

## Not All Lawyers Are Antisocial: Social Media Regulation and the First Amendment

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*Within just a few years, social media outlets like Facebook, LinkedIn, and Twitter went from teenager-focused novelties to ubiquitous services boasting hundreds of millions of users. These virtual communities give people the ability to interact, teach, learn, and connect with each other on a global scale. But unfortunately, many state bar regulators have enacted or are contemplating reactionary limitations on lawyers' use of social media. Such regulations unnecessarily chill the adoption of this new technology and deprive both attorneys and clients of its benefit. On examination, however, many of these restrictions are vulnerable to challenge. Unlike traditional advertising, which receives limited constitutional protection, social media cannot readily be categorized as commercial speech. Without the deferential authority on which bar regulators have relied in the past, restrictions on these new technologies will be subject to heightened scrutiny, promising lawyers who use them a wider degree of autonomy. Of course, social media should not be a place where ethical behavior goes to die. But the First Amendment will ensure that regulators find balance between protecting legitimate client concerns and allowing lawyers to thrive in an increasingly digital world.*

Introduction.....	134
I. Social Media in the Legal Profession .....	136
A. “This Isn’t a Direct Marketing Tool; This is Human Connection.” .....	136
B. State Regulators “Unfriend” Social Media .....	139
II. Social Media and the Commercial Speech Doctrine.....	141
III. Applying the First Amendment to Social Media Regulations .....	146
A. Regulations Prohibiting or Restricting Client Testimonials .....	146
B. Regulations Requiring Profiles Be Inaccessible to Public .....	148

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C. Restrictions on Establishing Connections with Attorneys/Judges .....	151
D. Vague or Ambiguous Social Media Regulations .....	153
IV. Overcoming Social Anxiety: A Proposed Regulatory Solution.....	154
Conclusion .....	158

## Introduction

Recent development in legal ethics might lead one to conclude that social interaction has no place in the profession. Judges in Florida cannot have friends.<sup>1</sup> Lawyers in Indiana are nervous about recommending to others the work of their colleagues.<sup>2</sup> And clients in South Carolina should be careful when complimenting counsel after a job well done.<sup>3</sup> This truly is a lonely world. Although limitations like these would be patently absurd if they applied to real-world contact, they are unfortunately all too much a reality when it comes to lawyers' use of virtual platforms like Facebook, LinkedIn, and Twitter.

Colloquially termed social networking services or social media, this technology is quickly becoming entrenched within popular culture. Friends, parents, celebrities, and even octogenarian monarchs are avid users of social media.<sup>4</sup> It is used to broadcast everything from the philosophical to the mundane, and businesses are finding that establishing a social media presence is a must in today's digital marketplace. Not surprisingly, these tools are finding their way into the legal profession too and for good reason. Social media can revolutionize the way lawyers interact with one another and share information with the public. The Journal of the American Bar Association even compiles a list of the "Top 100" law-focused Twitter users.<sup>5</sup>

Nevertheless, many state regulators believe that technology-savvy lawyers "represent a dangerous trend that needs oversight."<sup>6</sup> Ostensibly under the guise

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1. Florida Judicial Ethics Advisory Comm., Op. No. 2009-20 (Nov. 17, 2009) (opining that judges adding attorneys appearing before them as "friends" on social network websites violate the judicial ethics code) [hereinafter *2009 Florida Opinion*].

2. Adrian Dayton, *LinkedIn Recommendations, Yay or Nay?*, ABOVE THE LAW (Oct. 21, 2010, 1:08 PM), <http://abovethelaw.com/2010/10/linkedin-recommendations-yay-or-nay/> (describing law firm fears of an ethics violation for its attorneys' use of LinkedIn's "recommendation" feature).

3. South Carolina Ethics Advisory Comm. Op. 09-10 (2009) (requiring that client statements posted on social networking websites conform to the ethical code) [hereinafter *2009 South Carolina Opinion*].

4. Tiffany Hsu, *Queen Elizabeth II Joins Facebook; 113,000 Likes So Far*, L.A. TIMES (Nov. 8, 2010, 1:21 PM), <http://latimesblogs.latimes.com/technology/2010/11/queen-elizabeth-facebook.html>.

5. Blawg 100, *Tweeters Who Write Legal Blogs in the ABA Journal's 2010 Blawg 100*, <http://twitter.com/#!/ABAJournal/blawg100> (last visited April 8, 2011).

6. Jason Riley, *Kentucky Bar Association Seeks to Regulate Attorneys' Facebook Comments Offering Services*, LOUISVILLE COURIER-JOURNAL, Nov. 14, 2010, available at <http://www.courier-journal.com/apps/pbcs.dll/article?AID=/201011140300/NEWS01/311150006>.

of protecting professionalism, some state bars have taken a staunchly conservative approach designed to limit the reach of social media in the profession. Some others have failed to address the issue at all, leaving lawyers to guess what on-line activity might trigger future discipline. The cumulative result is a patchwork of inconsistent and ambiguous state regulations that impede wider adoption of social media. In September, 2010, the American Bar Association (ABA) Commission on Ethics 20/20 announced it will consider how to properly regulate lawyers' use of social media, what it dubs "Internet-based client development tools."<sup>7</sup> Although the ABA's involvement might finally result in a comprehensive scheme to regulate social media, the Commission is not working in a sandbox. Regulation of lawyers' use of social media must still be judged against the First Amendment.<sup>8</sup>

States traditionally rely on the unambiguously commercial nature of advertising to place limits on lawyers' speech. Regulators take this approach with static law firm webpages by treating them as advertisements.<sup>9</sup> Thinner First Amendment protections for commercial speech allow ethics rules limiting such things as, for example, client testimonials and other statements that risk misleading the public. But social media differs in several important respects from conventional print or television ads, and even other websites. These distinctions bring social media outside the commercial speech realm, and as such, restrictions on their use will be more highly scrutinized than those on advertising. Thus regulation necessarily will be flexible, thereby allowing the technology to reach its potential within legal practice.

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7. Am. Bar Assoc., Comm'n on Ethics 20/20, *For Comment: Issue Papers Concerning Lawyers' Use of Internet Based Client Development Tools* 1, Sept. 20, 2010, available at [http://www.abanet.org/ethics2020/pdfs/clientdevelopment\\_issuespaper.pdf](http://www.abanet.org/ethics2020/pdfs/clientdevelopment_issuespaper.pdf) [hereinafter Am. Bar. Assoc., *Call for Comment*]. Even the name the ABA assigns social media—"Internet-based client development tools"—alludes to the potential value these services have within the profession.

8. *Id.* at 2-3 (recognizing that "First Amendment issues [are] at stake" when regulating social networking tools); see generally Erwin Chemerinsky, *Silence Is Not Golden, Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 861-864 (1998).

9. See, e.g., Ala. Ethics Op. 1996-07 (1996) (finding that any information made available to the public about a lawyer or a lawyer's services on the Internet, whether through a "web page, bulletin board or unsolicited email," is regulated by the rules on advertising and solicitation); N.C. Bar Ass'n Ethics Comm. RPC 239 (1996) (holding that attorneys may advertise on the Internet if the advertisements comply with the state's Rules of Professional Conduct); Ill. State Bar Assoc. Ethics Op. 96-10 (1997); Utah Ethics Op. 97-10 (1997) (holding that attorneys may operate and maintain a web site as long as it complies with state rules regarding advertising and solicitation); Ky. State Bar Ass'n, Op. E-403 (1998) (holding that state rules regarding advertising apply to Internet advertising); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 709 (1998) (finding that an attorney may operate and advertise a practice over the Internet, as long as attorney complies with applicable rules of professional conduct); State Bar of N.D. Ethics Comm. Op. 1999-02 (1999) ("Attorney advertising or solicitation on a web page is governed by the same rules which generally apply to attorney advertising or solicitation by more traditional methods.").

Part I of this Article outlines the social media environment today and explains the advantages of these services and the ways in which their use can benefit the legal community. Part II offers an analysis of social media under Supreme Court precedent distinguishing between commercial and non-commercial speech. Next, Part III applies the First Amendment to a variety of restrictions states have or may adopt in the future and concludes that state bars will have limited power to regulate the social media habits of their members. Finally Part IV argues that new ethics rules are not needed to regulate social media properly and suggests that clarifying the existing rules to unambiguously encompass emerging technologies will allow the profession to embrace social media use.

