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Lawyers Beware: You Are What You Post— The Case for Integrating Cultural Competence, Legal Ethics, and Social Media

Jan L. Jacobowitz*

First learn the meaning of what you say, and then speak.

—Epictetus¹

[W]ords used carelessly, as if they [do] not matter in any serious way, often [allow] otherwise well-guarded truths to seep through.

—Douglas Adams²

Happy Mother's Day to all the crack hoers out there. It'[s] never too late to turn around, tie your tubes, clean up your life and make [a] difference to someone out there [who] deserves a better mother.

—Assistant State Attorney in Orange County, Florida³

I. INTRODUCTION

No thought left unspoken . . . social media networking—ubiquitous in our society—provides the opportunity for individuals to share their moment-to-moment thoughts and actions. Social media has created communities and its own culture. Social networking has empowered individuals to join together to stage uprisings, support charitable causes, launch entrepreneurial ventures, and generally share the accomplishments and defeats of their daily lives. Many lawyers actively participate in social media networks in their personal and professional lives. Some lawyers employ social media for marketing their practices and obtaining information and evidence to more effectively represent their clients. Unfortunately, other lawyers have found themselves caught in a quagmire of ethical and professional missteps resulting in disciplinary problems and loss of employment. This second group of lawyers often fails to appreciate the application of the legal ethics rules and

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1. BRAINYQUOTE, <http://www.brainyquote.com/quotes/quotes/e/epictetus149142.html> (last visited Apr. 13, 2015).
2. DOUGLAS ADAMS, *THE LONG DARK TEA-TIME OF THE SOUL* 187 (1990).
3. Joe Kemp, 'Happy Mother's Day to All the Crack Hoers Out There': Florida Prosecutor Sparks Outrage Over Rude Facebook Rants, N.Y. DAILY NEWS, May 22, 2014, available at <http://www.nydailynews.com/news/national/florida-prosecutor-sparks-outrage-rude-facebook-rants-article-1.1801757>.

standards of professionalism to the use of social media. Moreover, like many other individuals engaged in social media, these lawyers generally seem to lack perspective on the far-reaching impact that a social media communication may have upon the audience—and ultimately upon the communicator.

This article explores the importance of cultural competence both as a critical component of effective and ethical legal practice and as it pertains to a lawyer's participation in social media networking. This article will first define cultural competence and its significance to the legal profession. Next, this article will discuss the culture of the legal profession as it is reflected in social science research, popular culture, and scholarly works. Then, this article will examine the culture of social media and the legal profession's participation in this culture. Finally, this article will explore the interrelationships of the legal profession, cultural competence, and social media with the goal of providing insight and guidance for lawyers to professionally and ethically engage in social networking.

II. DEFINING CULTURAL COMPETENCE

A. Culture

Culture has been described as the “software of the mind.”⁴ Like a software program, culture allows the hard drives of our minds to sort and attach meaning to the world around us. More specifically, culture has been defined as the “deposit of knowledge, beliefs, values, attitudes and meanings . . . acquired by a group of people in the course of generations through individual and group striving.”⁵ In fact, there are over five hundred working definitions for culture. Employing the following concise definition serves the goal of this article: “Culture is the language, values, beliefs, traditions, and customs people share and learn.”⁶

It is important to note that culture is *learned*. Geert Hofstede illustrates this principle by placing culture at the middle of a pyramid with human nature at the base of the pyramid and personality at the top.⁷ He explains, “exactly where the borders lie between nature and culture, and between culture and personality is a matter of discussion among social scientists.”⁸ For exam-

4. GEERT HOFSTEDE ET AL., CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND 5 (2010).

5. Stephanie West Allen, *Why I Left My Heart in San Francisco: California Lawyers Expand Their Cultural Awareness*, 15 LAWYER HIRING AND TRAINING REPORT 4, Apr. 1995, available at http://westallen.typepad.com/idealawg/files/forum_on_training.pdf (quoting LARRY SAMOVAR ET AL., COMMUNICATION BETWEEN CULTURES 23–24 (2009)).

6. RONALD B. ADLER ET AL., INTERPLAY: THE PROCESS OF INTERPERSONAL COMMUNICATION 31 (2012) (internal citations omitted).

7. HOFSTEDE ET AL., *supra* note 4, at 6.

8. *Id.*

ple, the ability to experience fear, anger, and happiness is part of the basic human “operating system,” but culture modifies the manifestations of these emotions.⁹ Personality consists of a “unique . . . set of mental programs” derived from heredity, which is “modified by the influence of collective programming (culture) *as well as* by unique personal experiences.”¹⁰

We all belong to many cultures such as gender, nationality, religion, age, race, and sexual preference.¹¹ These cultures provide both collective programming and unique personal experiences, which shape the cultural lenses through which we view and define the world. Some of our cultural differences are explicit and noticeable such as the differences in language, religious practice, gender, or age. However, some of our culturally influenced perceptions of our surroundings are so deeply ingrained that we are generally unaware of implicit biases that may influence our communication and reactions.¹² In fact, we all have:

immediate, automatic associations that tumble out before we have time to think.¹³ . . . The giant computer that is our unconscious silently crunches all the data it can from the experiences we’ve had, the people we’ve met, the lessons we’ve learned, the books we’ve read, the movies we’ve seen, and so on, and it forms an opinion.¹⁴

Clotire Rapaille, author of *The Culture Code*, refers to this data as imprints on our minds and explains that “[e]ven the most self-examining of us are rarely in close contact with our subconscious. We have little interaction with

9. *Id.*

10. *Id.* at 7.

11. *Id.* at 17–18. Hofstede describes these subcultures as “several layers of mental programming,” which correspond to “different levels of culture.” He describes the levels as a national level; a regional and/or ethnic and/or religious and/or linguistic level; a gender level; a social class level related to educational and professional opportunities; and for those employed, a work organizational level.

12. CLOTAIRE RAPAILLE, *THE CULTURE CODE: AN INGENIOUS WAY TO UNDERSTAND WHY PEOPLE AROUND THE WORLD LIVE AND BUY AS THEY DO* 14, 27 (2007); MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2007) [hereinafter GLADWELL, *BLINK*].

13. GLADWELL, *BLINK*, *supra* note 12, at 85.

14. *Id.*

this powerful force that drives so many of our actions.”¹⁵ Simply stated, “most people do not know why they do the things they do.”¹⁶

Malcolm Gladwell describes an interesting example of this subconscious “imprinting” phenomenon in his book, *Outliers: The Story of Success*.¹⁷ He traces the cultural heritage of eight families who, in the early 1800’s, migrated from the rocky cliffs of the northern British Isles to the Appalachians where they founded Harlan County, Kentucky, which is part of the Cumberland Plateau area. Gladwell details the family feuds over property and chattel that erupted not only in Harlan, but also in neighboring communities throughout the region, thereby creating a culture of violence. Sociologists studied this pattern of feuding in this region and concluded that the violence was caused by a “particularly virulent strain of what sociologists deem a ‘culture of honor,’”¹⁸ the origin of which was the region’s ancestral heritage. In other words, the Harlan County community’s culture of honor, which was a contributing factor to the feuding, was consistent with their ancestral culture that developed hundreds of years ago in the cliffs of Ireland and Scotland.¹⁹ This ancestral culture developed as a result of an individual shepherd’s compulsion to protect his herd.²⁰

15. RAPAILLE, *supra* note 12, at 14. French psychiatrist and cultural anthropologist Rapaille explains that emotion is required for learning and that our emotional responses give rise to imprints on our brains. This psycho-emotional phenomenon explains how individuals know where they were, for example, when they learned that President Kennedy was assassinated and other major dramatic events.
16. *Id.* Rapaille studies culture to assist corporations in marketing products. He conducts focus groups that ask individuals not what they would like in a product but rather, what is their earliest association to a product. In other words, Rapaille believes that you cannot believe what people say; rather, you have to determine what they mean. In this manner, he concluded that the American code for Jeep is horse. A successful marketing campaign subsequently ensued that used a Jeep in a western setting in which a horse might have been substituted for a Jeep. Interestingly, when the Nestle Corporation was struggling to create a market for coffee in Japan in the 1970’s, Rapaille determined that the Japanese had no early association for coffee and therefore Nestle would be doomed to fail. Nestle developed an alternative strategy that involved introducing coffee flavored children’s desserts in Japan. Twenty years later, after having produced an entire generation with a positive association with coffee, there was a significant market for coffee in Japan. *Id.* at 1–10.
17. MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* 166 (2011) [hereinafter GLADWELL, *OUTLIERS*].
18. *Id.*
19. *Id.* The ancestral shepherd’s individualistic culture existed in sharp contrast to the cooperative culture found in farming communities where people had to work in collaboration with one another.
20. *Id.*

Thus, some sociologists suggest that understanding a person's culture requires knowing not only where the person lives but also, and more importantly, where his ancestors lived. By looking further into the past, one can uncover patterns of behavior that are deeply ingrained in a group of people regardless of whether the original environment that gave rise to the cultural trait still exists.

