (Ga. 1992) (discussing how “courts throughout this country have sought to encourage professionalism among lawyers”).
- ³² *Id.* (internal quotation marks omitted) (quoting Chief Justice Clarke without citing to any particular authority for the quote).
- ³³ Aaronson, *supra* note 19, at 115 (internal quotation marks omitted) (quoting [Final Report of the Comm. on Civility of the Seventh Fed. Judicial Circuit](#), 143 F.R.D. 441, 448 (1992) [hereinafter Final Report]).
- ³⁴ *Id.* (quoting Final Report, *supra* note 33, at 446).
- ³⁵ See *Revson v. Cinque & Cinque, P.C.*, 70 F. Supp. 2d 415, 435 (S.D.N.Y. 1999), *rev'd in part*, 221 F.3d 71 (2d. Cir. 2000) (noting that “[a] number of ‘civility’ codes have been adopted...[which] are aspirational in nature”). Though some might question “what’s in a name,” others may find it illustrative that the D.C. Bar’s promulgated code is entitled Voluntary Standards of Civility in Professional Conduct. Voluntary Standards of Civility in Prof'l Conduct, D.C. Bar, http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/voluntary_standards_for_civility/index.cfm (last visited Oct. 24, 2011). Further, the Florida Bar has published Ideals and Goals of Professionalism. Ideals and Goals of Professionalism, Fla. Bar, <http://www.floridabar.org/tfb/TFBProfess.nsf/5d2a29f983dc81ef85256709006a486a/deafda73c03233e985256b2f006ccd5e?OpenDocument> (last visited Oct. 24, 2011). Moreover, Georgia’s civility code is called Lawyer’s Creed and Aspirational Statement on Professionalism. Lawyer’s Creed and Aspirational Statement on Professionalism, State Bar of Ga., http://www.gabar.org/related_organizations/chief_justices_commission_on_professionalism/lawyers_creed (last visited Oct. 24, 2011).
- ³⁶ Aaronson, *supra* note 19, at 114-15 (footnote omitted).

³⁷ See *id.* at 115-16.

³⁸ See Barry Sullivan & Ellen S. Podgor, [Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment](#), 15 *Notre Dame J.L. Ethics & Pub. Pol'y* 117, 118-119 (2001).

³⁹ See generally Am. Bar Ass'n Standing Comm. on Professionalism, *Report on a Survey of Law School Professionalism Programs 54* (2006) [hereinafter ABA Survey] available at http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/LawSchool_ProfSurvey.authcheckdam.pdf (summarizing survey results for professionalism courses and encouraging law schools to “offer more than just the basic professional responsibility course”). Of the forty-one schools surveyed, ninety-three percent of the mandatory ethics courses covered more than just the basic rules, also including instruction on the “philosophical foundation of our legal system,” “natural law,” and “faith based values.” *Id.* at 69-70.

⁴⁰ Deborah L. Rhode, [Ethics by the Pervasive Method](#), 42 *J. Legal Educ.* 31, 41 (1992).

⁴¹ *Id.*

⁴² See *id.*

⁴³ Model Rules of Prof'l Conduct R. 1.6 (2010).

⁴⁴ *Id.* at R. 3.3.

⁴⁵ *Id.* at R. 1.8-11.

⁴⁶ *Id.* at R. 1.15.

⁴⁷ See Bennett, *supra* note 8, at 114.

⁴⁸ See sources cited *supra* note 11.

⁴⁹ See Neuner, *supra* note 13, at 2042 (discussing that “[p]rofessionalism is not comprised of a single trait or attribute, but is instead a combination of elements”).

⁵⁰ See, e.g., Bills, *supra* note 15, at 32 (discussing belligerent behavior by attorneys).

⁵¹ See, e.g., Stone et al., *supra* note 15, at 127-28 (survey results showing that around fifteen percent of attorneys display this type of incivility).

⁵² See Vinson, *supra* note 11, at 356 (“The growing use of social networking is explosive in the legal field.”).

⁵³ Judicial Conference, *Resource Packet*, *supra* note 3, at 27.

⁵⁴ N.Y. State Advisory Comm. on Judicial Ethics, Op. 08-176 (2009), available at <http://www.nycourts.gov/ip/judicialethics/opinions/08-176.htm>.

⁵⁵ See id. (“[S]ocial networks generally allow users to reconnect with friends and family, discuss common interests, share photographs, and play games with each other.”).

⁵⁶ Theodore W. Ullyot, Vice President & Gen. Counsel, Facebook, Remarks at the Third Circuit Judicial Conference: Panel Discussion on Ethical Considerations in the Digital Age (May 5, 2011).

⁵⁷ Id.; see also Vinson, *supra* note 11, at 361.

⁵⁸ Ethan Zelizer, Embracing and Controlling Social Media in the Workplace, *CBA Rec.*, Oct. 2010, at 52, 53 (describing Facebook).

⁵⁹ Id.

⁶⁰ Id. (describing MySpace).

⁶¹ Id. (describing LinkedIn).

⁶² Id.

⁶³ See generally Judicial Conference, Resource Packet, *supra* note 3, at 12 (discussing the general concept of a “threaded discussion”).

⁶⁴ See Jennifer J. Rose, The Blog Spot, *Internet L. Researcher*, Nov. 2006, at 9, 9, available at Westlaw, 11 No. 10 GLILR 9, (“[M]ore than 6% of all lawyers now have blogs, adding some 1.2 million blog posts each day to the ether, driving some 57% of lawyers to read at least one blog a day.”).

⁶⁵ Zelizer, *supra* note 58, at 53.

⁶⁶ See Joshua Landau & Kate Willcox, [Within the Law: Dealing with Non-Confidential Sensitive Information in the Age of Online Legal Tabloids](#), 23 *Geo. J. Legal Ethics* 667, 667 (2010) (calling legal blogs a “common source of industry information”).

⁶⁷ See Zelizer, *supra* note 58, at 53.

⁶⁸ See Landau & Willcox, *supra* note 66, at 667 (“Blogs such as Above the Law post information about law firms and law schools that they receive from anonymous tipsters....” (footnote omitted) (citing Above the Law, [http:// www.abovethelaw.com](http://www.abovethelaw.com) (last visited Sept. 30, 2011))).

⁶⁹ See id. at 674 (“Legal blogs, particularly tabloids and gossip blogs such as Above The Law, may not always cast aspects of the profession in the most flattering light.”). I note that there is a wide variety of legal blogs that discuss substantive legal developments. As those do not appear to implicate professionalism in the same way that an attorney’s personal blog or Above the Law does, I do not discuss them.

⁷⁰ Zelizer, *supra* note 58, at 53.