## I. Social Media in the Legal Profession

### A. “This Isn’t a Direct Marketing Tool; This is Human Connection.”

Social media use has been dubbed a “global phenomenon.”<sup>10</sup> Indeed, perhaps the most compelling reason for lawyers to adopt the technology (and likewise for ethics rules to properly embrace it) is that potential clients have already done so. Two-thirds of the world’s population now participates in at least one social media service.<sup>11</sup> Five of the twenty most visited websites in the United States are social media platforms.<sup>12</sup> It is a snowballing cultural movement, and not one reserved just for teenagers and college students. The use of social media among Internet users age 50 and older doubled over the last year.<sup>13</sup> This key demographic—comprised of business owners, in-house counsel, and the retiring generation—contains those individuals most likely to consume legal services in the near term.<sup>14</sup> To reach this

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10. Danah M. Boyd & Nicole B. Ellison, *Social Networking Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM’N 210, 217 (2007).

11. James Cool & Thomas Young, *Do Well by Doing Good*, 45 TRIAL 32, 36 (2009) (quoting Nielsen study).

12. Alexa, Top 500 Sites in the United States, <http://www.alexa.com/topsites/countries/US> (last accessed April 8, 2011). The websites are: Facebook (2nd), Twitter (7th), Blogger (8th), LinkedIn (12th), and WordPress (19th).

13. Mary Madden, Pew Research Center, *Older Adults and Social Media*, Aug. 27, 2010, available at <http://pewinternet.org/Reports/2010/Older-Adults-and-Social-Media/Report.aspx>.

14. For example, Mike Dillon, formerly general counsel for technology giant Sun Microsystems, suggests that the Internet is replacing large law firms as the go-to repository for legal expertise when companies search for outside counsel. The Legal Thing, <http://blogs.sun.com/dillon/> (May 22, 2007) (“To find an attorney in a specialized area, I don’t need to turn to a large law firm. Instead, I send out an email to my network of other in-house attorneys or within professional associations . . . and get referrals.”). See also Greentarget Strategic Communications, *2010 Corporate Counsel New Media Engagement Survey*, May 11, 2010, at 5, available at <http://www.greentarget.net/Portals/0/Corporate%20Counsel%20Survey%20Report%20Final.pdf> (survey demonstrates that more than a quarter of responding in-house counsel rank a lawyer’s social media presence as the “most important” factor considered when making an outside hire).

population, lawyers can turn to a variety of social media platforms. The three most relevant of these are Facebook, LinkedIn, and Twitter.<sup>15</sup>

Facebook is the most popular social media website in the world, boasting more than 500 million members.<sup>16</sup> Anyone with an e-mail address may join Facebook's community, where they can establish a free personal profile. These profiles display basic information (like name, occupation, interests, etc.) and pictures, and allow users to add other individuals as "friends." The latter feature is probably Facebook's best-known contribution to the social networking world.<sup>17</sup> "Friending" another user links together profiles and permits either user to see the activity of the other. It also results in a searchable list of individuals with whom a user has a connection or relationship. This list is typically visible to other users, even those who are not "friends." Facebook pages also contain a "wall" where the user and his friends can post updates, share links to other websites, and publish messages. These communications, too, are generally available publically by default.<sup>18</sup>

What Facebook is to the casual social networking cohort, LinkedIn aims to be for the 70 million lawyers, doctors, and corporate warriors who have established an on-line presence with the service.<sup>19</sup> LinkedIn essentially allows users to create an interactive, web-based resume. Clicking on any of the member's information—educational background, work history, awards and honors—will instantly display a list of others with similar credentials. Of particular interest to lawyers, the platform deploys several other features aimed at building professional networks. Like Facebook, LinkedIn members can add friends (called "connections") and can

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15. These services can be found at [www.facebook.com](http://www.facebook.com), [www.linkedin.com](http://www.linkedin.com), and [www.twitter.com](http://www.twitter.com), respectively. Blogging websites, though outside the scope of this Article, are also popular platforms.

16. Facebook, *Press Room: Statistics*, <http://www.facebook.com/press/info.php?statistics> (last accessed April 8, 2011).

17. The service's ubiquity has even turned the word "friend" into a verb. *See, e.g.*, Ethan Gilsdorf, *Facebook World*, BOSTON GLOBE, July 11, 2010, available at [http://www.boston.com/ae/books/articles/2010/07/11/facebook\\_world/](http://www.boston.com/ae/books/articles/2010/07/11/facebook_world/). Friending's nefarious conceptual counterpart, "unfriending," was voted the New Oxford American Dictionary's Word of the Year in 2009. Emma Barnett, *Facebook's "Unfriend" Verb Is Voted "Word of the Year,"* Nov. 17, 2009, UK TELEGRAPH, <http://www.telegraph.co.uk/technology/facebook/6591614/Facebooks-Unfriend-verb-is-voted—Word-of-the-Year.html>.

18. Facebook, like other social networking platforms, permits users to exercise a fair amount of control over the relative privacy of their information. These efforts include settings to restrict or prohibit access to certain information. Facebook's privacy policy is not without criticism, however. *See* Jessica E. Vascellaro, *Facebook Grapples with Privacy Issues*, WALL ST. JOURNAL, May 19, 2010, available at <http://online.wsj.com/article/SB10001424052748704912004575252723109845974.html>.

19. Leena Rao, *LinkedIn Tops 70 Million Users; Includes Over One Million Company Profiles*, TECHCRUNCH, June 20, 2010, <http://techcrunch.com/2010/06/20/linkedin-tops-70-million-users-includes-over-one-million-company-profiles/>.

“recommend” the professional services of another by offering short testimonials.<sup>20</sup> LinkedIn also benefits from a vast degree of public visibility, a characteristic making it attractive to professionals marketing their services. To wit, a person’s LinkedIn profile will often be among the first few pages resulting from a Google search of their name.

Twitter is the web’s fastest-growing social network,<sup>21</sup> a fact that has not escaped lawyers. “[L]egal professionals are flocking to Twitter as a chance to socialize, promote and network.”<sup>22</sup> Instead of building around profile pages like Facebook and LinkedIn, Twitter focuses on “tweets”—short messages (no more than 140 characters long) that are pushed to the Internet in real-time. Tweets are broadcasted to the “world” by default, meaning that anyone, even those without a Twitter account, may view a user’s messages.<sup>23</sup> Twitter members use the platform to express their views on everything from politics, to popular culture; and from advertising their professional services, to what they ate for lunch. Twitter provides users their own landing page, which aggregates their tweets and the tweets of other users they choose to follow.<sup>24</sup>

Many practicing lawyers have adopted social media technology already. Over three-quarters of attorneys report using a social networking service.<sup>25</sup> And for good reason: social media offers attorneys a variety of benefits. For example, it gives lawyers a valuable, yet “virtually cost-free podium” from which to speak.<sup>26</sup> They can “comment on legal news, law firm issues, and [their] experiences in court.”<sup>27</sup> Attorneys can make contacts quickly, exchange information, and collaborate across jurisdictional boundaries. Moreover, publically commenting on the law requires that practitioners keep current with new developments. The nature of social media

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20. Cool & Young, *supra* note 11, at 36.

21. Robin Wauters, *Facebook Largest Social Network, Twitter Fastest-Growing On the Mobile Web*, TECHCRUNCH, Jan. 26, 2010, <http://techcrunch.com/2010/01/26/facebook-twitter-mobile-web-opera/> (noting that Twitter’s usage increased an astonishing 2,800 percent in 2009).

22. Kelly Phillips Erb, *Microblogging: Is Twitter the New Blog?*, 31 PENN. LAWYER 34, 34 (2009).

23. Twitter’s internal privacy settings allow users to restrict access to their account. However, this feature naturally degrades the service’s self-publicizing appeal, and for this reason the majority of users do not change the default setting.

24. “Following” a user on Twitter is similar to adding them as a friend on Facebook or a connection on LinkedIn. One notable difference is that the followed-user is not required to accept the request.

25. Leader Networks, *2009 Networks for Counsel Study: Global Study of the Legal Industry’s Adoption of Online Professional Networking, Preferences, Usage and Future Predictions*, 2009, available at [http://www.leadernetworks.com/documents/Networks\\_for\\_Counsel\\_2009.pdf](http://www.leadernetworks.com/documents/Networks_for_Counsel_2009.pdf) (study commissioned by LexisNexis).

26. Dustin B. Benham, *The State Bar of Texas Provides New Guidance to Attorneys Regarding the Proper Use of Social Media and Blog for Advertising Purposes*, 52 ADVOC. 13 (2010).