Gladwell illustrates this theory by fast-forwarding to the early 1990s at the University of Michigan where psychologists Dov Cohen and Richard Nisbett conducted an experiment designed to test the deeply ingrained nature of the culture of honor. The experiment involved intentionally antagonizing a group of college-aged males, some of whom were raised in the south and others who were raised in the north, and recording their reactions. The students initially completed a questionnaire and were then instructed to take that questionnaire to a room at the end of a long, narrow hallway. A confederate in the hallway intentionally made the passage difficult by opening a file cabinet drawer and looking annoyed. When a student attempted to pass by, the confederate slammed the drawer, bumped his shoulder into the young man and in a low, but audible voice said, "asshole."²¹

Although the students from the south no longer lived in the environment of their ancestors—many were the children of upper middle class families—these students exhibited anger, had heightened levels of cortisol and testosterone, gave firmer handshakes, and demonstrated other signs of aggression.²² On the other hand, students who grew up in northern parts of the country were generally amused, had lower cortisol levels, and exhibited no change in the strength of their handshakes.

Gladwell explains:

Cultural legacies are powerful forces. They have deep roots and long lives. They persist, generation after generation, virtually intact, even as the economic and social and demographic conditions that spawned them have vanished, and they play such a role in directing attitude and behavior that we cannot make sense of our world without them.²³

Of course, as mentioned above, many of the cultural differences that impact interpersonal communication are more explicit and therefore easier to observe. For example, some cultures value low context communication as opposed to high context communication.²⁴ Low context communication cultures value the direct expression of thoughts and feelings through verbal communication. High context communication cultures, on the other hand, place more value on nonverbal cues and verbal communication is more

21. *Id.* at 171.

22. *See id.*

23. GLADWELL, *OUTLIERS*, *supra* note 17, at 175.

24. *See* ADLER, *supra* note 6, at 44.

nanced and indirect.²⁵ The often-cited example of the contrast between these two communication styles is the distinction between communication in eastern and western cultures. An American businessman travels to China to negotiate a business deal. He enters the conference room, offers a firm handshake while making direct eye contact, and launches almost immediately into his business presentation, which is a miserable failure. The American businessman has offended his Chinese counterpart with his direct eye contact, aggressive handshake, and failure to engage in personal conversation before discussing the business deal.

A more dramatic example of the impact of cultural communication styles is found in Gladwell's chapter, "The Ethnic Theory of Plane Crashes,"²⁶ which describes the unraveling of the mystery of Korean Air's tragic number of airline crashes in the 1990s. The number of crashes exceeded industry standards and there was no obvious explanation.²⁷ Ultimately, the remedy was primarily cultural.²⁸ The Korean culture's high context language and hierarchy of relationships prevented the appropriate and direct communication required between captains, first lieutenants, flight engineers, and the control tower employees. An American consultant was hired to alter the airline employees' cultural communication style.²⁹ The solution required English as the primary means of direct communication among the flight crew, thereby enabling a cultural shift in communication style that resulted in a significant reduction in airline crashes.³⁰ Thus, although some cultural components are implicit and difficult to recognize (especially in the moment), an objective analysis of possible implicit and explicit differences may improve communication and productive collaboration in any number of settings.

In fact, when we communicate with others, awareness of the intercultural nature of our communication may be critical to the exchange. Intercultural communication refers to the significance that our cultural differences may have upon the exchange. It is "[t]he process that occurs when two or more cultures or co-cultures exchange messages in a manner that is influenced by their different cultural perceptions and symbol systems, both verbal and nonverbal."³¹ The spectrum of intercultural communication ranges from

25. *See id.*

26. *See* "The Ethnic Theory of Plane Crashes," in GLADWELL, *OUTLIERS*, *supra* note 17, at 177.

27. *Id.* at 180.

28. *But see My Thoughts on Gladwell's Response*, ASK A KOREAN (July 16, 2013), <http://askakorean.blogspot.com/2013/07/my-thoughts-on-gladwells-response.html> (debating Gladwell's description based upon a competing cultural analysis).

29. *See* GLADWELL, *OUTLIERS*, *supra* note 17, at 180–81.

30. *Id.* at 182.

31. ADLER, *supra* note 6, at 40 (citing SAMOVAR, *supra* note 5).

a communication in which cultural differences have little impact on the communication to an interaction that is heavily influenced by differences.³² Thus, for a traveler to a foreign country who does not know the local customs, there may be a significant intercultural impact; however, for a married couple that grew up in different cultures, there may be a low impact based upon a mutual understanding developed throughout their relationship.³³

For lawyers dealing with clients, the impact may vary depending upon the lawyer's cultural competence. Cultures have varying communication styles and assign different meanings to verbal and nonverbal communication.³⁴ For example, as discussed above, some cultures use high context communication as opposed to low context communication.³⁵ Thus, a client's failure to make eye contact, with his attorney may be interpreted from a low context perspective as lack of interest or a less-than-candid response to a question; however, if the client is from a high context communication culture, then he may be avoiding direct eye contact as a sign of respect for the attorney's authority.³⁶

Cultures may also be characterized as either individualist or collectivist.³⁷ The individualist culture values autonomy, individual goal-setting, accountability, and personal choice.³⁸ The collectivist culture places an emphasis on group harmony, cohesion and choices made in consultation with and often in deference to family and authority figures.³⁹ These differences often come into play when a client is deciding upon the strategy for either proceeding with litigation or attempting to resolve a legal matter.⁴⁰

For example, Marci Seville discusses the case of a Chinese migrant worker who will not consider reinstatement as an option in settling an em-

32. *Id.* at 41.

33. *Id.*

34. *See id.*; *see also* HOFSTEDÉ, *supra* note 4. There are many categories and characteristics into which cultural differences are analyzed. In addition to those cited above, some of the common ones referred to in the literature are differing attitudes in the areas of power distance, achievement versus nurturing, and uncertainty avoidance. However, it is beyond the scope of this article to thoroughly explore the many fascinating distinctions that have been attributed to cultural difference.

35. ADLER, *supra* note 6, at 44–45.

36. *See, e.g., id.*

37. *See* ADLER, *supra* note 6, at 45; *see also* HOFSTEDÉ, *supra* note 4, at 91–92.

38. *See* ADLER, *supra* note 6, at 45–46.

39. *See id.*

40. *See id.*; *see also* Jan L. Jacobowitz, *A Rose By Any Other Name? Enhancing Professionalism Through Cultural Competency*, FAWL JOURNAL 8 (Spring 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1509647 [hereinafter Jacobowitz, *A Rose*].

ployment case.⁴¹ The Chinese proverb, “*The good horse won’t eat back old grass*”, provides insight into the client’s stance.⁴² The proverb reflects a cultural adage that translates in an employment situation to mean that a good employee will never go back to work for her former employer because to do so would subject the employee to shame among her Chinese co-workers.⁴³

Sue Bryant and Jean Koh Peters provide a powerful illustration of the impact of cultural shame in the case of a Chinese woman charged with the murder of her husband.⁴⁴ The woman has a viable self-defense argument and is offered a misdemeanor plea, but informs her lawyers that she cannot accept a plea because it would be humiliating and would shame her ancestors, her children, and their children if she acknowledged any responsibility for the killing—she would rather risk a twenty-five-year jail sentence than suffer the shame of the plea.⁴⁵ A lawyer lacking cultural competency would likely have difficulty understanding his clients’ decision-making strategies in these situations.

B. Cultural Awareness

Cultural awareness is a first step towards achieving cultural competence. Cultural awareness involves the process of learning and developing sensitivity to the characteristics of another culture.⁴⁶ The ultimate goal is to appreciate the similarities and differences of another culture without judgment.⁴⁷ Raymonde Carroll, explains:

Very plainly, I see cultural awareness as a means of perceiving as “normal” things, which initially seem “bizarre” or strange among people of a culture different from one’s own. To manage this, I must imagine a universe in which the “shocking” act can take place and seem “normal” and can take on meaning without ever being noticed. In other words, I must try to enter, for an instant, the cultural imagination of another.⁴⁸

41. See generally Marci Seville, *Chinese Soup, Good Horses, and Other Narratives: Practicing Cross-Cultural Competence Before We Preach*, in VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER (2011).

42. *Id.* at 280.

43. See *id.*

44. Sue Bryant & Jean Koh Peters, *Culture and the Role it Plays in Lawyers’ Work* (Oct. 2007), http://www.illinoislegaladvocate.org/index.cfm?fuseaction=home.dsp_content&contentID=5986.

45. See *id.*

46. See Jacobowitz, *A Rose*, *supra* note 40, at 7.

47. See *id.*

48. RAYMONDE CARROLL, *CULTURAL MISUNDERSTANDINGS: THE FRENCH-AMERICAN EXPERIENCE 2* (1990).

Interestingly, Carroll's suggestion might be just as valuable when a parent is attempting to understand the "bizarre" conduct of his teenage child as when a lawyer is struggling to understand the reactions of his client to the settlement and plea offers discussed above. The ever-growing importance of cultural awareness stems from increased mobility and global interaction as a result of access to the Internet, smart phones and communication available on social media⁴⁹ However, awareness of a cultural difference without possession of the skills of cultural competence may result in misinterpreting the difference or failing to effectively employ the awareness toward a more productive interaction.

C. Cultural Competence

Cultural competence involves acumen that moves beyond cultural awareness. Developing cultural competency is an ongoing process that travels on a spectrum. This spectrum includes the elements of awareness, knowledge, and skills. Cultural competency has been defined as "the ability to accurately understand and adapt behavior to cultural difference and commonality."⁵⁰ In other words, having awareness and knowledge of cultural differences is important, but does not alone provide the adaptive skills that define cultural competency.