⁷¹ Jonathan Turley, Florida Supreme Court Upholds Sanction Against Lawyer Who Called Judge a “Witch” on a Blog, JonathanTurley.org (Sept. 30, 2009), <http://jonathanturley.org/2009/09/30/florida-supreme-court-upholds-sanction-against-lawyer-who-called-judge-a-witch-on-a-blog>.

⁷² See Zelizer, *supra* note 58, at 53.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Judicial Conference, Resource Packet, *supra* note 3, at 12.

⁷⁶ *Id.*

⁷⁷ See, e.g., How the World Views Law School, YouTube (Apr. 4, 2007), http://www.youtube.com/watch?gl=US&feature=related&hl=iw&v=e_yDaYy5AHY; PDA in the Law School, YouTube (Feb. 16, 2010), <http://www.youtube.com/watch?v=bvMgqa-VQA4>.

⁷⁸ See, e.g., Zelizer, *supra* note 58, at 53 (“From 2008 to 2009, Facebook grew 228% to add 65.7 million new users.”).

⁷⁹ See Ulyyot, *supra* note 56; see also Nicholas Carlson, Goldman to Clients: Facebook Has 600 Million Users, MSNBC.com (Jan. 5, 2011), http://www.msnbc.msn.com/id/40929239/ns/technology_and_science-tech_and_gadgets/t/goldman-clients-facebook-has-million-users/ (noting that Goldman Sachs announced to its clients that Facebook has 600 million users). As of October 21, 2011, the Facebook statistics page shows that Facebook now has more than 800 million active users. Statistics, Facebook, <http://www.facebook.com/press/info.php?%20statistics> (last visited Oct. 21, 2011, 3:36 PM).

⁸⁰ See Ulyyot, *supra* note 56.

⁸¹ Zelizer, *supra* note 58, at 53-54.

⁸² Helen Hirschbiel, A Word of Caution: Social Media for Lawyers, Or. St. B. Bull., Nov. 2009, at 9, 9, available at <http://www.osbar.org/publications/bulletin/09nov/barcounsel.html> (citing Leader Networks, 2009 Networks for Counsel Study: A Global Study of the Legal Industry’s Adoption of Online Professional Networking, Preferences, Usage and Future Prediction 10, 12-13 (2009), available at http://www.leadernetworks.com/documents/Networks_for_Counsel_2009.pdf).

⁸³ Facebook’s Growth Exceeds Expectations-WSJ, Reuters (May 1, 2011), <http://www.reuters.com/article/2011/05/02/facebook-wsj-idUSN0117780720110502> (noting that as of May 2011, Facebook was on track for a \$100 billion valuation when it goes public).

⁸⁴ See Zelizer, *supra* note 58, at 53.

85 Id. at 54.

86 Id. at 53.

87 Helen A.S. Popkin, *Twitter Gets You Fired in 140 Characters or Less*, MSNBC.com (Mar. 23, 2009, 8:15:51 PM), <http://msnbc.msn.com/id/29796962> (internal quotation marks omitted).

88 Id. (internal quotation marks omitted).

89 Id.

90 Facebook Post Gets Worker Fired, ESPN.com (Mar. 9, 2009), <http://sports.espn.go.com/nfl/news/story?id=3965039> (first alteration in original).

91 Id.

92 Turley, *supra* note 71.

93 See John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. Times, Sept. 13, 2009, at 1, available at <http://www.nytimes.com/2009/09/13/us/13lawyers.html>.

94 Suzanne Craig Robertson, *Social Media Is Calling. How Should Lawyers Answer?*, Tenn. B.J., Mar. 2011, at 16, 17 (quoting Lucian Pera, a partner with Adams and Reese LLP in Memphis, TN) (internal quotation marks omitted).

95 See Judicial Conference, *Resource Packet*, *supra* note 3, at 6; Carrie Pixler & Lori A. Higuera, *Social Media: Ethical Challenges Create Need for Law Firm Policies*, Ariz. Att’y, Apr. 2011, at 35, 36 (“Because of the impersonal nature of social media, people are more willing to share intimate life details about themselves with others online, to a greater extent than they would share in a face-to-face encounter.”).

96 Judicial Conference, *Resource Packet*, *supra* note 3, at 6.

97 *Civility in America: A Nationwide Study*, Weber Shandwick, 4 (2010), http://www.webershandwick.com/resources/ws/flash/WS_Civility_Study_Social_Media_Exec_Summary_6_10.pdf.

98 One author has described the “hallmarks of social networking” as “permanence, searchability, replicability, transformability, and unintended audiences.” Vinson, *supra* note 11, at 369.

99 See Judicial Conference, *Resource Packet*, *supra* note 3, at 5-6.

100 See *supra* text accompanying notes 93-94.

101 Though in this Part I often refer to the “firm,” I include within this term attorneys working in judicial chambers since one major focus of this Article is the conduct of young attorneys working as associates or law clerks.

- ¹⁰² See, e.g., Judicial Conference, Resource Packet, *supra* note 3, at 5 (“Use of social media also raises ethical, security, and privacy concerns for courts and court employees.”).
- ¹⁰³ See Robertson, *supra* note 94, at 18 (quoting Lucian Pera, a partner with Adams and Reese LLP in Memphis, TN).
- ¹⁰⁴ See Landau & Willcox, *supra* note 66, at 667 (stating that there are “no binding ethical rules prohibiting the anonymous submission of internal communications or office gossip to legal blogs”).
- ¹⁰⁵ See generally Vinson, *supra* note 11, at 405-06 (suggesting that legal employers develop a social networking policy that prohibits disclosure of information beyond confidential materials).
- ¹⁰⁶ See generally *id.* (“Policies should also set forth a non-exhaustive listing of examples of prohibited conduct.”).
- ¹⁰⁷ Associate Bonus Watch 2010, Above the Law, [http:// abovethelaw.com/associate-bonus-watch-2010](http://abovethelaw.com/associate-bonus-watch-2010) (last visited Oct. 21, 2011).
- ¹⁰⁸ Associate Salaries, Above the Law, [http:// abovethelaw.com/associate-salaries](http://abovethelaw.com/associate-salaries) (last visited Oct. 21, 2011).
- ¹⁰⁹ See Ian Shapira, No Objections Here, Wash. Post, July 24, 2007, at B1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/23/AR2007072301890.html>.
- ¹¹⁰ Email Scandals, Above the Law, <http://abovethelaw.com/email-scandals> (last visited Oct. 21, 2011).
- ¹¹¹ Kashmir Hill, Summer Associate Etiquette 101: Share Your Bottle of Wine, Above the Law (Aug. 9, 2010, 10:58 AM), <http://abovethelaw.com/2010/08/summer-associate-etiquette-101-share-your-bottle-of-wine>; Elie Mystal, Akin Gump Summers Ice Some Bros, Above the Law (July 27, 2010, 12:26 PM), <http://abovethelaw.com/2010/07/akin-gump-summers-ice-some-bros>.
- ¹¹² The site’s focus on law firms is evident from the design of its home page, which includes sections for both “Big Law” and “Small Law Firms,” but none for judicial offices. See Above the Law, <http://abovethelaw.com> (last visited Oct. 21, 2011).
- ¹¹³ Judicial Conference, Resource Packet, *supra* note 3, at 15.
- ¹¹⁴ See *id.* (implying such a taboo in Canon 1).
- ¹¹⁵ Edward Lazarus’s book, *Closed Chambers*, was considered a daring break with this informal taboo. See Edward Lazarus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* 27 (1998); see also Alex Kozinski, *Conduct Unbecoming*, 108 *Yale L.J.* 835, 835 (1999) (discussing how Lazarus’s book disclosed more than what a law clerk should); Evan Fray-Witser, The End of a Gag Order: A Former US Supreme Court Clerk Breaks a Taboo and Tells a Few Unflattering Tales out of Chambers, *Bos. Globe*, Apr. 19, 1998, at N1, available at http://www.boston.com/globe/search/stories/books/edward_lazarus.htm.
- ¹¹⁶ See *supra* text accompanying notes 107-112.
- ¹¹⁷ See *Restatement (Third) of Agency* §8.05(2) & cmt. c (2006).