27. Erb, *supra* note 22, at 35.

forces attorneys to write effectively and with brevity, skills that carry over into real world practice.<sup>28</sup>

Social media is also a powerful business development tool, attracting both clients and attorney referrals. Some regard it as the digital equivalent of a “giant cocktail party.”<sup>29</sup> Like its real world counterpart, social media provides a valuable way to interact within the community and build a network. For this reason social media is quickly replacing alumni contacts as an important source of referrals.<sup>30</sup> There lies the real significance of social media. “This isn’t a direct marketing tool; this is human connection.”<sup>31</sup> Rather than replace traditional forms of interaction, on-line tools augment face-to-face relationships and extract more value from them. Social media need not simply coexist with the legal profession. It instead can be a valuable resource for both lawyers and the public. Unfortunately, some bar associations seem to disagree.

### **B. State Regulators “Unfriend” Social Media**

Considering the conservatism of the legal profession, it is perhaps no surprise that state bars have greeted the emergence of this new technology with skepticism.<sup>32</sup> Social media burst into the public consciousness only within the past few years. Since then the technology has already far outpaced the slow, bureaucratic rate at which ethics rules are adapted. “Existing ethics guidelines generally do not focus on technology issues, and state bar associations have been slow to fill in the gaps with opinions and best practice guides.”<sup>33</sup> And when they have addressed the issue, states have responded with a bizarre and inconsistent patchwork of regulations.

Take, for instance, Florida’s Judicial Ethics Advisory Committee. In 2009, it issued an opinion concluding that judges are prohibited from adding as friends on social media services any lawyers who appear in front of them.<sup>34</sup> The committee

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28. Evan D. Brown, *Five Reasons for Lawyers to Use Social Media*, Presentation to Chicago Bar Association’s Law Practice & Technology Committee (Jan. 2009) (on file with author). Brown, an intellectual property lawyer and social media advocate, can be found at <http://www.hinshawlaw.com/ebrown/>. He also blogs about developments in Internet law at <http://www.internetcases.com>.

29. Erb, *supra* note 22, at 37.

30. Leader Networks, *supra* note 25, at 7.

31. Rob Key, chief executive officer of Converseon, a social marketing firm.

32. See Karen Sloan, *Kentucky Bar Proposes Regulation of Attorneys’ Social Media*, NAT’L LAW J., Nov. 17, 2010, available at <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202474978093> (Bar associations’ instinctive “reaction is to regulate every change that comes along.”).

33. Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 114 (2009).

34. *2009 Florida Opinion*, *supra* note (the committee relies on FLA. CODE OF JUDICIAL CONDUCT CANON 2B: “A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.”).

rationalized its decision by noting that such a gesture “convey[s] the impression that [the lawyers] are in a special position to influence the judge.”<sup>35</sup> This conclusion misses the mark. “Although the term ‘friend’ is used in a social media context, it merely means a person is a contact, not necessarily someone you would let crash on your couch overnight or a friend in the traditional pre-internet sense.”<sup>36</sup> Florida’s restriction, if analogized to a real world blanket prohibition on lawyer-judge interaction, is absurd and demonstrates a fundamental misunderstanding that many regulators have about social media.

South Carolina takes a more measured approach to regulating lawyer social media; however, its treatment still ignores important, user-driven features of the technology. Although the state tentatively allows clients to post content on lawyers’ profiles, the message is required to adhere to South Carolina’s ethics rules if it can be construed to be an endorsement of the lawyer’s work or skill.<sup>37</sup> The opinion also contains language suggesting that a lawyer might even be responsible for monitoring *the client’s* social media outlets to ensure any comments about the lawyer are within ethical guidelines.<sup>38</sup> While perhaps noble in purpose, enforcing this opinion in practice proves difficult. Suppose, after a court victory, an elated client posts on his own Facebook wall that “Taylor is the best lawyer in town!” This is considered an endorsement under the state’s ethics rules.<sup>39</sup> South Carolina thus requires that the lawyer, who may not even know that the post exists, first find the message and then try to convince the client to remove or edit it so it does not “create unjustified expectations” about the lawyer’s skills. If the client refuses, the lawyer’s continued representation may imply adoption of the comment and subject her to discipline.<sup>40</sup>

These are by no means the only approaches states have taken. Texas requires that attorneys block the public from accessing their profiles, otherwise physical copies of the page must be filed with the bar;<sup>41</sup> Kentucky is considering adopting a

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35. *Id.*

36. Kathleen Elliott Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just “Face” It*, 41 U. MEM. L. REV. 355, 360, n. 10 (2010).

37. *2009 South Carolina Opinion*, *supra* note 3.

38. *Id.*, citing South Carolina Ethics Advisory Comm. Op. 99-09 (1999). Unbeknownst to his lawyers, a client created a webpage about on-going litigation that described the case and asked other victims to contact the lawyer if they wished to be included. Determining that the webpage was an attempt by the client to advertise for the lawyers (even though it was not commissioned by them), the opinion concluded that “if the attorneys do not approve of this method of advertising, they should promptly inform the client of this and demand that the web page be changed.”

39. *See id.* (an endorsement is “a general recommendation or statement of approval of the lawyer”).

40. *See* South Carolina Ethics Advisory Comm. Op. 99-09, *supra* note 38. If the client who created the unauthorized “advertisement” for the lawyers refused to remove it, failing to withdraw from the case would be considered an endorsement of the page by the lawyers. *Id.*

41. Texas State Bar Advertising Committee Interpretive Comment No. 17(A)-(I) (2010) [hereinafter *2010 Texas Opinion*].

similar rule.<sup>42</sup> But this too is an impractical approach. It forces lawyers to choose between forgoing the benefits of social media and attempting to keep current with the bar copies of dynamically changing content.<sup>43</sup> Even worse yet, several other jurisdictions have not formally addressed social media at all, leaving the ethical propriety of the technology in doubt and chilling its use by lawyers who fear future discipline. For example, a law firm in Indiana, concerned about an ambiguity in the state's ethics code, is forbidding its employees from using LinkedIn's recommendation feature.<sup>44</sup> Indiana has yet to issue a formal clarification of its rule as applied to social media.

Quite simply there is very little consensus among authorities about the regulation of social media, a fact that impedes adoption of the technology and deprives both lawyers and clients of its benefits. For instance, inconsistent state rules allow bar regulators to exert power outside their borders; lawyers with multijurisdictional practices are forced to adhere to the most restrictive state's rules because social media, unlike print or television, cannot be contained within political boundaries.<sup>45</sup> Likewise, social media use in states with ambiguous guidelines, or those with none at all, will be chilled as lawyers will not want to risk discipline from an ad hoc review in the future. The ABA Commission on Ethics 20/20 has an opportunity to review this mess of state regulations and present a uniform alternative. But first it must consider whether social media use is a form of commercial speech—the scope of regulation permissible under the First Amendment depends on the answer.

## II. Social Media and the Commercial Speech Doctrine

Bar authorities often find the most obvious way to regulate social media is to treat it as advertising.<sup>46</sup> Doing so gives regulators a fair amount of flexibility and

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42. *Proposed Amendment, Deletion, and Addition to the Regulations of the Attorneys' Advertising Comm'n*, BENCH & BAR (Ky. Bar Assoc.), Sept. 2010, at 45 [hereinafter *Proposed Kentucky Rule*].

43. See Benham, *supra* note 26, (noting that new Texas rule "leaves the attorney in the tenuous position of submitting every post related to her practice to the [bar's] Advertising Review Committee or making judgment calls at the risk of a possible ethical sanction.").

44. See Dayton, *supra* note 2. The firm feels compelled by the language of IND. R. PROF'L CONDUCT R. 7.2(d) (providing, in relevant part, that "A lawyer shall not, on behalf of himself, his partner or associate, or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication which: . . . (3) contains a testimonial about or endorsement of a lawyer[.]"). No analogous language is found in the ABA's model rule. See MODEL RULES OF PROF'L CONDUCT R. 7.1, *et seq.*

45. For example, lawyers can target certain newspapers or television markets with ads that predictably adhere to the ethical rules of that particular state. While it is true that law firm websites pose similar problems as social networking in this respect, the former are more securely categorized as commercial speech and their regulations are more uniform (discussed *infra*).