The developmental stages and traits of cultural competency have been defined by various terminologies. For example, the development of cultural competency has been described as consisting of four levels: the parochial stage, the ethnocentric stage, the synergistic stage and the participatory third culture stage.⁵¹ The shorthand for defining the parochial stage is "my way is the only way," which signifies a point at which the impact of cultural difference is disregarded.⁵² The ethnocentric stage is best described as "I know their way, but my way is better"; thus indicating a degree of cultural awareness, but simultaneously dismissing the other culture as inferior and not worthy of consideration.⁵³ The synergistic stage is referred to as "my way and their way," signifying that an individual is aware of both the problems and benefits of cultural differences and is willing to use cultural diversity to create new solutions and alternatives.⁵⁴ Finally, the participatory third culture stage is labeled "our way" and involves individuals of different cultures con-

49. See ADLER, *supra* note 6, at 36–37.

50. Travis Adams, *Cultural Competency: A Necessary Skill for the 21st Century Attorney*, 4 WM. MITCHELL L. RAZA J. 2, 6 (2013).

51. Stephanie Quappe & Giovanna Cantatore, *What Is Cultural Awareness, Anyway? How Do I Build It?*, CULTUROSITY.COM (2005), <http://www.culturocity.com/pdfs/What%20is%20Cultural%20Awareness.pdf>.

52. *Id.*

53. *Id.*

54. *Id.*

tinuously engaging in dialogue within a particular context to create new meanings and rules for meeting the needs of a specific set of circumstances.⁵⁵

Jatrine Bentsi-Enchill uses Dr. Milton Bennett's Developmental Model of Intercultural Sensitivity to describe six stages of cultural competence⁵⁶ in relation to the legal profession. She begins with *denial*, which is a general lack of cultural awareness that may result in difficulty in establishing trusting relationships and client-centered strategies with clients.⁵⁷ Stage two is *defense*,⁵⁸ which is similar to "I know their way, but my way is better." For example, in the situation discussed above in which the Chinese woman would not accept a plea—regardless of the advice of her counsel—because of the role of shame in her culture, it is not difficult to imagine the feelings of frustration and perhaps annoyance that a lawyer lacking in cultural competence might experience.

Stage three is described as *minimization of the difference*.⁵⁹ A lawyer operating at this stage will be aware of and appreciate the cultural differences, but will remain wed to his own culture as the superior one; he may misinterpret a client's conduct by evaluating it in accordance with his own cultural values. The misinterpretation of a client's failure to make eye contact as a sign that the client is lying or not interested in his case, without regard to the fact that the client is from a culture of high context communication, is an example of a lawyer operating at this level.

Stage four is *acceptance of the difference*,⁶⁰ which is deemed to be the beginning of the ability to interpret culture through a culturally unbiased lens. This stage is exemplified by the elements of open-mindedness, flexibility, and adaptability, which are central to effective cross-cultural lawyering. For example, if an immigration client offers a lawyer a bribe to expedite the client's case and the client is from a country in which bribes are commonplace, the lawyer has the ability to both refuse the bribe and not harshly judge the client for making the offer.

*Adaptation to the difference*⁶¹ is stage five and indicates that a lawyer has developed solid skills in intercultural communication as a result of increased awareness, acceptance, and initiative to understand the nuances of another culture. Finally, stage six is *integration of the difference*⁶² and is

55. *Id.*

56. Jatrine Bentsi-Enchill, *The 6 Stages of Cultural Competence in Lawyers*, ESQ. BLOG (Nov. 17, 2005, 6:58 AM), <http://esqdevelopmentinstitute.blogspot.com/2005/11/6-stages-of-cultural-competence-in.html>.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Bentsi-Enchill, *supra* note 56.

reflected in a lawyer's ability to evaluate conduct and communication within the cultural frame of reference of another person—meaning a client, colleague, opposing counsel, or adverse party. Lawyers at this level will demand intercultural competence and support education and training programs targeted towards this goal.

Regardless of the manner in which the stages on the spectrum of cultural competency are described, the progression along the spectrum generally involves three main components: attitude, knowledge, and interpersonal communication skills. Attitude may be partially fueled by motivation, but also includes traits such as a tolerance for ambiguity and open-mindedness.⁶³ Generally, interpersonal communicators are concerned with reducing uncertainty about one another. In an intercultural communication, the level of uncertainty may be especially high and create ambiguity when neither communicator is fluent in the other language. Studies have shown that competent intercultural communicators not only tolerate, but also often embrace this type of ambiguity.⁶⁴ Additionally, these communicators recognize the importance of remaining nonjudgmental and open-minded about the habits of different cultures; they realize that judgment leads to bias and stereotyping, which inhibits cultural competency.

Knowledge and skills, the other components of cultural competency, require both self-awareness and awareness of or empathy towards others. Knowledge can be derived from passive observation, that is, noticing the behavior of another culture and adapting insights gained from observation to appropriately tailor communication. Knowledge may also be derived from active strategies such as reading, enrolling in courses, watching films, and speaking to experts in the area. Another strategy is honest self-disclosure, that is, expressing your cultural ignorance and a willingness to learn about another person's culture.⁶⁵

Stephanie West Allen, in conducting workshops for mediators, suggests that a lawyer ask himself four questions that are designed to gauge cultural competency.⁶⁶ The first question is: *What is your own cultural heritage?*⁶⁷ This question calls for a reflection and awareness of the lawyer's own background to provide the lawyer with a better starting point for comparison.⁶⁸

The second question is: *What is my comfort level with people who are culturally different?*⁶⁹ The query asks the lawyer to consider whether he is

63. ADLER, *supra* note 6, at 48–49.

64. *Id.*

65. *Id.*

66. Allen, *supra* note 5, at 4.

67. *Id.* at 5.

68. *Id.*

69. *Id.*

comfortable with ambiguity and open-minded about other cultures or instead views his culture as superior to others.⁷⁰

The third question is: *How much do I know about the tendencies of my own mind?*⁷¹ This question compels a lawyer to consider his implicit biases and cognitive traps.⁷²

The final question is: *Do I know that the ways of my culture are not universal?*⁷³ In other words, beyond recognizing general differences does a lawyer fully comprehend that even seeming “universal truths” in the U.S. legal profession, such as, confidentiality, may not be defined as such in another cultural context, such as collectivism, in which ownership of the dispute would not belong solely to the individual and sharing information with the group would be the preferable way to reach consensus on strategy for proceeding with a case.⁷⁴

While Allen’s questions are posed in the context of a mediation workshop, the questions have broad application for cultural competency not only in other areas of the legal profession, but also for general intercultural communication competency.⁷⁵ Allen’s analysis also highlights the fact that the legal profession is a culture unto itself.

Sue Bryant and Jean Koh Peters expand the concept of the legal profession as a culture in their seminal article *Five Habits for Cross-Cultural Lawyering* in which they explain that, “even when a lawyer and a non-law trained client share a common culture, the client and the lawyer will likely experience the lawyer-client interaction as a cross-cultural experience because of the cultural differences that arise from the legal culture.”⁷⁶ Bryant and Koh Peters’ article is primarily geared towards enhancing cross-cultural communication and building “trust and understanding between lawyers and clients,”⁷⁷ an area of growing significance and increasing scholarship.⁷⁸

70. *Id.*

71. *Id.*

72. Allen, *supra* note 5, at 5.

73. *Id.*

74. See Liwen Mah, *The Legal Profession Faces New Faces: How Lawyers’ Professional Norms Should Change to Serve a Changing American Population*, 93 CAL. L. REV. 1721, 1747, 1759–60 (2005).

75. Andrea A. Curcio et al., *A Survey Instrument To Develop, Tailor, and Help Measure Law Student Cultural Diversity Education Learning Outcomes*, 38 NOVA L. REV. 177, 191–92 (2014).

76. Bryant & Peters, *supra* note 44, at 1.

77. *Id.* (providing lawyers who are “in a cross-cultural relationship” with a three-step process: “(1) A lawyer should be able to identify his assumptions. (2) A lawyer should challenge those assumptions with fact. (3) A lawyer should practice law/lawyering based on fact.”).

In fact, I have suggested that cultural competency be incorporated into the interpretations of competence, diligence, communication, and confidentiality contained in the rules of professional conduct.⁷⁹ Perhaps in a similar vein, in August 2012, the ABA amended the notations under Rule 1.1 Competence to include the statement “a lawyer must be aware of the advantages and disadvantages of technology.”⁸⁰ Indeed, technology has created a global environmental and cultural shift that is impacting competence in the practice of law, but this global environment also compels the value of cultural competency for the legal profession in its dealing with clients.

Moreover, there are other reasons to explore culture competency and how it may influence the conduct of lawyers when confronted with shifting cultural norms in society. This article is focused less on the lawyer-client relationship and more on lawyers understanding their own professional culture in relation to the changing landscape and culture of connectivity arising from the advancements of technology and social media. Of course, as technology pervades the practice of law, the lawyer-client relationship is impacted, but the greater significance may lie in the culture clashes between the developing social media culture and the traditional culture of the legal profession such that some lawyers are tripping on ethical landmines and are surprised by the resulting explosions that are damaging their reputations and threatening their careers.