- 118 Id. §1.01 cmt. c (“The elements of common-law agency are present in the relationship[] between employer and employee....”).
- 119 Id. §8.01.
- 120 Id.
- 121 Restatement (Third) of Employment Law §8.01 (Tentative Draft No. 4, 2011).
- 122 Gordon Smith, In Defense of Loyalty, Conglomerate (May 18, 2011), <http://www.theconglomerate.org/2011/05/in-defense-of-loyalty.html> (quoting Restatement (Third) of Employment Law §8.01 (Tentative Draft No. 4, 2011)) (internal quotation marks omitted).
- 123 [Restatement \(Third\) of Agency §8.05 \(2006\)](#).
- 124 Id. §8.05 cmt. b.
- 125 Id. §8.05 cmt. c.
- 126 See Landau & Willcox, *supra* note 66, at 667.
- 127 Smith, *supra* note 122 (citing American Law Institute Reporter Samuel Estreicher).
- 128 Id.
- 129 See Kasten, *supra* note 8, at 40-41.
- 130 See How Do I Edit My Employers on My Profile?, Facebook, <http://www.facebook.com/help/?faq=212641962091249> (last visited Oct. 22, 2011).
- 131 See *id.*; see also Vinson, *supra* note 11, at 362-63 (noting Facebook users’ urge to provide too much information on their profiles).
- 132 See Kimberly A. Knox & Brendon P. Levesque, [Professional Responsibility Review 2009](#), 84 Conn. B.J. 227, 246 (2010).
- 133 See Zelizer, *supra* note 58, at 55-56. For this Article, I have crafted the terms “direct posting” to refer to postings about work related matters and “indirect posting” to refer to postings about personal nonwork related matters.
- 134 See Model Rules of Prof’l Conduct R. 1.6(a) (2010).
- 135 For a discussion of the potential risks associated with seemingly innocuous online posts, see Margaret M. DiBianca, [Ethical Risks Arising from Lawyers’ Use of \(and Refusal to Use\) Social Media](#), 12 Del. L. Rev. 179, 190 (2011).

- ¹³⁶ See *supra* text accompanying notes 87-92 (vent posts); *infra* text accompanying notes 137-140 (case and client posts).
- ¹³⁷ Abby Simons, Judge Denies Request for New Trial Based on Prosecutor's Alleged Facebook Postings, *Star Trib.* (Mar. 11, 2010), <http://www.startribune.com/local/minneapolis/87360937.html>.
- ¹³⁸ Judge Criss, of the 212th District Court in Galveston, Texas, was known for her judicial blog, *As the Island Floats*. See Mary Flood, Judges Share Court Humor, Serious Questions on Blogs, *Hous. Chron.* (Mar. 15, 2007), <http://www.chron.com/default/article/Judges-share-court-humor-serious-questions-on-1541678.php>.
- ¹³⁹ Molly McDonough, Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches, *ABA J.* (July 31, 2009), http://www.abajournal.com/news/article/facebooking_judge_catches_lawyers_in_lies_crossing_ethical_lines_abachicago.
- ¹⁴⁰ *Id.*
- ¹⁴¹ Pixler & Higuera, *supra* note 95, at 36.
- ¹⁴² See, e.g., Jay D. Strother, *Just Being Social*, *Legal Mgmt.*, Mar.-Apr. 2011, at 32, 33, 38 (stating that the ABA has issued an opinion regarding lawyer websites, but not about social networking sites).
- ¹⁴³ ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 10-457, at 1 (2010).
- ¹⁴⁴ *Id.*
- ¹⁴⁵ Model Rules of Prof'l Conduct R. 7.1 (2010) ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.").
- ¹⁴⁶ *Id.* R. 5.1(a) ("A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.").
- ¹⁴⁷ *Id.* R. 5.3 (extending the obligation to "nonlawyer assistants").
- ¹⁴⁸ ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 10-457, at 1 (2010).
- ¹⁴⁹ Model Rules of Prof'l Conduct R. 7.1 (2010).
- ¹⁵⁰ *Id.*
- ¹⁵¹ *Id.* R. 8.4(d).
- ¹⁵² However, the Florida Bar's disciplinary body stated in a letter to a lawyer that he "impugn[ed] the integrity of [the judge] and the judiciary as a whole" by posting derogatory statements about the judge on a blog, and that his behavior implicated the Florida corollary rule to Rule 8.4(d). See Letter from Alan Anthony Pascal, Bar Counsel, Florida Bar, to Sean William Conway (Nov. 8,

2007), available at <http://jonathanturley.files.wordpress.com/2009/09/2007-04-03-letter-notifying-conway-of-bar-investigation.pdf>.