46. See 2010 *Texas Opinion*, *supra* note 41 ("Landing pages such as those on Facebook, Twitter, LinkedIn, etc. where the landing page is generally available to the public are advertisements."); see also Am. Bar. Assoc., *Call for Comment*, *supra* note 7, at 3 (asking for comment on "whether [announcements posted on social networking platforms] are subject to the usual ethical restrictions on lawyer advertising and solicitation").

power. Indeed, not long ago lawyers were entirely prohibited from publicizing their services ostensibly out of concern for protecting the integrity of the practice of law.<sup>47</sup> Advertising was thought to “tarnish the dignified public image of the profession.”<sup>48</sup> But the Supreme Court finally rejected this notion and in the process created the commercial speech doctrine by moving advertising under the umbrella of the First Amendment. “Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price.”<sup>49</sup> Wholesale bans on attorney advertising finally crumbled in tow.<sup>50</sup>

But commercial speech does not enjoy limitless First Amendment protection; it may be subjected to reasonable regulation that serves a legitimate public interest.<sup>51</sup> Courts consistently hold that false, misleading, and deceptive commercial speech may be regulated.<sup>52</sup> These decisions underlie the limits in place on attorney advertising today. For example, the ABA Model Rules prohibit lawyers from making “false or misleading communication” about the lawyer’s services, language that closely tracks the contours of the constitutional doctrine.<sup>53</sup> Limits on commercial speech protection also validate restrictions of attorney referral services and publishing client testimonials, among other things.<sup>54</sup> Thus, if social media is categorized as commercial speech, its regulation could be expansive and difficult to challenge. Indeed, Texas’ rule assumes—without analysis—that public profile pages are advertisements and therefore subject to strict restrictions.<sup>55</sup>

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47. Vestiges of this mindset can still be found today. *See, e.g.*, IND. R. PROF’L CONDUCT R. 7.2(b) (providing that lawyers can advertise only in a “dignified manner”); N.Y.R. PROF’L CONDUCT R. 7.1(g)(1) (prohibiting the use of Internet pop-up ads by attorneys).

48. *Bates v. State Bar of Az.*, 433 U.S. 350, 368 (1976). This sentiment was not confined to regulation of attorneys. States have placed similar advertising moratoriums on pharmacists, optometrists, and accountants, among other professionals. *See, e.g.*, *Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002) (pharmacists); *Edenfield v. Fane*, 507 U.S. 761 (1993) (accountants); *Friedman v. Rogers*, 440 U.S. 1 (1979) (optometrists).

49. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Counsel, Inc.*, 425, U.S. 748 (1976).

50. For a comprehensive review of cases applying the First Amendment to professional advertising, *see generally* STEVEN G. BRODY & BRUCE E. H. JOHNSON, § 14:33 *Professional Advertising*, in *ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE* (2d ed. 2010).

51. *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).

52. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 575-76 (1980).

53. MODEL RULES OF PROF’L CONDUCT R. 7.1.

54. *See id.*, R. 7.2 cmt. 7 (providing that attorney referral services cannot be “false or misleading”); *see, e.g.*, Utah State Bar Ethics Advisory Comm., Op. No. 09-01 (2009) (discussing limits on commercial speech restrictions for advertising and concluding that client testimonials are prohibited to the extent they are “false or misleading”).

55. *2010 Texas Opinion*, *supra* note 41 (“Landing pages such as those on Facebook, Twitter, LinkedIn, etc. where the landing page is generally available to the public are advertisements.”).

Commercial speech is characterized by an “expression related *solely* to the economic interests of the speaker and its audience.”<sup>56</sup> Its labeling is an exercise of “commonsense.”<sup>57</sup> But while commercial speech is easy to identify in traditional advertisements, social media cannot be so readily branded. Lawyers take advantage of social media for a myriad of reasons: learning, teaching, networking, and collaborating. These uses, at best, bear only an indirect relation to the lawyer’s economic interests. For example, a lawyer who posts commentary about a recent court opinion might hope that it will increase his exposure among the community, eventually leading to an uptick in business. However, that content has significant educational value that is wholly unrelated to the lawyer’s economic interest. Likewise, an attorney may recommend a colleague on LinkedIn to reinforce a personal friendship just as much as to build a referral base. These uses of social media do more than merely “propose a commercial transaction.”<sup>58</sup>

In the analog world (albeit in different contexts), courts have refused to treat speech as an advertisement when only an insignificant part of it is commercial. For example, in *Stern v. Bluestone* plaintiff alleged that defendant lawyer’s facsimile newsletters violated the Telephone Consumer Protection Act (TCPA), which prohibits transmission of “unsolicited advertisements.”<sup>59</sup> The newsletters contained case law updates and essays on various legal topics; the defendant’s contact information also appeared on each issue. Although the New York Court of Appeals presumed that defendant hoped these newsletters would recruit new clients, it refused to interpret them as advertisements under the TCPA. “To the extent that Bluestone may have devised the reports as a way to impress other attorneys with his legal expertise and gain referrals, the faxes may be said to contain, at most, ‘[a]n incidental advertisement’ of his services, which ‘does not convert the entire communication into an advertisement.’” Like the faxes in *Bluestone*, social media is used by lawyers to broadcast informative legal information and discuss topics of public concern. Thus, when social media does more than merely offer the lawyer’s services for a fee, it is not commercial speech and is entitled to heightened First Amendment protection.

Bar associations might nevertheless try to justify regulating social media as advertising by treating each lawyer’s page not as a single unified expression, but rather as the sum of separate component parts. This approach would allow isolation of certain portions of the page as commercial speech, subject to stricter rules, and others as non-commercial, having more protection. For instance, regulators

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56. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980) (emphasis added).

57. *Va. State Bd. of Pharm.*, *supra* note 49, at 771, n. 24.

58. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973).

59. 911 N.E.2d 844 (N.Y. 2009).

might determine that an attorney's Facebook update promoting a seminar she is presenting—without regard to her profile's other content—is sufficiently related to her economic interests to subject it to the commercial speech standard. Notwithstanding the vagueness of a regulation that would apply only to *some* of a lawyer's social media content,<sup>60</sup> the Supreme Court has refused to deconstruct expressions in this way. When commercial speech is “inextricably intertwined” with fully-protected non-commercial speech, it is proper to apply more rigid First Amendment protection to the speech as a whole.<sup>61</sup> “[A]pplying one test to one phrase and another test to another phrase . . . would be both artificial and impractical.”<sup>62</sup> Therefore even arguably commercial messages will lose their commercial character if they are aggregated with fully-protected speech on an attorney's social media platform.<sup>63</sup>

Thus, it will be difficult for bar associations to define user-generated content, like that created by social networkers, as commercial speech. The closest example of a government's attempt to do so is the Federal Trade Commission's (FTC) recent amendments to its Endorsement and Testimonial Guides.<sup>64</sup> In 2009 the FTC, for the first time, extended these consumer-protection rules to bloggers in an effort to regulate speech about companies or products with which the blogger has a “material connection.”<sup>65</sup> The new rules restrict bloggers' speech and require attachment of a disclaimer informing readers about this connection. A failure to do so can “subject [bloggers] to liability for false or unsubstantiated statements.”<sup>66</sup> Implicit in these amendments is the FTC's determination that a *user-generated blog*

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60. See Part III.D discussion, *infra*.

61. *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (involving a challenge to a North Carolina regulatory scheme requiring financial disclosure statements to be attached to charitable solicitations).

62. *Id.*

63. *Id.*; but see *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989) (holding that “Tupperware parties” in university dorms were not sufficiently intertwined with educational lessons to render ban of solicitation in dorms unconstitutional). Although *Fox* purports to limit the *Riley* doctrine somewhat, it is fair to regard aggregated messages on a social media site substantially more intertwined than the “educational” messages presented at a Tupperware party. The *Fox* Court determined that the university's ban did not deprive the commercial speakers of a forum—it could be sold outside the dorms. Separating the components of social media, however, would require the lawyer to find an alternate forum for his commercial speech, thus depriving him of the broadcasting power of the Internet. Additionally, the commercial-nature of selling housewares is much less ambiguous than is that of a lawyer's use of social media, as discussed *supra*.

64. Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255).

65. *Id.* at 53,142 (codified at 16 C.F.R. § 255.5 (2010)). The evil the FTC fears is a product review or “endorsement” written by a blogger who has received—directly or indirectly—compensation for his review. Remuneration might be as explicit as a cash payment, or as innocuous as providing a demo product that the blogger returns after she is finished.