III. THE CULTURE OF THE LEGAL PROFESSION

So what is the culture of the legal profession? If we return to the fundamental definition of culture as “the language, values, beliefs, traditions, and customs people share and learn” and apply the metaphor of culture as a “software program of the mind,” some thoughts may immediately come to mind. Lawyers are highly educated. Lawyers speak their own language of legalese. Lawyers value justice, the rule of law, and equality. Lawyers are the

78. See Seville, *supra* note 41; Curcio, *supra* note 75; Katherine Frink-Hamlett, *The Case for Cultural Competency*, N.Y. L.J. (2011); Jacobowitz, *A Rose*, *supra* note 40; Mah, *supra* note 7474; Nelson Miller, *Beyond Bias—Cultural Competence as a Lawyer Skill*, MICH. B.J. 38 (June 2008).

79. Jacobowitz, *A Rose*, *supra* note 40, at 8. (“If cultural competency was mandated, then competence would be defined as not only having the requisite legal skill, but also having an understanding of the culture of the client. Diligence would compel a lawyer to pursue a case in a manner consistent with the cultural values of the client. Communication would result in not only keeping the client informed, but in doing so in a style that is consistent with the client’s culture and manner of communication. Confidentiality would be explained and treated in a manner consistent with the individualist or collectivist viewpoint.”).

80. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2012); *see also* MODEL RULES OF PROF’L CONDUCT R. 5.3, 5.5 (2012) (amended to incorporate outsourcing of legal work that has also been the result of technology and other changes in the practice of law).

voice of the people. Lawyers are zealous advocates. Lawyers value integrity and objectivity.

Or perhaps if we consider public opinion polls, pop culture and sociological analysis, we might say that lawyers are “ambulance chasers.” Lawyers are greedy. Lawyers are contentious and some are downright nasty. Lawyers are depressed, substance abusers who have lost their way. Lawyers are amoral. Lawyers value winning no matter what the cost. In fact, social science research stereotypes lawyers as:

self-confident, dominant, argumentative, aggressive, combative, cunning, highly intelligent, ingenious, required or permitted to use drama for effect, committed above all else to prevail for their clients and causes, involved in work, well-dressed, driven toward competence, ambitious, competitive with others in the field, and interested in social issues. It also portrays lawyers as working long hours; writing convincingly, interestingly, and creatively; not being uncomfortable lying; living in suburban, upper-middle-class neighborhoods; and driving sports cars.⁸¹

Susan Daicoff indicates that some of these stereotypes are supported by research on lawyers.

She has developed a personality profile for lawyers that she describes as follows:

- a) A drive to achieve, evidenced by an achievement orientation;
- b) Dominance, aggression, competitiveness, and masculinity;
- c) Emphasis on rights and obligations over emotions, interpersonal harmony, and relationships;
- d) Materialistic, pragmatic values over altruistic goals; and
- e) Higher than normal psychological distress.⁸²

Thus, various contrasting images of lawyers emerge when attempting to define the culture of the legal profession. There are several reasons why it may

81. SUSAN SWAIM DAICOFF, *LAWYER, KNOW THYSELF* 26 (2004) (internal citations omitted).

82. *Id.* at 41. After tracing the five thousand year history of lawyers, Andrus concludes that a lawyer is defined by the following traits: ethics; ability to heighten a client’s legal conscious; insight and savvy with regard to problems, clients, and issues; in tune with the sound, smell, taste, and feel of words; ability to prepare and present a position; ability to properly organize and analyze facts; ability to see both sides of a dispute; ability to critique his or her own position (not just the other side’s); a possession of deep and extensive knowledge based on personal experience and learning; a refined sense of justice—even in these cynical times; ability to embrace meaningful evaluation of his or her abilities and faults; active pursuit of evaluation through peers, clients, and introspection. *See R. BLAIN ANDRUS, LAWYER: A BRIEF 5,000 YEAR HISTORY* 374–383 (2009).

be difficult to readily identify a consensus on the cultural attributes of the profession.

First, if the mind is the “hard drive” in the technology metaphor that labels culture as software, then clearly the legal profession’s culture is only one of many software programs running in the minds of lawyers. Everyone, including lawyers, has multiple cultural software applications simultaneously running in the mind’s hard drive.⁸³ Thus, regardless of an individual’s immersion into the profession through law school and work experience, that individual was culturally “programmed” before becoming a lawyer. Differences in gender, religious upbringing, ethnicity, race, socio-economic background, nationality, and other variables that constitute an individual’s unique mental programming impact the cultural lens through which he views the world and influence how that individual assimilates into the legal profession’s culture. In other words, determining “where the border lies between nature and culture, and between culture and personality” remains a challenge.⁸⁴

Second, the public’s perception—based upon personal interaction and the experience of friends and family—may widely vary. Individuals often interact with lawyers in connection with extremely stressful events—divorce, bankruptcy, personal injuries—and the perception of the culture of the legal profession may be significantly influenced by the outcome of an individual’s case and his general experience with one lawyer.

Third, popular culture has portrayed lawyers on a spectrum that ranges from idyllic (think Gregory Peck as Atticus Fitch in *To Kill a Mockingbird*) to the devil incarnate (think Al Pacino as John Milton in *Devil’s Advocate*).⁸⁵ Lawyer jokes abound and reference to Shakespeare’s “First, kill all the lawyers” prose survives through the centuries.⁸⁶

Finally, since its inception, the American legal profession has been both exalted and criticized by scholars and commentators. Alexis de Tocqueville’s early observations provide a reference point. He is often quoted on his view

83. See HOFSTEDE, *supra* note 4, at 17–18; see also DAICOFF, *supra* note 81, at 51 (“People who choose law have some unique characteristics as children and as students . . . suggesting that [some aspects of the] the lawyer’s personality develops long before . . . law school.”).

84. HOFSTEDE, *supra* note 4, at 6.

85. See ANDRUS, *supra* note 82, at xxiii.

86. See *World’s Best (and Worst) Lawyer Jokes*, LAW. WEEKLY (Apr. 21, 2010), <http://www.lawyersweekly.com.au/folklaw/world-s-best-and-worst-lawyer-jokes>; Jacob Gershman, *To Kill or Not to Kill All the Lawyers? That Is the Question. Attorneys Object to Interpretation of Shakespeare’s Line: ‘Not a Stur’*, WALL ST. J. (Aug. 18, 2014), available at <http://online.wsj.com/articles/shakespeare-says-lets-kill-all-the-lawyers-but-some-attorneys-object-1408329001>.

that lawyers occupied a position of trust and served the best interest of the people.⁸⁷ Adam White explains:

By Tocqueville's telling, the legal class had the public's trust because the people know that lawyers' "interest is to serve the people's cause"; indeed, although the lawyer is drawn "to the aristocracy by his habits and his tastes," he first and foremost "belongs to the people by his interest and by his birth[.]" Thus lawyers, drawn from the people yet trained to be an elite class, become the "natural liaison" between the two classes—the "sole aristocratic element that can be mixed without effort into the natural elements of democracy and combined in a happy and lasting manner with them."⁸⁸

White notes that even in Tocqueville's time, the legal profession had its critics. Gordon Wood, a Jeffersonian Populist implored people to "keep up the cry against Judges, Lawyers . . . and all other designing men, and to do 'their utmost at election to prevent all men of talents, lawyers, rich men from being elected.'" Wood wrote that lawyers' efforts to attract clients and "support [] any cause that offers" had "obliterated all [lawyers] regard to right and wrong."⁸⁹

The tension between a lawyer's role as a proponent of the public good and a lawyer's self-interest in obtaining financial success, as identified by Gordon Wood, has been analyzed, bemoaned, and rationalized by leading scholars and lawyers throughout the past two centuries. Louis Brandeis counseled lawyers to focus less on corporate interests and more on the public good.⁹⁰ As "big business" became a driving force in the American economy, Roscoe Pound implored lawyers to "remain wary of 'the general and increasing bigness of things in which individual responsibility as a member of a profession is diminished or even lost, and economic pressure upon the lawyer [to] make the money-making aspect of the calling the primary or even the sole interest.'"⁹¹

87. Phil C. Neal, *De Tocqueville and the Role of the Lawyer in Society*, 50 MARQ. L. REV. 607, 607–08 (1967); Mah, *supra* note 74, at 1727.

88. Adam J. White, *Tocqueville's "Most Powerful Barrier": Lawyers in Civic Society*, AEI PROGRAM ON AMERICAN CITIZENSHIP, Policy Brief 13, 2 (Sept. 2013).

89. *Id.* at 2.

90. *Id.* at 8.