- ¹⁵³ Professor Orin Kerr has suggested that many of the ethical questions that arise with social media use and social networking can be resolved by reference to offline analogies, that is, asking ourselves whether the action would be unethical if done in person. Professor Orin S. Kerr, George Washington University School of Law, Remarks at the Third Circuit Judicial Conference: Panel Discussion on Ethical Considerations in the Digital Age (May 5, 2011). While I agree with Professor Kerr that this is a helpful test, I think more guidance is necessary with respect to what is professional.
- ¹⁵⁴ Jayne Navarre, *Social Lawyers: Transforming Business Development* 517 (2010) (“A comment made in-person will only live in the minds of those who heard it, while an online comment will live forever in search results on the Internet, or worse, it could go viral.”).
- ¹⁵⁵ Statistics, Facebook, <http://www.facebook.com/press/info.php?statistics> (last visited Oct. 22, 2011).
- ¹⁵⁶ See Navarre, *supra* note 154, at 517.
- ¹⁵⁷ See Model Rules of Prof’l Conduct Preamble (2010).
- ¹⁵⁸ See *supra* text accompanying notes 94-99.
- ¹⁵⁹ See How Do I Edit My Employers on My Profile?, Facebook, <http://www.facebook.com/help/?faq=212641962091249> (last visited Oct. 22, 2011).
- ¹⁶⁰ McDonough, *supra* note 139.
- ¹⁶¹ See Pixler & Higuera, *supra* note 95, at 35 (“[N]ew guidelines for social media tools are barely evolving....”).
- ¹⁶² Judicial Conference, Resource Packet, *supra* note 3, at 15.
- ¹⁶³ See *id.* at 6.
- ¹⁶⁴ *Id.* at 16.
- ¹⁶⁵ See *id.* at 6 (encouraging courts and judges to “incorporate social media issues into their orientation and training for judicial employees,” but not requiring it).
- ¹⁶⁶ See *supra* Part III.A.
- ¹⁶⁷ Cf. Judicial Conference, Resource Packet, *supra* note 3, at 34 (“Consider your online dialogue as subject to the same bounds of civility required at work.”).
- ¹⁶⁸ In terms of the lawyer-client relationship, others have already touched upon the concerns related to inadvertently forming an attorney-client relationship or giving advice. See David Hricik, *Communication and the Internet: Facebook, E-mail and Beyond* 14

(Dec. 2009) (unpublished manuscript) (on file with SSRN at <http://ssrn.com/abstract=1557033>). As these issues address ethical violations rather than professionalism, I shall not address them here.

¹⁶⁹ See supra Part III.A-B.

¹⁷⁰ Cf. Judicial Conference, Resource Packet, supra note 3, at 16 (discouraging posting a comment that pertains to “issues in a pending case, even if the case is not directly mentioned”).

¹⁷¹ See id.

¹⁷² See id.

¹⁷³ See Peter Lattman & Azam Ahmed, Galleon Conviction Likely to Embolden Prosecutors, N.Y. Times Dealbook (May 11, 2011), <http://dealbook.nytimes.com/2011/05/11/galleon-conviction-is-expected-to-embolden-prosecutors>. Perhaps one of the more interesting revelations that came from the Galleon proceedings is the sophisticated strategies that hedge funds employ to attempt to gain knowledge advantages over public markets. See Neil Stewart, Galleon Case Puts Mosaic Theory on Trial, Bus. Insider (Mar. 7, 2011), <http://www.businessinsider.com/galleon-case-puts-mosaic-theory-on-trial-2011-3>. In his defense, Raj Rajaratnam consistently referred to this mosaic approach as the basis of his ability to act before information became public and markets moved. See Lattman & Ahmed, supra; The Galleon Trial: The Mosaic Defence, Economist (London), Apr. 16-22, 2011, at 82, available at http://www.economist.com/node/18561025?story_id=18561025 (discussing mosaic theory of investing). While in his particular case it became apparent that he went beyond the use of this mosaic theory by employing “expert networks,” it is nonetheless evident that hedge funds do operate legally using the mosaic theory. See Stewart, supra.

¹⁷⁴ See generally Stewart, supra note 173 (discussing how “investors and analysts can gather little bits of non-material information and piece them together to form a material conclusion”).

¹⁷⁵ See Vinson, supra note 11, at 361, 369.

¹⁷⁶ See Model Rules of Prof'l Conduct Preamble P 5, R. 1.3 cmt. 1 (2010).

¹⁷⁷ See id. Preamble P 5.

¹⁷⁸ See Aaronson, supra note 19, at 113.

¹⁷⁹ See Christopher J. Piazzola, [Ethical Versus Procedural Approaches to Civility: Why Ethics 2000 Should Have Adopted a Civility Rule](#), 74 U. Colo. L. Rev. 1197, 1217 (2003) (discussing a court’s civility code, which is focused on pretrial procedure).

¹⁸⁰ See Pixler & Higuera, supra note 95, at 35 (noting how new guidelines for social media tools are “barely evolving”).

¹⁸¹ 752 N.Y.S.2d 605 (N.Y. App. Div. 2002).

¹⁸² Id. at 607.

¹⁸³ Ortego & Maleson, supra note 15 (quoting Thomas P. Sukowicz & Thomas P. McGarry, Feathers May Fly for Using Foul

Language, Chi. Law., Dec. 2002, at 14) (internal quotation marks omitted).

184 Id.

185 260 F.3d 228 (3d Cir. 2001).

186 Id. at 237.

187 926 F. Supp. 1282 (E.D. Tex. 1996).

188 Id. at 1285-86.

189 637 A.2d 34 (Del. 1993).

190 Id. at 53-55; see also Jean M. Cary, [Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation](#), 25 Hofstra L. Rev. 561, 565-67 (1996) (quoting [Paramount Commc'ns](#), 637 A.2d at 53-54); George, *supra* note 13, at 478-79 (quoting [Paramount Commc'ns](#), 637 A.2d at 53-54) (providing a copy of the abrasive colloquy). The Delaware Supreme Court threatened to bar the attorney from appearing before it again if the attorney failed to appear in this court and explain his conduct. [Paramount Commc'ns](#), 637 A.2d at 56.

191 See generally Pixler & Higuera, *supra* note 95, at 38 (concluding that attorneys must “develop and implement policies that will guide them in the ethical and professional use of social media”).

192 See Shandwick, *supra* note 97, at 4.

193 Id. at 1.

194 Id. at 4.

195 Id.

196 See *id.*; [The Linked-in Lawyer](#), *supra* note 4 (providing statistics showing that lawyers’ presence on social networks is increasing).