66. *Id.* at 53,139 (codified at 16 C.F.R. § 255.1(d) (2010)).

can constitute commercial speech,<sup>67</sup> a marked departure from the typical view that commercial speech is limited primarily to traditional advertisements.<sup>68</sup>

Serious doubt exists about the validity of these wildly unpopular rules,<sup>69</sup> but even if they survive constitutional challenge, a lawyer's use of social media cannot fairly be compared to a blogger's payola. The economic motivation behind the lawyer tweeting about the upcoming seminar, for example, is far less defined than that of a blogger receiving compensation for a product endorsement. Although some financial benefit may eventually befall the lawyer from increased public exposure (indeed, that is one of the goals of using social media), its value is indirect and difficult to quantify. It certainly cannot be said that the tweet is an "expression related *solely* to the economic interests" of the lawyer. A blogger's product review is also unlikely to contain the amount of fully-protected speech—political viewpoints, social commentary, artistic expressions—that can often be found on social media outlets.

Without the commercial speech label, regulations of social media will not be accorded the deference of those on advertising, and these restrictions will be subject to increased judicial inquiry. Because social media limitations regulate the forum, not the content, of speech, the familiar intermediate scrutiny framework will apply.<sup>70</sup> These regulations will survive the ire of the First Amendment only if they advance important government interests that are unrelated to the suppression of speech and are no greater in scope than necessary to further the state's objective.<sup>71</sup> With this reviewing standard in mind, several potential forms of social media regulations are analyzed below.

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67. The FTC's "false or unsubstantiated statements" language follows the limits on restrictions of commercial speech. *See Va. St. Bd. of Pharm.*, *supra* note 49, at 771 (holding that states may regulate commercial speech which is false, deceptive, or misleading).

68. Of course, a blog could easily take on the characteristics of traditional advertising were it maintained by or under the control of employees of the company that produces the product. But this circumstance is not the FTC's focus.

69. For an argument that the FTC's rules themselves violate the First Amendment, *see* Comment, *Recent Regulation: Internet Law—Advertising and Consumer Protection—FTC Extends Endorsement and Testimonial Guides to Cover Bloggers*, 123 HARV. L. REV. 1540 (2010). Many bloggers, legal commentators, and policy-makers have criticized the rules. *See* Declan McCullagh, *FTC Blogging Rules Draw Online Protests*, CBS NEWS, Oct. 8, 2009, available at [http://www.cbsnews.com/8301-504383\\_162-5372890-504383.html](http://www.cbsnews.com/8301-504383_162-5372890-504383.html).

70. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791-92 (1989) (providing that restrictions on forum of speech, without aim to suppress the content of message, subject to intermediate scrutiny); *see also* James B. Lake, *Speaking Legally and Freely: Lawyer Web Sites, and the First Amendment*, 58 S.C.L. REV. 871, 875 (2007) (explaining that the fact that a message is communicated via the Internet does not label the speech's content).

71. *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994) (describing intermediate scrutiny test).

### III. Applying the First Amendment to Social Media Regulations

To date, regulators have proposed or adopted a number of social media limitations for lawyers that can be roughly grouped into four categories: (1) regulations prohibiting or restricting the availability of client testimonials; (2) regulations that limit the amount of information a lawyer can make publically available; (3) limitations on who a lawyer may add as a connection; and (4) other regulations that may be vague or overbroad.

#### A. Regulations Prohibiting or Restricting Client Testimonials

Client testimonials published on social media services are unique in that they are both incredibly valuable and yet might also be the use of social media that regulators fear most. Prohibitions on client endorsements have always been a central part of restrictions on attorney advertising out of the fear that their content may unduly influence vulnerable clients into unrealistic expectations about a lawyer's skills. Although there is a risk that a particularly deceptive testimonial may lure an unwitting client, peer recommendations play an important role in our decisions whether to consume nearly every product or service. The Internet, and more specifically social media, can give the public ready access to information about lawyers and allow them to make informed choices before contracting for legal services. Both LinkedIn and Avvo,<sup>72</sup> another online portal, have specific features that allow third parties to post personal recommendations of users.

Like South Carolina, regulators might be tempted to restrict, to varying degrees, the availability or content of testimonials posted on a lawyer's social media page. But such restrictions are ripe for challenge under the First Amendment. As a threshold matter, a testimonial posted to a social media service is actually the *endorser's* speech, not the lawyer's. Unlike traditional advertising where an attorney retains final editorial authority over the content of the message before it is broadcasted, a social networking profile is merely a passive conduit through which third-party content is displayed.<sup>73</sup> Clients and others can, on their own initiative,

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72. Avvo.com is a social media website the goal of which is to promote transparency about the legal profession. Avvo aggregates public information and "objectively" ranks attorneys based on categories like experience, industry recognition, and professional conduct. The service is unique in that it uses bar records to create skeletal profiles of all attorneys automatically. At their option, lawyers can register with Avvo to claim their profiles, allowing them to fill in additional biographical information.

73. Despite its many ill-conceived social media regulations, Florida recognizes this and provides that lawyers are "not responsible for information posted on the lawyer's page by a third party, unless the lawyer prompts the third party to post the information or the lawyer uses the third party to circumvent the lawyer advertising rules." *The Florida Bar Guidelines for Networking Sites*, Feb. 9, 2010 (updated May 11, 2010), available at <http://www.floridabar.org/tfb/TFBLawReg.nsf/9dad7b bda218afe885257002004833c5/a502e8b302def7a5852576e3004fc685!OpenDocument> [hereinafter "*Florida Guidelines*"].

navigate to a lawyer's profile, compose a testimonial, and publish it—all without any affirmative action by the lawyer herself.<sup>74</sup>

This distinction has two important implications. First, it serves to reinforce the non-commercial nature of testimonials in social media because the speaker (someone other than the recommended lawyer) has no economic incentive to post the endorsement, absent direct compensation.<sup>75</sup> Second, state lawyer regulatory agencies' authority extends over attorneys only; the public is not bound by their decrees. Any broader statute restricting the public's ability to publish recommendations of lawyers would be a content-based speech regulation and would surely fail.<sup>76</sup> The absence of commercial speech here should also defeat regulations that limit only an attorney's ability to recommend colleagues as the content deserves a higher degree of constitutional protection.

Regulating authorities may try to circumvent the problematic issue of the speaker's identity by nevertheless attributing all content displayed on a lawyer's page to the lawyer, regardless of its author, under a theory that the lawyer can edit and delete the content on his social network.<sup>77</sup> However, federal law should preempt any such rule. Section 230 of the Communications Decency Act protects users of "interactive computer services," like social media platforms, from liability for the content of another.<sup>78</sup> The statute provides that users "shall [not] be treated as the publisher or speaker of any information provided by [a third-party]."<sup>79</sup> Section 230 is most commonly used to immunize Internet services and their users against liability for a third-party's defamatory speech. For example, Yahoo! successfully invoked the statute to avoid tort liability for publishing indecent depictions of a woman uploaded by her former boyfriend.<sup>80</sup> But the statute is not by its terms limited to common law actions.

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74. This is true of both Facebook (via a user's wall) and Twitter (by directing a tweet at a user), depending on the user's security settings. By contrast, LinkedIn requires that members approve recommendations before they are publically displayed. However, 47 U.S.C. § 230, discussed *infra*, makes this difference irrelevant.

75. Of course, if the lawyer solicited and paid for a recommendation, the testimonial would be commercial speech and would be subject to the traditional prohibitions on false or misleading content.

76. *See, e.g.*, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible.").

77. Alas, Florida's time in the sun was short-lived. *See Florida Guidelines*, *supra* note 73 ("If a third party posts information on the lawyer's page about the lawyer's services that does not comply with the lawyer advertising rules, the lawyer must remove the information from the lawyer's page.").

78. *See generally* 47 U.S.C. § 230 (2010). An interactive computer service "means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." *Id.* § 230(f)(2).

79. *Id.* § 230(c)(1).

80. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), *as amended* (Sept. 28, 2009).

Notably, Section 230 expressly preempts *all* inconsistent state laws that subject immunized parties to liability.<sup>81</sup> Because most states treat disciplinary proceedings as civil in nature,<sup>82</sup> the statute prohibits states from sanctioning lawyers by considering a third party's speech the lawyer's own. Section 230 additionally includes protection from liability for "publishing" third-party content,<sup>83</sup> which includes reviewing, editing, and deciding whether to publish content or to withdraw it from publication.<sup>84</sup> Thus, the statute also preempts state regulations that prohibit lawyers from "accepting" testimonials on sites like LinkedIn or Avvo that require users to approve third-party content before it is publically posted.<sup>85</sup> Section 230 likewise precludes regulations like South Carolina's that burden attorneys with policing client comments to ensure conformance to the ethics rules.