91. *Id.* at 8 (citing ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 354 (1953)). Interestingly, in his book, Andrus notes that "[i]n early America, the Laws and Liberties of 1648 omitted the stipulation contained in Section 26 of the Body of Liberties of 1641 that a lawyer may not receive remunerations for his services. Hence by 1648 (at least *sub silentio*) the paid

More recently, in 1993, Anthony Kronman commented on these clashing values in his book, *The Lost Lawyer: Failing Ideals of the Legal Profession*, by suggesting that:

A culture that reinforces the idea that the practice of law affords deeper satisfactions than the mere production of income is bound to affect the ideals that lawyers share . . . and thus to exert a strong counter pressure against the natural interest that lawyers have always had in making money . . . When this norm is relaxed, or reversed, as it has been in recent years, the counter pressure is removed and the interest in moneymaking begins inevitably to play a larger role in defining the aims of professional life[.]⁹²

In 2010, Tom Morgan controversially wrote in his book, *The Vanishing American Lawyer*, that “lawyers in America are not now a profession—and over most of their history—they have never been one.”⁹³ His assertion is tied to his theory that without the concepts of profession and professionalism, lawyers may be more successful in adapting to the evolving legal needs of the new global, technology driven society.⁹⁴

In a review of the book, Neil Hamilton challenged Morgan’s proposition and asserted that the concept of law as a profession fosters an ethical professional identity, which benefits not only lawyers, but also society.⁹⁵ However, Hamilton notes that he and Morgan agree upon the fundamental characteristics of the legal “profession.”

attorney was recognized—though certainly not welcomed.” ANDRUS, *supra* note 82, at pxxix.

92. ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 296 (1993). “These norms are informed by two influences, which are often in tension with one another. First, the profession sees nobility in its cause, believing that the practice of law in the spirit of a public service can and ought to be the hallmark of the legal profession. Justice Sandra Day O’Connor noted that the profession’s norm entails an ethical obligation to temper one’s selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. Second, the profession sees value in its own perpetuation, economically, politically, and socially. While the profession’s economic viability is essential, many Americans view lawyers with distrust and are skeptical about whether lawyers’ current norms exist more to serve themselves than to serve their clients.” Mah, *supra* note 74, at 1725 (internal citations omitted).

93. THOMAS D. MORGAN, *THE VANISHING LAWYER* 21 (2010).

94. See Neil Hamilton, *The Profession and Professionalism Are Dead?: A Review of Thomas Morgan, The Vanishing American Lawyer*, 20 *PROF’L LAWYER* 2, 14 (2010).

95. *Id.* at 17.

Professor Morgan argues, and I agree, that everyone benefits from having lawyers—and others acting alongside and in competition with lawyers—act with high character and a sense of pride and dignity in the excellence of the work. He also advocates, and I agree, that lawyers should internalize high degrees of “integrity, loyalty, competence, and confidentiality.” My definition of professionalism drawn from the ABA professionalism reports includes also public service, respect for the legal system, independent professional judgment, peer review and self-restraint in seeking sustainable profits. He notes, and I agree, that all legal service providers exercise implicit moral judgments when they decide how to act on matters that they handle, and society benefits if these are good moral judgments.⁹⁶

IV. TOWARD A WORKING DEFINITION OF THE CULTURE OF THE LEGAL PROFESSION

Thus, from Tocqueville to Morgan and Hamilton, legal scholars have robustly written about the role and characteristics of lawyers and the legal profession.⁹⁷ Implicit in the literature is the description of the cultural traits of the legal profession. Because the spectrum of personality traits and cultural norms is so wide-ranging and controversial, it becomes necessary to develop a contextual definition to proceed with a meaningful discussion of the juxtaposition of the culture of the legal profession with social media cul-

96. *Id.*

97. See also JAMES E. MOLITERNO, *ETHICS OF THE LAWYER'S WORK* 5, 58–60 (2003) (distinguishing between personal identity and the role of the lawyer and exploring the connection between the traditional attributes and role of a lawyer and the considerations of personal values in assuming the role of a lawyer). Moliterno quotes David Luban on the conflict that may arise between personal and role morality, defining role morality as being tied to the principles of partisanship and nonaccountability as they relate to the obligation to the client as a first priority. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* xix–xxi (1988). Moliterno also quotes William Simon's four shared lawyering principles as neutrality, partisanship, procedural justice, and professionalism. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, WIS. L. REV. 29, 36, 38 (1978); RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER* 3–4 (1999) (exploring the proposition that “[e]very day, American lawyers in a wide variety of practices face competing principles—among the most important, the choice between representing a client's interests diligently and being truthful in one's words and deeds . . . Just as the rules of ethics are based on substantially on moral standards, each lawyer must ultimately decide how to balance ethics with the moral principles of our society. . .”).

ture and general cultural competency.⁹⁸ Guidance may be found in the Carnegie Foundation's Report, *Educating Lawyers—Preparation for the Profession of Law* (Carnegie Report) and in the Preamble to the American Bar Association's (ABA) Model Rules of Professional Conduct, which echoes Hamilton's identifiers of integrity, loyalty, competence, confidentiality, and respect for the legal system.

The Carnegie Report explains:

professions are critically determined by the education of their members By providing systematic immersion into a distinctive knowledge base, professional schools set their students apart from lay people, binding them into a shared pattern of thinking and acting. . . . Professional education teaches both a way of understanding how the world works and a distinctive set of skills for working in the world. But, perhaps most decisively, professional education forms the identity of the future professional, showing how to succeed and how to comport oneself as . . . a member of the bar. . . .

In particular, the academic setting of most law school training emphasizes the priority of analytical thinking in which students learn to categorize and discuss persons and events in highly generalized terms. This emphasis on analysis and system has profound effects in shaping a legal frame of mind. It conveys at a deep, largely uncritical level an understanding of the law as a formal and rational system, however much its doctrines and rules may diverge from the commonsense understandings of the layperson. This preference for the procedural and systematic gives a common tone to legal discourse that students are quick to notice, even if reproducing it consistently is often a major learning challenge. . . .

[T]he task of connecting these conclusions [based upon abstracting facts from natural contexts and then applying rules and procedures to draw conclusions based upon reasoning] with the rich complexity of actual situations that involve full-dimensional people, let alone the job of thinking through the social consequences or ethical aspects of the conclusions remains outside of the method.⁹⁹

98. The difficulty in reaching consensus and narrowing the definition of the culture of the profession is also probably compounded by the fact that in 2009 the legal profession had dramatically grown to approximately 890,000 lawyers in the U.S. as compared to 213,000 in 1960. ANDRUS, *supra* note 82, at xxviii.

99. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 185–87 (2007).

Thus, the Carnegie Report details some of the shared customs and values of legal education and notes the analytical, dispassionate critical thinking that is the hallmark of legal analysis. It is also critical of what it deems to be legal education's failure to focus on the practical realities and ethical challenges inherent in the practice of law.

If we accept as fundamental the learned attribute of analytical thinking, or *thinking like a lawyer*, and then review the aspirations of the legal profession, which are reflected in the ABA Preamble to the Model Rules of Professional Conduct, we may establish a working definition of some of the main components of the culture of the legal profession. The preamble defines a lawyer as "a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."¹⁰⁰ It also asserts that "[i]n all professional functions a lawyer should be competent, prompt and diligent[,] . . . maintain communication with a client[,] . . . [and] keep in confidence information relating to representation of a client."¹⁰¹

A lawyer's role is deemed to be vital "in the preservation of society . . . and . . . [t]he fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship."¹⁰² Yet, "a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service."¹⁰³ The preamble also notes:

[w]ithin the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system. . . .¹⁰⁴

Thus, a review of the literature, which discusses the culture and role of the legal profession, the social science and psychology, which attributes various personal traits and values to lawyers, the Carnegie Report's insights, and the ABA Preamble's aspirations, reveals a few common threads. Lawyers generally are highly analytical, logical thinkers in a profession that emphasizes loyalty and confidentiality to the client and respect for the rule of law and the legal system. Nonetheless, traditional legal training does not necessa-

100. MODEL RULES OF PROF'L CONDUCT pmbi. ¶ 1 (2012).

101. *Id.* ¶ 4.

102. *Id.* ¶ 13.

103. *Id.* ¶ 7.

104. *Id.* ¶ 9.

rily emphasize the connection between abstract analytical thinking and the “thinking through the social consequences or ethical aspects of the conclusions” that are reached as a result of applying facts to the law in a rational manner.

So, perhaps a shorthand description of the culture of the legal profession includes a culture that emphasizes analytical thinking, loyalty and confidentiality towards its clients, and respect for others in acknowledgment of the vital role of the legal profession in society. Further abbreviated, the legal profession may be seen as a culture exemplified by the normative values of analytical thinking, confidentiality and respect.¹⁰⁵ Assuming these normative values to be cornerstones of the legal profession, the professional culture may be analyzed in the context of social media, but only after the culture of social media is identified and defined.

V. THE CULTURE OF SOCIAL MEDIA

If the working definition of culture as “the language, values, beliefs, traditions, and customs people share and learn”¹⁰⁶ is applied to social media, an emerging, seemingly new culture becomes apparent. However, Tom Standage concludes that from a historical and behavioral perspective, the Internet is merely the latest iteration of a social networking culture that has developed over the last two thousand years. In his recent book, *Writing on the Wall: Social Media—The First 2,000 Years*, Standage explains that human beings are inherently social animals with brains that have evolved to process information, exchange information to assess and maintain positions in social networks, and use media technology “to extend this exchange of information across time and space to include people who are not physically present.”¹⁰⁷ He observes that “sharing information with other people in our social networks is, it would appear, a central part of being human.”¹⁰⁸ As for the current social media networking, he asserts:

[t]he Internet, with its instant, global reach, does this particularly effectively, allowing users to share information with unprecedented ease. But it is by no means the first technology to have supported such a social media environment; it is merely the most recent and most efficient way that humans have found to scratch a prehistoric itch.¹⁰⁹

105. These terms are certainly not meant to be all encompassing, but rather representative of some of the values of the legal profession that are relevant to the discussion of the legal profession’s engagement in social media.