197 See Robertson, *supra* note 94, at 17 (quoting Lucian Pera, a partner with Adams and Reese LLP in Memphis, TN).

198 See *id.* at 18 (quoting Lucian Pera, a partner with Adams and Reese LLP in Memphis, TN).

199 See Piazzola, *supra* note 179, at 1217.

200 See, e.g., *id.* at 1209 (discussing how a court “denied pro hac vice admission to a lawyer who caused two mistrials in his home jurisdiction through his uncivil and unethical conduct” (citing [Kohlmayer v. Nat’l R.R. Passenger Corp.](#), 124 F. Supp. 2d 877, 881, 883-84 (D.N.J. 2000)); [In re Moore](#), 177 F. Supp. 2d 197, 198-99, 201 (S.D.N.Y. 2001) (disbarring attorney who insulted the

Second Circuit Court of Appeals in his brief to the U.S. Supreme Court); [Carroll v. Jaques](#), 926 F. Supp. 1282, 1290, 1293 (E.D. Tex. 1996) (sanctioning attorney for bad faith litigation).

201 [In re Moore](#), 177 F. Supp. 2d at 201.

202 [Jaques](#), 926 F. Supp. at 1290, 1293.

203 [Ortega & Maleson](#), supra note 15 (citing [Sukowicz & McGarry](#), supra note 183, at 14).

204 [Saldana v. Kmart Corp.](#), 260 F.3d 228, 237-38 (3d Cir. 2001). But see [Jaques](#), 926 F. Supp. at 1292 (relying on its inherent power, the court sanctioned an attorney who insulted and cursed at opposing counsel).

205 See supra text accompanying notes 142-148.

206 See supra notes 179-180 and accompanying text.

207 See generally Model Rules of Prof'l Conduct Preamble P 5 (2010) (stating that a lawyer should demonstrate respect for other lawyers, judges, and public officials).

208 Va. Bar Ass'n Creed, Va. Bar Ass'n, <http://216.230.13.18/aboutus.htm#creed> (last visited Oct. 24, 2011) (discussing courtesy and civility "As to Opposing Parties and Their Counsel and Other Colleagues in the Practice of Law"). This code also addresses obligations to "the Courts and other tribunals" and "to clients and the public." Id.

209 Principles of Professionalism for Del. Lawyers, Del. State Bar, P A.4, <http://courts.state.de.us/forms/download.aspx?id=39428> (last visited Oct. 24, 2011).

210 Voluntary Standards for Civility, D.C. Bar, http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/voluntary_standards_for_civility/general.cfm. (last visited Oct. 24, 2011).

211 Standards for Prof'l Conduct Within the Seventh Fed. Judicial Circuit, Seventh Circuit Court of Appeals, P 1, <http://www.ca7.uscourts.gov/Rules/rules.htm#standards> (last visited Oct. 24, 2011).

212 See id. The same point applies to portions of the Delaware Code, which advises attorneys that "[p]rofessional civility is conduct that shows respect not only for the courts and colleagues, but also for all people encountered in practice." Del. State Bar Ass'n, supra note 209, P A.4.

213 See discussion supra Part II.A.

214 See O'Brien, supra note 8, at 512. Some have proposed more training and education in law firms and law schools as the solution to the legal and ethical problems posed by social networking as opposed to more centralized regulation by the ABA. See Vinson, supra note 11, at 405.

215 See [Pixler & Higuera](#), supra note 95, at 35.

- ²¹⁶ See, e.g., Ann Hubbard, [The Major Life Activity of Belonging](#), 39 *Wake Forest L. Rev.* 217, 247 (2004) (noting that the social capital theory is now better known because of Robert Putnam).
- ²¹⁷ Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* 19 (2000).
- ²¹⁸ See James S. Coleman, *Foundations of Social Theory* 306 (1990).
- ²¹⁹ See Fiona M. Kay & John Hagan, [Building Trust: Social Capital, Distributive Justice, and Loyalty to the Firm](#), 28 *Law & Soc. Inquiry* 483, 488 (2003) (citing Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 24 *Ann. Rev. Soc.* 1, 5 (1998); Michael Woolcock, *Social Capital and Economic Development: Toward a Theoretical Synthesis and Policy Framework*, 27 *Theory & Soc’y* 151, 185 (1998)).
- ²²⁰ Putnam, *supra* note 217, at 22.
- ²²¹ See Bob Edwards & Michael W. Foley, *Civil Society and Social Capital: A Primer*, in *Beyond Tocqueville: Civil Society and the Social Capital Debate in Comparative Perspective* 1, 8 (Bob Edwards et al. eds., 2001).
- ²²² Robert D. Putnam et al., *Making Democracy Work: Civic Traditions in Modern Italy* 177 (1993).
- ²²³ See Shaul M. Gabbay & Roger Th. A. J. Leenders, *Social Capital of Organizations: From Social Structure to the Management of Corporate Social Capital*, in 18 *Research in the Sociology of Organizations: Social Capital of Organizations* 1, 2 (Shaul M. Gabbay & Roger Th. A. J. Leenders eds., 2001).
- ²²⁴ Kay & Hagan, *supra* note 219, at 483.
- ²²⁵ See *id.* at 485.
- ²²⁶ See Robertson, *supra* note 94, at 18.
- ²²⁷ See Kay & Hagan, *supra* note 219, at 509.
- ²²⁸ Putnam expressed concern about the Internet’s deleterious effect on social capital. See Robert N. Bellah et al., *Introduction to the Updated Edition of Habits of the Heart*, in *The Civil Society Reader* 328, 335 (Virginia A. Hodgkinson & Michael W. Foley eds., 2003) (“Putnam also worries that the Internet, the electronic town meeting, and other much ballyhooed new technological devices are probably civically vacuous, because they do not sustain civic engagement.”).
- ²²⁹ See John A. McCreary, Jr., *Social Networking and Employment Law*, Pa. B. Ass’n Q., Apr. 2010, at 69, 69.
- ²³⁰ See Kay & Hagan, *supra* note 219, at 489 (noting that social capital resides “in the solidarity and reputation of a law firm”).
- ²³¹ See *id.*
- ²³² The relationship between productivity and social capital is most consistent with Pierre Bourdieu’s and James Coleman’s theories of

social capital, which views social capital on par with financial and human capital, and vital to productivity as it is “instrumental in the flow of goods and services to individuals and groups.” Edwards & Foley, *supra* note 221, at 8.

²³³ Putnam, *supra* note 217, at 21.

²³⁴ Kay & Hagan, *supra* note 219, at 509.

²³⁵ See Putnam, *supra* note 217, at 21 (discussing how social capital and trustworthiness “entail mutual obligation and responsibility for action”).

²³⁶ See *id.* at 20.

²³⁷ See *id.* at 20-21, 134 (describing the concept of generalized reciprocity as “[t]he touchstone of social capital” and as the principle that “I’ll do this for you now, without expecting anything immediately in return and perhaps without even knowing you, confident that down the road you or someone else will return the favor”).