Given the technical realities of testimonials in the social media context, bar associations will be limited in their ability to impose restrictions. To the extent lawyers use the services merely as static advertisements and personally republish client testimonials themselves, the testimonials might be subject to reasonable regulation precluding false or deceptive content. Of course, if the lawyer solicited and paid for a recommendation, the testimonial would be commercial speech and would be subject to the traditional commercial speech restrictions. A closer question presents when the lawyer solicits, but does not compensate for, a testimonial. But in any case, lawyers will enjoy far more flexibility in displaying client endorsements on social media than regulators have previously allowed in advertising. This can only benefit the public by increasing the transparency of the profession.<sup>86</sup>

### **B. Regulations Requiring Profiles Be Inaccessible to Public**

Some jurisdictions might believe that a clean line to draw would be to require that lawyers erect a wall between their social networks and the public. What will be termed "lockdown restrictions" here, these regulations exclude the public by re-

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81. 47 U.S.C. § 230(e)(3).

82. Although not in the context of 47 U.S.C. § 230, *see, e.g., In re Chastain*, 532 S.E.2d 264, 267 (S.C. 2000); *Matter of Discipline of Babilis*, 951 P.2d 207, 214 (Utah 1997); *Matter of Rabideau*, 306 N.W.2d 1, 6-7 (Wis. 1981); *State ex rel. Nebraska State Bar Ass'n v. Richards*, 84 N.W.2d 136, 141 (Neb. 1957); *contra Mississippi State Bar v. Young*, 509 So.2d 210, 212 (Miss. 1987) (disciplinary actions are quasi-criminal proceedings because the lawyer enjoys due process rights).

83. 47 U.S.C. § 230(c)(1) (emphasis added).

84. *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1170-71 (9th Cir. 2008).

85. *See Browne v. Avvo*, 525 F. Supp. 2d 1249 (W.D. Wash. 2007). In a class action case filed against Avvo, plaintiffs initially plead a cause of action for third-party content the site posted; however, they later conceded the claim was barred by Section 230. *Id.* at 1255. The court ultimately found that Avvo's numerical rating scheme was protected by the First Amendment, and it dismissed the action.

86. Publicly available information about lawyers is "helpful, perhaps indispensable, to the formation of an intelligent opinion by the public on how well the legal system is working and whether it should be regulated or even altered." *Bates, supra* note 48, at 358.

quiring that lawyers use privacy settings to limit access to their pages to “friends” or “connections”—those users who have an established social media relationship with the lawyer. Lockdown restrictions remove a lawyer’s tweets, for example, from the publically searchable database and severely limit the effectiveness of social networks as information centers.

Challenges to these limitations can be brought under several theories. Perhaps not surprisingly, lockdown restrictions are new only to the digital realm. States in the past attempted to limit the audience of traditional advertisements. For instance, an old Missouri Supreme Court rule prescribed that printed announcement cards could be sent by lawyers only to other lawyers, their clients, former clients, personal friends, and relatives.<sup>87</sup> Absent from this list of acceptable recipients was the public at large of course, much like lockdown restrictions in the social media environment. Missouri argued that it was ill-equipped to monitor the content of advertisements sent to a broad audience. However, the U.S. Supreme Court rejected that reasoning and struck down the statute. Difficulties in enforcement, the court held, cannot relieve the government from its duty to ensure regulations are no greater in scope than necessary to further its objective.<sup>88</sup>

Lockdown restrictions also reek of despotism. Implicit in these regulations is the belief that the public lacks the ability to protect itself from deception. The First Amendment frowns on this “highly paternalistic approach” to speech regulation.<sup>89</sup> A necessary corollary to speech protections are protections to ensure speakers will have an audience. The law is “especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.”<sup>90</sup> Rather than give clients the opportunity to absorb and weigh for themselves information about lawyers gleaned from social networks, lockdown restrictions represent threshold judgments about the educational value of the content and aim to keep it away from the public’s eyes. They serve to interrupt the free-flow of information to consumers that the First Amendment protects, especially in a non-commercial context.

Regulators might seek to avoid constitutional ire by forgoing a complete ban on public social networks in favor of providing an alternative regulatory framework for lawyers who choose not to lockdown their content. Texas, for instance, permits lawyers’ profiles to be “generally available to the public,” but mandates that the lawyer first file a copy of the page with the Advertising Review Committee of the Texas Bar for approval.<sup>91</sup> Texas’s rule is ironic considering the Bar itself, like

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87. *In re R.M.J.*, 455 U.S. 191, 196 (1982).

88. *Id.* at 200.

89. *Va. State Bd. of Pharm.*, *supra* note 49, at 771.

90. 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 503 (1996) (finding state’s ban on price advertising for alcoholic beverages unconstitutional).

91. 2010 *Texas Opinion*, *supra* note 41 (providing that social media presences are advertisements subject to the professional rules); TEX. DISCIP. RULES OF PROF’L CONDUCT R. 7.07 (describing process of submitting advertisements to state bar for approval).

many others, has a public Facebook page.<sup>92</sup> But there are several problems with its approach. First, requiring that a lawyer's social media page receive the bar's blessing as appropriate under its advertising guidelines ignores the non-commercial nature of the technology.<sup>93</sup> The bar would look presumably for potentially false or deceptive content, evaluation criteria that are inapplicable outside the commercial speech doctrine.<sup>94</sup> And absent the advertising rules, Texas does not articulate the "narrow, objective, and definite standards" for reviewing social media content that the First Amendment requires to avoid arbitrary censorship.<sup>95</sup>

Second, these types of filing alternatives are impractical. Their enforcement would be an administrative nightmare for regulators. Unlike print advertising or static law firm websites, social media is dynamic, breathing content that can (and regularly does) update every few hours. The Texas rule does not express how often lawyers are required to update their filings with the bar. Should it be every month; every week; every day? And as the state requires that a fee accompany any submission for review,<sup>96</sup> directing lawyers to submit an update too frequently may impermissibly chill social media use because "financial burden[s] operate as disincentives to speak."<sup>97</sup> In sum, these types of alternatives provided for those who decline to block public access to their profile will not save the lockdown regulations from constitutional scrutiny.

Not only do lockdown restrictions raise concerns about validity, but they are also bad policy. Lawyers should "be encouraged to use [the Internet] to discuss legal developments with other lawyers, clients, and the public."<sup>98</sup> Clients have a right "as consumers and citizens to know about the activities of the legal profession," and lockdown provisions deprive lawyers and the public from using the incredible platform social media provides to accomplish this objective.<sup>99</sup> Open social networks also help to dismantle the wall between lawyers and laymen and demonstrates that lawyers indeed have a "human side."<sup>100</sup> This in turn helps attorneys to

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92. Facebook.com, State Bar of Texas, <http://www.facebook.com/statebaroftexas> (last visited Nov. 30, 2010). The following state bars also currently have a Facebook presence: Alabama, California, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Utah, Washington, and Wisconsin.

93. See Part II discussion *supra* (and accompanying notes).

94. See TEX. DISCIP. RULES OF PROF'L CONDUCT R. 7.02 (providing that communications about a lawyer's services—advertisements—cannot be "false or misleading" about the qualifications or the services of the lawyer or firm).

95. *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150-51 (1969) (discussing the validity of city's public demonstration permitting procedures).

96. TEX. DISCIP. RULES OF PROF'L CONDUCT R. 7.07(b)(4).

97. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 105 (1991).

98. Lake, *supra* note 70, at 877.

99. *Bates*, *supra* note 48, at 358.

100. *Brown*, *supra* note 28, at 2.

build relationships with the people in their communities.<sup>101</sup> Lockdown restrictions run counter to these ambitions.

### C. Restrictions on Establishing Connections with Attorneys/Judges

Even in a profession known for its conservative nature, Florida's ban on social media connections between judges and lawyers raised eyebrows. Ethics professor Stephen Gillers called the rule "hypersensitive," and noted that people do not suddenly "drop out of society when they become judges."<sup>102</sup> Florida's rule probably best illustrates misconceptions the uninitiated harbor about the nature of social media; specifically the mistaken belief that a user will add as friends only those people with whom he socializes on a frequent basis. But the reality is that the meaning of "friends," "connections," or "followers" is defined differently in the social media realm. "Friendships" in a social network are better understood as simple links between people, either on personal or professional level, and even as mere acquaintances.<sup>103</sup> Ohio recognizes this and permits judges to make social media connections that otherwise adhere to judicial ethics rules, just like any other relationship a judge might have.<sup>104</sup> Nevertheless misconceptions about the technology remain, and they lead to regulations like Florida's.