106. ADLER, *supra* note 6.

107. TOM STANDAGE, *WRITING ON THE WALL: SOCIAL MEDIA—THE FIRST 2,000 YEARS* 7–8 (2013).

108. *Id.* at 14.

109. *Id.* at 8.

Standage traces the history of social communication from the invention of writing approximately five thousand years ago and the literal writing on walls, through the development of the Internet and social networking posts on virtual walls. He sees the 150 years before the invention of the Internet to be a time that was “overshadowed by centralized media operating on a broadcast model.”¹¹⁰ He claims, “[s]ocial forms of media based on sharing, copying, and personal recommendation, which prevailed for centuries, have been dramatically reborn, supercharged by the Internet.”¹¹¹

Standage concludes:

[t]oday, blogs are the new pamphlets. Microblogs and online social networks are the new coffeehouses. Media-sharing sites are the new commonplace books. They are all shared, social platforms that enable ideas to travel from one person to another, rippling through networks of people connected by social bonds, rather than having to squeeze through the privileged bottleneck of broadcast media. The rebirth of social media in the Internet age represents a profound shift—and a return, in many respects, to the way things used to be.¹¹²

Although Standage views social networking as a phenomenon that is engrained in the human culture, he also concedes that “[w]orking out the implications and long term consequences of this new media environment is the giant collective experiment in which humanity is now engaged.”¹¹³ Thus, the specific normative values and customs of today’s social networking culture are a work in progress.

Jose Van Dijck notes in her book, *The Culture of Connectivity: A Critical History of Social Media*, that “[i]n less than a decade, the norms for online sociality have dramatically changed, and they are still in flux. Patterns of behavior that traditionally existed in offline (physical) sociality are increasingly mixed with social and sociotechnical norms created in an online environment, taking on a new dimensionality.”¹¹⁴

It is likely that this dynamic fluxing is contributing to the disturbances arising in the legal profession’s culture when lawyers violate legal ethics norms with conduct that otherwise aligns with social media norms. Dijck shares legal scholar Julie Cohen’s insights about culture as an ongoing, dy-

110. *Id.* at 239.

111. *Id.*

112. *Id.* at 250.

113. STANDAGE, *supra* note 107, at 239.

114. JOSE VAN DIJCK, *THE CULTURE OF CONNECTIVITY: A CRITICAL HISTORY OF SOCIAL MEDIA* 19 (2013).

namic process, which is especially applicable to the evolving nature of online networking.¹¹⁵ Cohen explains:

culture is not a fixed collection of texts and practices, but rather an emergent, historically and materially contingent process through which understandings of self and society are formed and re-formed. The process of culture is shaped by the self-interested actions of powerful institutional actors, by the everyday practices of individuals and communities, and by ways of understanding and describing the world that have complex histories of their own. The lack of fixity at the core of this conception of culture does not undermine its explanatory utility; to the contrary, it is the origin of culture's power.¹¹⁶

As the culture of social media continues to form, further insight may be gained by examining current practices and the nature of the communication at play.

A. Communication

A look at fundamental communication studies lays a foundation that assists in outlining the culture of social media. Face to face communication is sometimes described in terms of the "richness" of the exchange, which means not only an observation of the words employed, but also an analysis of any nonverbal communication that accompanies those words.¹¹⁷ On the other hand, communication on social media is distinguished by its "leanness" or lack of nonverbal cues.¹¹⁸ This "lean" quality renders the mediated communication harder to confidently interpret. Both the sender and receiver must strive for clarity.¹¹⁹ The sender may attempt to carefully select his words to avoid ambiguity.¹²⁰ The receiver may need to clarify his interpretation of the message to avoid erroneous assumptions.¹²¹

Online communication is considered to be asynchronous communication, meaning that there is a time gap between when a message is sent and

115. *Id.* at 20.

116. JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE AND THE PLAY OF EVERYDAY PRACTICE* 25 (2012).

117. ADLER, *supra* note 6, at 176–182. There are many studies and a robust literature on the meaning of how we position our bodies, the movement of our eyes, and the hundreds of facial expressions in which we engage. Moreover, nonverbal communication not only has some universal application, but also may vary by the cultural attributes of the communicator.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 53.

received.¹²² The receiver may ponder the response or may choose not to respond at all.¹²³ Nonetheless, online communicators are more likely to communicate in a hyper-personal manner that accelerates the nature of personal sharing beyond what would naturally occur in face-to-face exchanges.¹²⁴

Moreover, the tendency to transmit messages without considering their consequences is more likely to occur on mediated channels and is a phenomenon known as “disinhibition.”¹²⁵ When extreme disinhibition leads to angry or vicious outbursts, the communication is known as “flaming.”¹²⁶ Unfortunately, some communicators learn the painful lesson that although face-to-face communication is transitory, online communication is permanent and may be forwarded to a vast audience.

VI. LANGUAGE, VALUES, CUSTOMS AND BELIEFS

Facebook, one of the most popular social networks in the world, uses the language of “friending,” “liking,” and “sharing.” “Friending” denotes an individual’s network of contacts, a badge of honor for some teenagers, who may or may not be “friends” in the more traditional sense of the word. “Liking” “pushes popular ideas or things with a high degree of emotional value, arguably at the expense of rational judgments for which there are no buttons in the online universe; ‘difficult but important’ is not a judgment prompted by social media sites.”¹²⁷ Sharing is perhaps the fundamental culture code for social networking. The tension between online sharing and privacy is the subject of ongoing debate among scholars, and public policy commentators; this tension has also given rise to litigation across a wide spectrum of legal scenarios.¹²⁸

Sharing and connection as fundamental normative values in the social media networking world are reflected in the opening statement of Facebook Principles, which states:

We are building Facebook to make the world more open and transparent, which we believe will create greater understanding and connection. Facebook promotes openness and transparency by giving individuals greater power *to share and connect*, and certain principles guide Facebook in pursuing these goals. Achieving

122. *Id.*

123. ADLER, *supra* note 6, at 53.

124. *Id.*

125. *Id.* at 59.

126. *Id.*

127. DUCK, *supra* note 114, at 66.

128. See Spencer Kuvin & Chelsea Silvia, *Social Media in the Sunshine: Discovery and Ethics of Social Media—Florida’s Right to Privacy Should Change the Analysis*, 25 ST. THOMAS L. REV. 335, 345 (2013).

these principles should be constrained only by limitations of law, technology, and *evolving social norms*. We therefore establish these Principles as the foundation of the *rights and responsibilities* of those within the Facebook service.¹²⁹

Share and *connect* reflect social media networking normative values that Facebook acknowledges are evolving social norms. Tweeting to followers, connecting on LinkedIn, and sharing photos on Instagram are all variations on this theme. Sharing is promoted as a positive attribute towards reaching a collective understanding that will improve the world. As of October 2014, there were 1.35 billion active monthly Facebook users worldwide.¹³⁰

The social media culture begs the questions: Do I join? If not, will I be left behind or forgotten? If so, with which networks should I engage? With how many people should I connect? How much information should I share and how many pictures and status updates should I post? Some people are reluctant joiners, some stay away, and still others join and incorporate social media into their daily lives. If we revisit Standage's premise that human beings are essentially hard wired for sharing and connecting and that social media and the Internet are just the latest cultural manifestation of an age old human behavior, then it seems inevitable that social media is here to stay.¹³¹ So, here's the query: how does an individual manage his online identity as distinct from his offline persona? Mark Zuckerberg, the Facebook founder, has explained, "You have one identity. The days of you having a different image for your work friends or co-workers and for the other people you

129. See *Facebook Home Page*, FACEBOOK, <https://www.facebook.com/principles.php> (last visited Apr. 13, 2015) (emphasis added); see also DUCK, *supra* note 114, at 60. Dijck notes that the concept of sharing has become ambiguous as it not only may refer to sharing among users, but also among social networks and third party vendors. Regardless, for the purposes of this article, the concept of sharing among users is the more pertinent one. Her book is an interesting study of five of the major social media platforms and the influence of owners of these platforms juxtaposed with the demands of the users as the culture of connectivity continues to evolve. For the purposes of this article, an acknowledgment of the predominant characteristics of sharing, liking and friending or connecting, which run throughout most major social media networks, will suffice.

130. *The Top 20 Valuable Facebook Statistics*, ZEPHORIA (Oct. 2014), <https://zephoria.com/social-media/top-15-valuable-facebook-statistics/>.

131. STANDAGE, *supra* note 107, at 14.

know are probably coming to an end pretty quickly.”¹³² He adds: “[h]aving two identities for yourself is an example of a lack of integrity.”¹³³

VII. THE LEGAL PROFESSION AND SOCIAL MEDIA

So what does the concept of a blended online and offline identity mean for the legal profession? In 2013, an increasing number of lawyers who responded to the annual ABA Technology Survey reported that they are participating in social media in both their personal and professional lives.¹³⁴ In fact, the survey results indicate that approximately eighty percent of lawyers maintain an online presence for professional purposes and ninety four percent use social media for personal reasons.¹³⁵ Law firms and individual lawyers have websites that link to blogs, Twitter, and Facebook accounts. The legal profession is employing social media to advertise and to gather information about clients, opposing parties, witnesses, jurors and judges.¹³⁶ Transactional lawyers are considering social media when conducting due diligence.¹³⁷ And yes, lawyers are sharing aspects of their personal lives—their opinions, vacation photos, birthday greetings and even their “likes”—with all of their “friends.”