²³⁸ *Id.* at 136 (citing Robert S. Burt & Marc Knez, Trust and Third-Party Gossip, in *Trust in Organizations: Frontiers of Theory and Research* 68, 83 (Roderick M. Kramer & Tom R. Tyler eds., 1996); Bernard Williams, Formal Structures and Social Reality, in *Trust: Making and Breaking Cooperative Relations* 3, 8 (Diego Gambetta ed. 1988)).

²³⁹ See Kay & Hagan, *supra* note 219, at 497 (finding a .47 correlation between trust that exists between attorneys and trust within the firm overall, “indicating the two factors are distinct and yet loosely interconnected”).

²⁴⁰ See *id.* at 494-97.

²⁴¹ Putnam, *supra* note 217, at 21.

²⁴² Putnam, *supra* note 217, at 135 (citing Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* 10 (1995); Kenneth J. Arrow, Gifts and Exchanges, 1 *Phil. & Pub. Aff.* 343, 357 (1972); Stephen Knack & Philip Keefer, Does Social Capital Have an Economic Payoff? A Cross-Country Investigation, 112 *Q.J. Econ.* 1251, 1283 (1997); Rafael La Porta et al., *Trust in Large Organizations*, 87 *Am. Econ. Rev.*, 333, 336 (1997)).

²⁴³ See *id.* at 506.

²⁴⁴ *Id.* at 485 (citing Rosabeth Moss Kanter, *Commitment and Community: Communes and Utopias in Sociological Perspective* 1 (1972); Ernest Gellner, Trust, Cohesion, and the Social Order, in *Trust: Making and Breaking Cooperative Relations*, *supra* note 238, at 142, 147).

²⁴⁵ *Id.* at 509.

²⁴⁶ *Id.* at 506.

²⁴⁷ *Id.* at 485.

248 See generally Piazzola, *supra* note 179, at 1211 (“[C]ivility may help to preserve the public’s trust in the legal system.”).

249 [Carroll v. Jaques](#), 926 F. Supp. 1282, 1290, 1293 (E.D. Tex. 1996).

250 See Judicial Conference, Resource Packet, *supra* note 3, at 5.

251 See *id.*

252 Piazzola, *supra* note 179, at 1210.

253 See Judicial Conference, Resource Packet, *supra* note 3, at 5.

254 See Piazzola, *supra* note 179, at 1211.

255 Judicial Conference, Resource Packet, *supra* note 3, at 5-6.

256 *Id.* at 6.

257 See Piazzola, *supra* note 179, at 1222.

258 N.Y. State Bar Ass’n, Report of the Task Force on the Future of the Legal Profession 11 (2011) [hereinafter NYSBA Report], available at http://www.nysba.org/AM/Template.cfm?Section=Task_Force_on_the_Future_of_the_Legal_Profession_Home&Template=/CM/ContentDisplay.cfm&ContentID=48108.

259 *Id.* at 16 (footnotes omitted).

260 Leigh Jones, Vanishing Act: Year II, Nat’l L.J., Nov. 8, 2010, <http://arwebserver.arlaw.com/pdf/NLJ250StoriesList2010.pdf>.

261 See *id.*

262 See NYSBA Report, *supra* note 258, at 2.

263 See *id.* at 16-19.

264 Cf. Piazzola, *supra* note 179, at 1209 (noting that “efficiency is perhaps the most common rationale for civility” and reporting the conclusions from the Seventh Circuit’s final report on civility that incivility can increase litigation costs and waste judicial resources).

265 Model Rules of Prof’l Conduct (2010).

²⁶⁶ See Kasten, *supra* note 8, at 40-41.

²⁶⁷ See ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 10-457 (2010), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/pdfs/10_457.authcheckdam.pdf (addressing lawyer websites); ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442 (2006), available at http://www.pdfforallawyers.com/files/06_442.pdf (discussing use of metadata found in email and other electronically sent data). Others have noticed this lag. Arizona attorneys Carrie Pixler and Lori A. Higuera note that “[s]imilar to how ethics committee guidance on e-mail and the Internet lagged behind the development of electronic communication, new guidelines for social media tools are barely evolving alongside attorneys’ expanding use of social media.” Pixler & Higuera, *supra* note 95, at 35.

²⁶⁸ Strother, *supra* note 142, at 34.

²⁶⁹ Robertson, *supra* note 94, at 17-18 (noting that a “[f]ew states do have specific rules”); see also Pixler & Higuera, *supra* note 95, at 35 (noting that, for Arizona attorneys, “[g]iven the absence of ethics guidance defining the boundaries of...social media, lawyers should assume that all communications in which their status as a lawyer is apparent are subject to the ethical rules”).

²⁷⁰ Joel Stashenko, N.Y. Bar: Beware the Pitfalls of Social Networking, N.Y. L.J. (Feb. 5, 2010), <http://www.law.com/jsp/lawtechnologynews10/PubArticleFriendlyLTN.jsp?id=1202442016509>.

²⁷¹ See generally Strother, *supra* note 142, at 38 (encouraging firms to address social media ethics to make up for the absence of an ABA rule).

²⁷² See Michael J. Kline & David E. Dougherty, [Avoiding Client Conflicts of Interest in an Era of Corporate Change](#), 14 AIPLA Q.J. 104, 108 (1986); cf. Christina Parajon, Comment, [Discovery Audits: Model Rule 3.8\(d\) and the Prosecutor’s Duty to Disclose](#), 119 Yale L.J. 1339, 1348 (2010) (discussing how guidance on the scope and expectation of a Model Rule is gained through increased application of the Rule and accompanying evaluations/advisory opinions by the relevant regulatory body).

²⁷³ See generally Strother, *supra* note 142, at 34 (explaining that the lagging of social media policies from the ABA have allowed states to create their own rules, thus, no uniform rules exist across the board).

²⁷⁴ See Judicial Conference, Resource Packet, *supra* note 3, at 5.

²⁷⁵ Cf. Strother, *supra* note 142, at 34 (quoting Kim A. Perret, the director of marketing and business development at Hunton & Williams in Washington, D.C.) (discussing the confusion that is created when states developed their own ethics rules apart from ABA guidance).

²⁷⁶ Tom Mighell, *Avoiding a Grievance in 140 Characters or Less: Ethical Issues in Social Media and Online Activities*, *Advoc. (Tex.)*, Fall 2010, at 8, 8.

²⁷⁷ See Vinson, *supra* note 11, at 405.

²⁷⁸ Mighell, *supra* note 276, at 8.

²⁷⁹ Jay, Comment to Law Clerks and Facebook, *The Volokh Conspiracy* (May 4, 2011, 10:11 AM), <http://volokh.com/2011/05/04/law-clerks-and-facebook>.