Although Florida's rule is aimed at judges, it has a derivative effect on attorneys, and it is not too difficult to imagine that a similar regulation might be extended to lawyers directly.<sup>105</sup> Whether a restriction on social media relationships is styled as a limitation on association or one on speech,<sup>106</sup> authorities seeking to

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101. See Cool & Young, *supra* note 11, at 36 (social networking sites "help community members learn more about you and begin to feel they know you personally.").

102. John Schwartz, *For Judges on Facebook, Friendship Has Limits*, N.Y. TIMES, Dec. 10, 2009, at A25, available at <http://www.nytimes.com/2009/12/11/us/11judges.html>.

103. See generally CLAY SHIRKY, *HERE COMES EVERYBODY* 16-20 (2008).

104. Ohio Bd. of Comm'ners on Grievances & Disc. Advisory Op. 2010-7 (2010) (opining that Facebook use by judges is permissible so long as conduct adheres to judicial code of ethics) [hereinafter *2010 Ohio Opinion*]. Among the rules applied to judges' social networking use are those restricting comment on pending matters before the court and requiring a judge to disqualify himself or herself from a proceeding when the judge's social networking relationship with a lawyer creates bias or prejudice. *Id.*

105. For example, regulators might point to MODEL RULES OF PROF'L CONDUCT R. 8.4(f), which prohibits an attorney from "knowingly assist[ing] a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law."

106. An argument might be made that social networking relationships implicate the right of expressive association under the First Amendment. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (finding "implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends"). However, the few courts addressing the issue do not seem ready to accept social networking websites, by themselves, as a protectable forum for association. See, e.g., *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 314 (D. Conn. 2008) (stating that court is "unsure as to whether MySpace can properly be considered an 'organization'" for an expressive

impose it will need to show that it advances a substantial government interest.<sup>107</sup> If this first prong of the intermediate scrutiny analysis fails, so too does the regulation. This is an area where regulators must articulate the distinctive evils posed by social media. That any absolute prohibition on real world lawyer-judge interaction would be unlawful is a proposition that needs little support. So to sustain this type of regulation, there must be something inherently unique and dangerous about virtual communication that is not found in real-space.

The hallmark governmental interest still grounding most ethics rules is concern for the integrity of the profession. Honorable lawyers and judges serve “to fortify the client’s trust placed with the attorney and to ensure the public’s confidence in the legal system as a reliable and trustworthy means of adjudicating controversies.”<sup>108</sup> Although this rationale is insufficient to uphold real world bans on interaction, it is probably enough to justify some on-line regulations. Commentators have noted several features of social media that may allow bootstrapping the integrity rationale to it and justify stricter regulation. In particular, authorities might be concerned about the permanence, searchability, replicability, and transformability of social media.<sup>109</sup> If a lawyer and judge meet for a drink, the encounter can be witnessed only by a limited audience for a fixed period of time. But social media memorializes these trivial day-to-day interactions and allows anyone with Internet access to scrutinize them in the aggregate. The perpetuity of Google’s memory is indeed troubling.

Even so, the next level of First Amendment analysis requires that restrictions be no greater in scope than necessary to propel the state’s interest in a trustworthy judicial system.<sup>110</sup> Rules that deny lawyers their First Amendment rights must be supported with more than fears of merely speculative harm. That certain conduct *may* or *has a tendency to* damage the integrity of the profession is not sufficient. Instead, only speech that poses “a ‘serious and imminent threat’ of interference with the fair administration of justice can be constitutionally proscribed.”<sup>111</sup> This language establishes an incredibly high standard. Regulations that encompass attorney conduct lacking this extreme risk of prejudice are therefore overbroad.

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association analysis). Regardless, it seems clear that displaying social networking friendships or connections are nevertheless a form of speech.

107. The analyses for determining the validity of content-neutral restrictions on association and speech are the same. *Compare Cent. Hudson, supra* note 52, at 561 (speech), *with Roberts, supra* note 106, at 623 (association).

108. *See, e.g., Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 370 (5th Cir. 1998).

109. *Vinson, supra* note 36, at 369.

110. *See, e.g., Procunier v. Martinez*, 416 U.S. 396, 413 (1974).

111. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975) (internal citation omitted) (striking as overbroad a regulation prohibiting lawyers’ speech that was “reasonably likely” to interfere with the right to a fair trial).

Whether social media relationships between judges and lawyers imminently endanger the fair administration of justice is a factual question and one over which reasonable minds may disagree. As the public becomes increasingly familiar with the technology and the nature of the connections made therewith though, it is difficult to fathom that most people would consider a Facebook friendship with a judge representative of undue influence; these are professionals with whom lawyers interact often, and it is expected that relationships will form. The risks posed by social media connections are more acute as between attorneys or judges and jurors—a situation that, as discussed in Part IV, can be addressed using the current rules. Regulating social media relationships past this context, however, is both unnecessary and bad policy. Simply put, a judge must be allowed to “be a part of his day and generation.”<sup>112</sup>

#### **D. Vague or Ambiguous Social Media Regulations**

Like Florida’s rule, other regulations on social media might also flow from regulators’ lack of understanding about how the technology works or how it is utilized in practice. Because regulators may not know how to formulate the end results they wish to achieve, the result may be broad, sweeping restrictions meant to address discrete fears about social media. Such regulations risk offending due process by being impermissibly vague. Vagueness becomes unconstitutional when the language of the regulation does not give its target fair notice of its prohibitions or an opportunity to conform conduct to fall outside the prohibition.<sup>113</sup>

For example, a state might promulgate a rule prohibiting lawyers from “using social media in such a way as to degrade the integrity of the profession.” The rule has obvious policy allure: protecting the public’s confidence in the judicial system, a valid regulatory end. But it is not clear from the rule’s terms exactly what conduct it forecloses. Regulations such as these reflect drafters who likely were not comfortable enough with the technology to be able to detail what specific behaviors would degrade the profession’s integrity—so they resorted to this broad proscription. However, because the language does not afford lawyers with “a reasonable opportunity to know what is prohibited,” the regulation would likely succumb to judicial challenge.<sup>114</sup> To avoid against that happening, regulators should seek the opinions of those who actively use social media, and perhaps invite cross-generational representatives to their deliberations.

In addition to concerns about affirmatively passing vague restrictions, states should be wary of not passing any social media-specific regulations at all. The

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112. *Prof. Air Traffic Controllers Org. v. Fed. Labor Relations Auth.*, 685 F.2d 547 (D.C. Cir. 1982) (internal citation omitted) (holding that social dinner between agency decisionmaker and party interested in a pending action did not amount to an appearance of impropriety).

113. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

114. *Id.* at 108.

idea that no express rule is actually itself an impermissible regulation admittedly seems a paradox. But lawyers already operate in a highly-regulated environment, and there are several standing ethics rules that could be construed as ambiguous as to their applicability in the virtual world. Suddenly applying these rules to social media use without further clarification could implicate due process concerns. “Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked,” a result that is not constitutionally permissible.<sup>115</sup> Indiana’s ambiguous prohibitions on lawyer testimonials, which are forcing at least one law firm to preemptively bar its attorneys from using LinkedIn, exemplify this principle.<sup>116</sup> If regulators do not address social media in some way—leaving the rules indefinite—lawyers might conclude that the risk of discipline from social media use does not justify adopting the technology. The First Amendment guards against laws that chill speech in this way.

#### **IV. Overcoming Social Anxiety: A Proposed Regulatory Solution**

All this is not to argue that social media is a lawless frontier. “Membership in the bar is a privilege burdened with conditions,” and states may of course place reasonable restrictions on attorney conduct.<sup>117</sup> The Constitution will never give lawyers a license to speak at will. No amount of First Amendment thumping will protect a lawyer who reveals a client’s privileged information,<sup>118</sup> or exonerate one who deliberately lies in court.<sup>119</sup> It is doubtful that anyone seriously advocates that states adopt a completely hands-off approach to regulating social media use by lawyers. But neither does social media use “compel a race to the bottom” of the profession.<sup>120</sup> Instead of creating new ethics rules aimed largely at suppression, bar regulators should simply refine the rules already in place. This represents a balanced approach that can protect against abuses while also serving to ensure that the technology’s benefits will be properly realized.