In fact, recent state bar opinions have advised that lawyers may investigate clients, opposing parties, witnesses, and jurors on social media with the general stipulation that publically posted information that is readily available to anyone is fair game, but sending a request to connect with a person may be impermissible or subject to specific criteria.¹³⁸ For example, sending a

132. Jared Newman, *Facebook Comments Expose a Flaw in Zuckerberg's Vision*, TECHNOLOGIZER (Mar. 7, 2011, 9:43 AM), <http://www.technologizer.com/2011/03/07/facebook-comments-zuckerberg-vision/>.

133. Miguel Helft, *Facebook, Foe of Anonymity, Is Forced to Explain a Secret*, N.Y. TIMES, May 13, 2011, available at http://www.nytimes.com/2011/05/14/technology/14facebook.html?_r=0.

134. Allison Shields, *Communicating in the Online Era: Blogging and Social Media*, ABA TECHREPORT, http://www.americanbar.org/publications/techreport/2013/communicating_in_the_online_era_blogging_and_social_media.html (last visited Apr. 13, 2015).

135. *Id.*

136. THADDEUS A. HOFFMEISTER, SOCIAL MEDIA IN THE COURTROOM: A NEW ERA FOR CRIMINAL JUSTICE 99 (2014).

137. See Jonathan D. Gworek, *The Threat of Social Media Diligence on the Confidentiality of the M&A Process: The Problem and Possible Solutions*, ABA BUSINESS LAW TODAY (Jan. 2014), http://www.americanbar.org/publications/blt/2014/01/01_gworek.html.

138. See Jan L. Jacobowitz & Danielle Singer, *The Social Media Frontier: Exploring a New Mandate for Competence in the Practice of Law*, 68 U. MIAMI L. REV. 445, 469–476 (2014) [hereinafter Jacobowitz & Singer, *The Social Media Frontier*]; see also Phila. Bar Ass'n Prof'l Guidance Comm., Formal Op. 2009-

Facebook friend request to a juror is impermissible as it is a violation of most state's versions of Model Rule 3.5, which prohibits lawyers from engaging in ex parte communication with a juror.¹³⁹ Similarly, sending a Facebook friend request to a represented party violates the no contact prohibition found in most state's versions of Model Rule 4.2.¹⁴⁰ On the other hand, some states have opined that sending a friend request to a witness may be permissible if there is full disclosure by the sender as to the nature of the inquiry and the connection to an anticipated or pending lawsuit.¹⁴¹

Recently, social media has invaded other aspects of discovery and states have begun to issue opinions on what lawyers may advise clients to do regarding removing social media content prior to or during litigation.¹⁴² The debate in this area concerns the question: under what circumstances may the removal of social media content be tantamount to spoliation? New York, North Carolina, Pennsylvania Philadelphia, and Florida ethics advisory opinions all suggest that removal and preservation may be possible, but warn that legal analysis of spoliation must be considered.¹⁴³ There is also a growing body of case law that addresses those circumstances under which social media evidence may be compelled by court order.¹⁴⁴

02 (2009); *see also* N.Y.C. Lawyer's Ass'n, Formal Op. 743 (2011); *see also* Mass. Bar Assoc., Formal Op. 2014-5 (2014); *see also* Pa. Bar Ass'n, Formal Op. 2014-300 (2014); *see also* *Social Media Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association*, NEW YORK STATE BAR ASS'N (Mar. 18, 2014), <http://www.nysba.org/workarea/DownloadAsset.aspx?id=47547>.

139. *See* Jacobowitz & Singer, *The Social Media Frontier*, *supra* note 138, at 469–71; N.Y.C. Lawyer's Ass'n, Formal Op. 743 (2011); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014).
140. *See* Jacobowitz & Singer, *The Social Media Frontier*, *supra* note 138, at 476; *see also* San Diego Cnty. Bar Ass'n, Formal Op. 2011-2 (2011).
141. *See* Jacobowitz & Singer, *The Social Media Frontier*, *supra* note 138, at 475–76; *see also* Mass. Bar Assoc., Formal Op. 2014-5 (2014).
142. *See* Jacobowitz & Singer, *The Social Media Frontier*, *supra* note 138, at 472–73; *see also* *Formal Social Media Ethics Guidelines*, NEW YORK STATE BAR ASS'N (Mar. 18, 2014), <http://www.nysba.org/workarea/DownloadAsset.aspx?id=47547>.
143. *See* N.Y. Cnty. Lawyer's Ass'n, Formal Op. 745 (2013); *see also* N.C. State Bar, Formal Op. 5 (2014); *see also* Pa. Bar Ass'n, Formal Op. 2014-300 (2014); *see also* Phila. Bar Ass'n Prof'l Guidance Comm., Formal Op. 2014-5 (2014); *see also* Prof'l Ethics of the Fla. Bar, Proposed Advisory Opinion 14-1 (Jan. 23, 2015).
144. *See* Agnieszka A. McPeak, *The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery of Social Media Data*, 48 WAKE FOREST L. REV. 887, 910 (2013); *see also* *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650, 656 (N.Y. Sup. Ct. 2010) (“Since [sic] Plaintiff knew that her information may become publicly available, she cannot now claim that she had a rea-

Additionally, a number of states have advised on another hotly debated social media topic—whether judges may be friends with lawyers on Facebook. On one end of the spectrum, states such as Florida have voiced the conservative viewpoint that a judge should not be connected on social media with a lawyer who may appear before the judge.¹⁴⁵ On the other end; however, states such as South Carolina have offered a more liberal view that encourages judges to participate in the interest of community, but cautions them not to discuss any case pending before them in accordance with Judicial Canons prohibiting bias and the appearance of impropriety.¹⁴⁶

So, with all of this advice being offered by the state and local bar associations and the ABA, why do lawyers who are engaged in social media continue to stumble onto ethical and professional landmines? In fact, lawyers continue to face discipline for a wide array of social media related offenses. In Florida, a lawyer was reprimanded for blogging about a judge's controversial courtroom procedures and referring to her as an "evil, unfair witch"

sonable expectation of privacy."); *see also* *Beswick v. Northwest Med. Ctr., Inc.*, No. 07-020592, 2011 WL 7005038 (Fla. 17th Cir. Ct. Nov. 3, 2011) (Defendants sought discovery of information Plaintiff shared on social networking sites concerning her noneconomic damages and the court found this information to be "clearly relevant to the subject matter of the current litigation and . . . reasonably calculated to lead to admissible evidence."); *see also* *Levine v. Culligan of Fla., Inc.*, No. 50-2011-CA-010339-XXXXMB, 2013 WL 1100404, at *5 (Fla. 15th Cir. Ct. Jan. 29, 2013) (finding that "the critical factor in determining when to permit discovery of social media is whether the requesting party has a basis for the request" and that "Defendant ha[d] not come forth with any information from the public portions of any of Plaintiff's profiles that would indicate that there [was] relevant information on her profiles that would contradict the claims in th[e] case"); *see also* *Salvalto v. Miliey*, No. 5:12-CV-635-Oc-10PRL, 2013 WL 2712206, at *2 (M.D. Fla. June 11, 2013); *see also* *Root v. Balfour Beatty Const. LLC*, 132 So.3d 867 (Fla. Dist. Ct. App. 2d Dist. 2014); *see also* *Nucci v. Target Corporation*, No. 4D14-138, 2015 WL 71726 (Fla. Dist. Ct. App. 2d Dist. 2014 Jan. 7, 2015) (finding that "[i]t would take a great novelist, a Tolstoy, a Dickens, or a Hemingway, to use words to summarize the totality of a prior life. If a photograph is worth a thousand words, there is no better portrayal of what an individual's life was like than those photographs the individual has chosen to share through social media before the occurrence of an accident causing injury.").