280 See Vinson, *supra* note 11, at 358.

281 See Zelizer, *supra* note 58, at 53.

282 See Stashenko, *supra* note 270 (commenting on the benefits of social media).

283 See *id.*

284 Strother, *supra* note 142, at 37 (quoting Jayne Navarre).

285 Stashenko, *supra* note 270.

286 *Id.*

287 Robertson, *supra* note 94, at 17.

288 *Id.*

289 IL Supreme Court, Twitter, <http://twitter.com/#!/illinoiscourts> (last visited Oct. 27, 2011).

290 N.Y. St. B. Ass'n J. Editorial Blog, <http://nysbar.com/blogs/barjournal> (last visited Oct. 27, 2011).

291 Kevin O'Keefe, Supreme Court Justice Kennedy Kicks off Discussion on Influence of Law Blogs, Real Law. Have Blogs (Sept. 6, 2010), <http://kevin.lexblog.com/2010/09/articles/blog-basics/supreme-court-justice-kennedy-kicks-off-discussion-on-influence-of-law-blogs/>.

292 See, e.g., NYSBA Report, *supra* note 258, at 111 (providing recommendations for law firms' social media policies); Strother, *supra* note 142, at 36 (recommending formal guidelines for law firms' social media policies).

293 Strother, *supra* note 142, at 36.

294 See *id.* But see Adrian Dayton, Open Letter to Law Firms: Control the Message, Marketing Strategy & L. (Apr. 14, 2009), <http://adriandayton.com/2009/04/control> (urging law firms not to try to control attorneys' use of social media).

295 Molly DiBianca, Social-Media Policies for Law Firms, ABA L. Prac. Today (Oct. 2010), <http://apps.americanbar.org/lpm/lpt/articles/pdf/ft10101.pdf>.

296 Therese Craparo & Anthony J. Diana, The Next Generation of E-Discovery: Social Networking and Other Emerging Web 2.0 Technologies, Mayer Brown (July 31, 2009), <http://www.mayerbrown.com/publications/article.asp?id=7339&nid=6>.

297 Valerie Brennan et al., Intellectual Property Update: Navigating Social Media in the Business World, Hogan Lovells, 1, 5 (Sept. 24, 2009), <http://www.hoganlovells.com>.

<http://www.hoganlovells.com/files/Publication/39796391-451f-46aa-841e-e0de925eb769/Presentation/PublicationAttachment/9c19fdd6-7bd7-42b0-a7f6-495df3a88572/IPUupdate.pdf>.

298 Melanie Green, Comment to Does Your Firm Have a Social Media Policy?, Lawyerist (June 2, 2009, 4:08 PM), <http://lawyerist.com/does-your-firm-have-a-social-media-policy>.

299 Id.

300 See Trenton C. Dykes, Do Your Corporate Policies Consider Social Media?, DLA Piper (June 2, 2009), <http://www.dlapiper.com/do-your-corporate-policies-consider-social-media>.

301 See, e.g., Heather Singer, Bench Blogging: Where Should Judges, Lawyers and Court Personnel Draw the Line, Case in Point, Spring/Summer 2007, at 3, 4-7, available at http://www.judges.org/pdf/cip_summer07.pdf (summarizing principles that have emerged for the use of social media by judges).

302 See Andrew J. Hughes, On Appeal: 70th Judicial Conference of the Third Circuit Promises Outstanding Learning and Networking Opportunities, Bar Ass'n for Third Fed. Circuit, Spring 2011, at 1, 3 available at http://thirdcircuitbar.org/newsletters/ThirdCircuitBarAssociationNewsletter_5-1_Spring_2011.pdf.

303 Runner, Comment to Law Clerks and Facebook, The Volokh Conspiracy (May 4, 2011, 9:59 AM), <http://volokh.com/2011/05/04/law-clerks-and-facebook>.

304 Judicial Conference, Resource Packet, *supra* note 3, at 15.

305 Id.

306 Id. at 16. This would also run afoul of Canon 2: "A judicial employee should avoid impropriety and the appearance of impropriety in all activities." Id. at 15.

307 Id. at 28.

308 Id.

309 Id. at 29.

310 Id. at 28.

311 Id. at 28-29.

312 Id. at 29-30.

313 For an overview of various corporate social media policies, see Lydia Dishman, Corporate Social Media Policies: The Good, the Mediocre, and the Ugly, Fast Co. (July 9, 2010), <http://www.fastcompany.com/1668368/social-media-policies-the-good-the-bad-and-the-ugly>; and, Lydia Dishman, More Social

Media Policies: LA Times, Harvard Law, Microsoft, and Cisco, Fast Co. (July 15, 2010), <http://www.fastcompany.com/1670530/social-media-policies-part-deux>.

314 Neil M. Richards & Daniel J. Solove, [Privacy's Other Path: Recovering the Law of Confidentiality](#), 96 Geo L.J. 123, 179 (2007).

315 Robert J. Ambrogi, Rules of Conduct for Social Networking, Law.com Legal Blog Watch (May 14, 2009, 2:47 PM), http://legalblogwatch.typepad.com/legal_blog_watch/2009/05/my-entry.html.

316 Id.

317 Id.

318 Reuters Handbook of Journalism, Reuters, 528 (Jan. 2, 2011), <http://handbook.reuters.com/extensions/docs/pdf/handbookofjournalism.pdf>.

319 Andrew C. Payne, Note, [Twitigation: Old Rules in a New World](#), 49 Washburn L.J. 841, 846 (2010) (citing Susan Whelan, An Introduction to Facebook for Beginners: An Overview of the Facebook Social Network, Suite101.com (Jan. 15, 2008), <http://susan-whelan.suite101.com/facebook-for-beginners-a41731>).

320 Changing Your Status, Gmail.com, <http://mail.google.com/support/bin/answer.py?hl=en&answer=29298> (last visited Oct. 27, 2011).

321 See Model Rules of Prof'l Conduct R. 1.6 & cmt. 2 (2010).

322 See Judicial Conference, Resource Packet, *supra* note 3, at 15.

323 See *id.* Though beyond the scope of this Article, I note that others have pointed out that it is questionable whether employers subject to the Railway Labor Act could discipline employees for union-related organizing activities if there is evidence that the employer harbors antiunion sentiment. See Chris Hollinger & China R. Rosas, Technology and Labor Law (ALI-ABA Course of Study, Apr. 15-17, 2010), WL SR035 Ali-Aba 79, 91-93 (citing [Sears Holdings \(Roebucks\), No. 18-CA-19081, 2009 WL 5593880, at *4 \(Dec. 4, 2009\)](#) (advice memorandum from NLRB general counsel)). In a recent case, the National Labor Relations Board filed a complaint alleging that a nonprofit unlawfully discharged employees after they criticized working conditions on Facebook. Complaint Issued Against New York Nonprofit for Unlawfully Discharging Employees Following Facebook Posts, N.L.R.B. (June 28, 2011), <http://nlrb.gov/news/complaint-issued-against-new-york-nonprofit-unlawfully-discharging-employees-following-facebook>.