Critics of social media often exalt the threats it poses to support adopting sweeping new ethics rules. A recent article in the ABA Journal highlights specific instances where the use of social media resulted in lawyer discipline. One lawyer used his blog to call a judge an “evil, unfair witch” and question whether

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115. *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964), quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

116. Dayton, *supra* note 2.

117. *In re Rouss*, 116 N.E. 782, 783 (N.Y. 1917) (Cardozo, J.).

118. See MODEL RULES OF PROF ’L CONDUCT R. 1.6. Each jurisdiction in the United States has codified a lawyer’s duty of confidentiality with the same or substantially similar language as presented in Rule 1.6.

119. MODEL RULES OF PROF ’L CONDUCT R. 3.3.

120. CAROLYN ELEFANT & NICOLE BLACK, SOCIAL MEDIA FOR LAWYERS 16 (2010).

she was “mentally ill;” another posted a client’s confidential information on her public website; and a judge was sanctioned for using a social media site to engage in *ex parte* communication about a pending case.<sup>121</sup> But does this parade-of-horribles justify slamming the door on emerging technologies? While social media is a denominator in each of these cautionary tales, its presence hardly dictated their result. The judgment displayed—or the lack thereof—by the actors involved would lead to discipline regardless of the forum, whether via postal mail, telephone, or the Internet. Ethics rules are drafted to govern the substance, not the medium, of attorney behavior. With that in mind, it is easy to find another trait each of the above social media pitfalls share: these situations are all covered by *existing* rules.<sup>122</sup>

Rather than evidence a pressing need for new regulations, these examples demonstrate that current rules can promote the ethical use of social media. One might wonder why then the technology continues to be such a powder keg in the legal community. Perhaps what are missing are unambiguous statements of applicability. The rules should be clear that the traditional behavioral restrictions apply equally to social media. Clarifying the Comments accompanying the rules is the best way to do this. Language might also be added to the Preamble emphasizing that the foundational ethical principles—such as professionalism, diligence, confidentiality, and honesty—continue to apply to social media use.<sup>123</sup> The following table proposes specific additions to the Comments of Rules that are likely to be implicated by social media use.

Clarifying the Comments of existing Rules is the optimal approach because it embodies three fundamental characteristics of an effective social media regulatory scheme:

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121. Steven Seidenberg, *Seduced*, A.B.A.J., Feb. 2011, at 49, 50.

122. See FLA. RULES OF PROF’L CONDUCT R. 4-8.2 (“A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. . .”); MODEL RULES PROF’L CONDUCT R. 1.6 (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent. . .”); MODEL CODE OF JUD. CONDUCT R. 2.9(A) (“A judge shall not initiate, permit, or consider *ex parte* communications. . .”).

123. Angela O’Brien, Comment, *Are Attorneys and Judges One Tweet Away From Facing A Disciplinary Committee?*, 11 *LOL. J. PUB. INT. L.* 511, 532 (2010).

<i>Existing Ethics Rule</i>	<i>Ethical Concern Arising From Social Media Use</i>	<i>Proposed Clarification to Comments</i>
1.6 Confidentiality of Information	The technology's culture of openness and complex (and often confusing) privacy settings may lead to inadvertent disclosure of client secrets.	"Lawyers should use caution when passing confidential information through an electronic intermediary, but this Rule does not prohibit the reasonable use of emerging technology by lawyers."
1.18 Duties to Prospective Client	The informality and prevalence of social media will encourage dialogue between lawyers and individuals that may give rise to an attorney-client relationship.	"This Rule applies to communications between lawyers and prospective clients across all media."
4.2 Communication with Person Represented by Counsel	Lawyers will use social media to contact these parties or deceptively investigate facts concerning a potential or pending case.	"This Rule applies to communications delivered or received over any medium. For the purposes of this Rule, 'a friend request' or other means of establishing an online connection is a communication."
4.3 Dealing with Unrepresented Person		
5.3 Responsibilities Regarding Nonlawyer Assistants	Attorneys delegating the creation and management of their social media presence, for example to a firm's marketing assistant.	The existing Comments will be adequate once the other rules Rule 5.3 encompasses are clarified.
7.1 Communications Concerning a Lawyer's Services	Clients, and/or other lawyers posting deceptive testimonials about the lawyer's skills on social media services, either their own or that of the lawyer. <sup>124</sup>	"Unsolicited communications created by third parties made on any online medium is not a communication by the lawyer under this Rule. Communications made by lawyers as to the services of other lawyers are permissible provided the lawyer has a personal basis for the communication." <sup>125</sup>
7.2 Advertising	Lawyers using social media platforms to post traditional advertisements in an end-run around the advertising rules.	"A lawyer's presence on social media services like Facebook, LinkedIn, and Twitter is presumptively not an advertisement under this Rule."

124. For concerns about lawyers posting misleading information about their education, experience, or specialties, existing rules (like those governing static law firm web pages) can be applied without clarification.

125. Although this article argues that social networking is not advertising, clarification within the advertising section of the Model Rules may be appropriate due to its organizational scheme.

**It is reasonable.** This approach presents the best balance between regulatory ends and attorneys' First Amendment rights. It applies all the client protections already embodied in the current rules to the social media forum. Moreover, the existing rules' focus on redress rather than the prophylactic measures states have adopted is better policy as "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand."<sup>126</sup>

**It is understandable.** Clear language in the commentary making the rules applicable to social media best apprises attorneys of what they can and cannot do and avoids the chilling effect described earlier. Lawyers are already comfortable with the existing rules, and courts have spent decades crafting their meaning. New rules would be mired in conjecture as attorneys and judges struggle to find their outer limits. Likewise, the broader concept that social media is simply a regulated forum is easier to teach than is a cluster of specific and new prohibitions.

**It is implementable.** The rapidly evolving nature of technology also renders any attempt at carving specific rules for on-line behavior a fool's errand. These new rules would likely be out-of-date the moment they leave committee, much less by the time they are adopted by states. Finally, clarifying the Comments will promote uniformity among the states quickly as, unlike a scheme of new rules requiring legislative enactment, state courts can interpret existing rules immediately using the Model Rules' updated commentary.<sup>127</sup>

In sum, regulators should not resort to drafting complex new limitations on social media use. Clarification of the commentary of the rules is an adequate and reasonable alternative that can achieve the goals of regulators, especially if it is also coupled with educational initiatives designed to increase awareness about the technology and its potential hazards. Bringing these risks to the profession's consciousness can be an effective way to regulate social media without scores of additional rules. Even lawyers who have no interest in the technology should be familiar enough with it to be able to spot potential ethical conflicts within their organizations.<sup>128</sup> Efforts should begin in law school ethics courses and continue throughout lawyers' careers.<sup>129</sup> Law firms should maintain internal social media

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126. *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

127. It is a well-accepted principle of statutory construction to look to model laws to aid in the interpretation of state derivatives. *See, e.g., Elliot v. Sears, Roebuck and Co.*, 642 A.2d 709, 714 (Conn. 1994) (looking to the commentaries on the model act on which a state statute was based for guidance).

128. Margaret M. DiBianca, *Ethical Risks Arising From Lawyers' Use of (and Refusal to Use) Social Media*, 21 DEL. L. REV. 179, 186-187 (2011) (cautioning that all lawyers should be familiar with social media because of the problems that may arise if others in their firm, like marketing assistants, use social networking services on their behalf).

129. *See generally* Vinson, *supra* note 36, at 375-388 (advocating for a comprehensive continuing legal education effort).

guidelines and make them prominent features of their training programs. Each of these labors have the added benefit of teaching lawyers how to use technology, a skill that is becoming an important component of a profession where deals are now consummated electronically and motions are now e-filed.

### **Conclusion**

If users of social media constituted their own country, it would rank among the most populous in the world. That is a jurisdiction within which lawyers should want to practice. Social media has a variety of benefits that attorneys can utilize to improve their practice and understanding of the law. These tools also give clients the ability to access information about the profession that was previously difficult to obtain. For all these reasons, any regulations placed on its use by lawyers should be reasonable and serve to usher social media into the legal profession.

The First Amendment may ensure that regulators do so. Because social media should not be labeled as commercial speech, regulations burdening its use will be subject to a higher level of scrutiny than regulations of traditional advertisements. As a result, prohibitions on client testimonials will likely falter, as will rules requiring lawyers to keep their profiles private. Assuredly not all regulations will fail. But the most prudent choice for the ABA as it considers a model regulatory scheme is to stick with the current rules rather than propose expansive new regulation. If existing rules can be clarified to ensure that social media use is brought within their purview, the technology can fully realize its beneficial role within an ethical profession.