324 Judicial Conference, Resource Packet, *supra* note 3, at 15. Under Canon 5 of the Employee Code, "A judicial employee should refrain from inappropriate political activity." *Id.*

325 See Judicial Conference, Resource Packet, *supra* note 3, at 16.

326 See Vinson, *supra* note 11, at 394-95.

327 This part of the rule would have to be modified for government employees, such as law clerks, who have First Amendment protections of their speech. The Supreme Court has developed a two-part test to assess public employee speech rights under the First Amendment. See [Connick v. Myers](#), 461 U.S. 138, 142 (1983) (quoting [Pickering v. Bd. of Educ.](#), 391 U.S. 563, 568 (1968)).

Under that test, an employee must first show that the speech involves a matter of “public concern.” *Pickering*, 391 U.S. at 568. Then, the Court balances the employee’s speech rights and the government employer’s interest in efficiency. *Id.*; see also 9th Circuit: College Has Right to Keep ‘Political Neutrality,’ First Amendment Ctr. (April 25, 2005), <http://www.firstamendmentcenter.org/9th-circuit-college-has-right-to-keep-political-neutrality> (describing the test). Subject to a *Pickering-Connick* analysis, therefore, a judge or other government employer could probably not punish derogatory speech or nonwork related speech.

328 It is worth noting with respect to Facebook, that the site offers a range of privacy settings that allow a user to conceal information or data so that only that user, his or her friends, or friends of friends can see it. See Vinson, *supra* note 11, at 368. Some find it challenging to understand the privacy settings, and perhaps for that reason, their efficacy has been a subject of some skepticism. See, e.g., Nick Bilton, Price of Facebook Privacy? Start Clicking, N.Y. Times, May 13, 2010, at B8, available at <http://www.nytimes.com/2010/05/13/technology/personaltech/13basics.html>. (discussing the multitude of privacy settings). That said, Facebook has recently improved some of its privacy settings. As of May 2010, users can choose to make some information private, such as hometown, residence, favorites, and friend lists. Vinson, *supra* note 11, at 367-68 (citing Hiawatha Bray, Blanket of Privacy for Facebook, *Bos. Globe*, June 3, 2010, at B5, available at http://www.boston.com/business/technology/articles/2010/06/03/blanket_of_privacy_for_facebook). Even so, one author notes a warning for users:

[U]sers should not take privacy for granted. These controls are not automatic and still reveal personal information by default. By default, privacy settings allow everyone to find a user in a search. Further, as the features and applications of Facebook continue to grow, so does the amount of information available about its users.

Id. at 369 (citing Bray, *supra*).

329 See Vinson, *supra* note 11, at 357.

330 See generally Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 *Ohio St. L.J.* 801, 803 (2000) (explaining social norms as another method to influence lawyers’ decisions).

331 *Id.* at 813 (quoting Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* 167 (1991)).

332 *Id.* at 802.

333 See Schwartz, *supra* note 93.

334 Facebook was launched in 2004. See Vinson, *supra* note 11, at 361; Schwartz, *supra* note 93 (quoting Professor Stephen Gillers for his observation that “young people who grew up with Facebook and other social media enter a profession governed by centuries of legal tradition”).

335 See Michael Calore, April 1, 2004: Gmail Hits Webmail G-Spot, *Wired* (Apr. 1, 2009), http://www.wired.com/science/discoveries/news/2009/03/dayintech_0401.

336 Tiffany M. Williams, Facebook: Ethics, Traps, and Reminders, *ABA Litig. News*, Fall 2009, at 4, 4, available at http://apps.americanbar.org/litigation/litigationnews/top_stories/social-networking-ethics.html.

337 Jennifer Valentino-DeVries, Q&A: Lawyers, Ethics and Social Networking, *Wall St. J. Digits Blog* (Mar. 19, 2010, 12:40 PM), <http://blogs.wsj.com/digits/2010/03/19/qa-lawyers-ethics-and-social-networking>.

338 See Rhode, *supra* note 40, at 46; Deborah L. Rhode, The Professional Responsibilities of Professional Schools: Pervasive Ethics in Perspective, in *Teaching and Learning Professionalism: Symposium Proceedings* 25, 26 (1997).

339 ABA Survey, *supra* note 39, at 24, 30, 54.

340 Rhode, *supra* note 40, at 42-43.

341 See Robertson, *supra* note 94, at 18.

342 See Rhode, *supra* note 40, at 43; Vinson, *supra* note 11, at 406.

343 See Rhode, *supra* note 40, at 41.

344 See ABA Survey, *supra* note 39, at 54 (acknowledging that there is “not a lot of time to spare in the other courses” to incorporate ethics and professionalism components).

345 Rhode, *supra* note 40, at 40 (alteration in original) (quoting Dale C. Moss, *Out of Balance: Why Can’t Law Schools Teach Ethics?*, *Student Law.*, Oct. 1991, at 19, 19).

346 See Vinson, *supra* note 11, at 375-376 (citing Schwartz, *supra* note 93).

347 See *id.* at 376.

348 See Rhode, *supra* note 40, at 43 (stating that courses designed to be personally relevant are more effective in teaching ethics).

349 See *id.*

350 ABA Survey, *supra* note 39, at 42.

351 *Id.*

352 *Id.*

353 See *id.*

354 *Id.*

355 Rhode, *supra* note 40, at 44 (first alteration in original) (quoting Michael J. Kelly, *Legal Ethics and Legal Education* 53 (1980)).

356 See Vinson, *supra* note 11, at 406.

357 See *id.* (advocating for the use of law school policies and guidelines on social networking).

358 ABA Survey, *supra* note 39, at 11.

359 Joyce E. McConnell, *Social Networking: A Reality for Lawyers and Law Students*, *W. Va. Law.*, Jan.-Mar. 2011, at 16, 17.

360 *Id.*

361 Weblogs at Harvard Law School, Harv. L. Sch., <http://blogs.law.harvard.edu/terms-of-use> (last visited Oct. 28, 2011).

362 See ABA Survey, *supra* note 39, at 11-12.

363 See Vinson, *supra* note 11, at 411-12.

364 Lynn A. Stout, *Social Norms and Other-Regarding Preferences*, in *Norms and the Law* 13, 28 (John N. Drobak ed., 2006).

365 *Id.*

366 Brown, *supra* note 330, at 811.

367 *Id.* at 812.