145. Fla. Jud. Ethics Advisory Comm., Formal Op. 2009-20 (2009).

146. *See* Jacobowitz & Singer, *The Social Media Frontier*, *supra* note 138, at 471-72; *see also* Md. Jud. Ethics Comm., Formal Op. 2012-07 (2012); *see also* Cal. Judges Assoc. Jud. Ethics Comm., Formal Op. 66 (2010); *see also* Ky. Ethics Comm. of the Ky. Jud., Formal Op. JE-119 (2010); *see also* S.C. Advisory Comm. on Standards of Jud. Conduct, Formal Op. 17-2009 (2009); *see also* Ohio Bd. of Comm'rs on Grievance & Discipline, Formal Op. 2010-7 (2010); *see also* N.Y. Advisory Comm. on Jud. Ethics, Formal Op. 08-176 (2009); *see also* Mass. Comm. on Jud. Ethics, Formal Op. 2011-6 (2011); *see also* Okla. Jud. Ethics Advisory Panel, Formal Op. 2011-3 (2011).

among other derogatory characterizations.¹⁴⁷ In Illinois, a public defender received discipline for blogging about her clients, using derogatory language and identifying them by their prison numbers or reference to their first names.¹⁴⁸ In Virginia, a lawyer agreed to a five year suspension of his license and paid over a half million dollars in sanctions as a result of instructing his client to “clean up his Facebook page,” delete his Facebook account, and sign answers to interrogatories that stated as of the date of the signing that he did not have a Facebook account.¹⁴⁹ In Georgia, a lawyer was reprimanded when she responded to a client’s negative review on the lawyer rating service AVVO and thereby breached client confidentiality.¹⁵⁰ In yet another Florida case, a public defender was terminated after she posted a picture of her client’s leopard printed underwear on Facebook and commented on the family’s choice of proper client attire.¹⁵¹ As Public Defender Carlos Martinez explained after terminating the lawyer, “[w]hen a lawyer broadcasts disparaging and humiliating words and pictures, it undermines the basic client relationship and it gives the appearance that [the client] is not receiving a fair trial.”¹⁵²

All of these disciplinary actions involve the application, in a social media context, of the traditional rules requiring respect for the judiciary, client confidentiality, and fairness to opposing counsel. However, there is also a growing list of examples of “random” postings—either done anonymously or openly—of thoughts and feelings about cases, controversies or current issues, the publication of which are jeopardizing the reputations and careers of the lawyers involved.

For example, last summer two public defenders were terminated after posting derogatory statements on their Facebook accounts about Palestinians

147. *The Fla. Bar v. Conway*, 996 So.2d 213 (Fla. 2008).

148. *In re Kristine Ann Peshek*, Disciplinary Comm’n, M.R. 23712 (Ill. May 18, 2010), available at <http://www.state.il.us/court/SupremeCourt/Announce/2010/051810.pdf>; *In re Disciplinary Proceedings Against Peshek*, 798 N.W.2d 879, 880–81 (Wis. 2011).

149. See generally *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013); see also *Matthew B. Murray Resigns from the Allen Law Firm*, ALLEN ALLEN ALLEN & ALLEN, <http://www.allenandallen.com/matthew-b-murray-resigns.html> (last visited Apr. 13, 2015); see also Peter Vieth, *Murray Agrees to 5-Year Bar Suspension in Wake of Sanctions Payment*, VA LAWYERS WEEKLY (July 29, 2013), <http://valawyersweekly.com/2013/07/29/murray-agrees-to-5-year-bar-suspension-in-wake-of-sanctions-payment/>.

150. *In re Skinner*, 740 S.E.2d 171, 173 (Ga. 2013).

151. Martha Neil, *Lawyer Puts Photo of Client’s Leopard-Print Undies on Facebook; Murder Mistrial, Loss of Job Result*, A.B.A. J. (Sept. 13, 2012), http://www.abajournal.com/news/article/lawyer_puts_photo_of_clients_leopard-print_undies_on_facebook_murder_mistrial/.

152. *Id.*

in connection with the death of three Israeli teenagers.¹⁵³ After terminating the two lawyers, Public Defender Howard Feinstein said that he was stunned by the nature of the Facebook posts and explained that it is “[t]ime for us to learn and grow and draw the line in the sand firmly that as public defenders we have a higher calling and we cannot engage in hate speech that interferes with the mission of this office which is equal justice for all.”¹⁵⁴

In September, an Arkansas judge was removed from the bench and banned from holding office after he posted comments about his cases on a University of Louisiana online message board under the pseudonym “geauxjudge.” Some of his comments were seen as reflecting bias against women, African Americans, and the gay community.¹⁵⁵ The judge also included commentary about the confidential adoption of a child by actress Charlize Theron.¹⁵⁶

In 2011, an Indiana state prosecutor was terminated after he tweeted “use live ammunition” in response to the news report that riot police had been ordered to remove protestors from the state capital of Madison, Wisconsin.¹⁵⁷

In 2011, a Minnesota Assistant U.S. Attorney made headlines after posting on Facebook that she was “keeping the streets safe from Somalis” during the trial of a Somali immigrant accused of attempted murder.¹⁵⁸

153. Brittany Wallman, *Public Defenders Fired in Broward County for Alleged Hate sSpeech on Facebook*, CBS12, <http://cbs12.com/news/top-stories/stories/public-defenders-fired-broward-county-alleged-hate-speech-facebook-17506.shtml> (last visited Mar. 12, 2015).

154. *Id.*

155. Debra Cassens Weiss, *Controversial ‘Geauxjudge’ Commenter Admits He Is a Judge, Drops Out of Appellate Race*, A.B.A. J. (Mar. 7, 2014, 1:13 PM), http://www.abajournal.com/news/article/controversial_gauxjudge_commenter_admits_he_is_a_judge_drops_out_of_appella.

156. Martha Neil, *Judge Banned from Bench Due to Online Comments, Disclosing Confidential Info on Celebrity’s Adoption*, A.B.A. J. (Sept. 11, 2014, 2:20 PM), http://www.abajournal.com/news/article/judge_who_talked_about_adoption_by_actress_charlize_theron_in_online_posts/?utm_source=internal&utm_medium=navigation&utm_campaign=most_read.

157. CNN Wire Staff, *Indiana State Prosecutor Fired over Remarks about Wisconsin Protests*, CNN (Feb. 23, 2011, 9:57 PM), <http://www.cnn.com/2011/US/02/23/indiana.ammo.tweet/>.

158. *Minnesota v. Usee*, 800 N.W.2d 192, 200 (Minn. Ct. App. 2011) (finding that “[h]ere, the jury was instructed throughout the trial not to research the case, the issues, or anyone involved in the case on the Internet. Appellant presented evidence in the form of two affidavits—one by each of his trial attorneys—stating that the prosecutor had posted the alleged comments on her public Facebook page. But appellant did not present evidence that any juror had been exposed to the comments. Absent evidence of juror exposure, appellant did not establish a prima facie case of juror misconduct.”).

In 2012, at least four attorneys in a U.S. Attorney's office either resigned or were demoted as a result of their "anonymous" postings on a Louisiana newspaper's website during the high profile trial of five New Orleans police officers who allegedly shot innocent victims in the aftermath of Hurricane Katrina.¹⁵⁹ The online comments were a significant contributing factor to behavior that the judge deemed "grotesque prosecutorial misconduct" when he overturned the conviction and ordered a new trial.¹⁶⁰ Notably, the main online perpetrator was not directly involved in the trial.

In 2013, a Beaumont, Texas Assistant U.S. Attorney made derogatory, racially charged comments on Facebook regarding the Trayvon Martin case.¹⁶¹

[He] . . . commented on the Trayvon Martin case, in which George Zimmerman was acquitted in the death of the teen who had gone to the store to buy Skittles and Arizona iced tea, the story says.

[He] wrote: "How are you fixed for Skittles and Arizona watermelon fruitcocktail (and maybe a bottle of Robitussin, too) in your neighborhood? I am fresh out of 'purple drank.' So, I may come by for a visit. In a rainstorm. In the middle of the night. In a hoodie. Don't get upset or anything if you see me looking in your window . . . kay?"¹⁶²

There are many more examples in what John Browning has dubbed the "rogues gallery" of social media blunders.¹⁶³ Perhaps one of the most recent

159. Martha Neil, *Ex-Prosecutor Blames Ambien, Job Pressure for Web Posts He Resigned Over; Says Few Were Work-Related*, A.B.A. J. (Sept. 10, 2014, 3:55 PM), http://www.abajournal.com/news/article/ex_prosecutor_blames_pressures_of_job_for_blog_posts_he_resigned_over_says/.

160. Martha Neil, *Judge Cites 'Grotesque Prosecutorial Misconduct,' Reverses Cop Convictions in Danziger Bridge Case*, A.B.A. J. (Sept. 17, 2013, 8:55 PM), http://www.abajournal.com/news/article/judge_cites_grotesque_prosecutorial_misconduct_reverses_cop_convictions_in/.

161. Debra Cassens Weiss, *Assistant U.S. Attorney's Derogatory Facebook Comments about 'Dalibama' and Trayvon Martin are Probed*, A.B.A. J. (Aug. 15, 2013, 12:06 PM), http://www.abajournal.com/news/article/assistant_us_attorneys_derogatory_facebook_comments_about_dalibama_and_tray/?utm_source=maestro&sc_cid=130815AR&utm_campaign=weekly_email&utm_medium=email.

162. *Id.* While the Beaumont U.S. Attorney's Office found the comments to be reprehensible, it is unclear whether the prosecutor was disciplined because the comments did not have to do with a case in the office and the office did not have a social media policy.

163. See generally JOHN G. BROWNING, *SOCIAL MEDIA AND LITIGATION: PRACTICE GUIDE 159* (2014); see also John Browning, *Friend or Foe: Ethical Concerns in the Use of Social Media*, *TECHNOLOGY AND THE 21ST CENTURY ADVOCATE*

is the Florida prosecutor's mother's day greeting to "all you crack hoes" that appears at the opening of this article.¹⁶⁴ Some of the lawyers involved in the examples discussed above lost their jobs, while others were disciplined on the job or by a bar association. Universal among the cases is the impact on the legal profession. No doubt, there are individual factors that apply in all of these examples, but given the pervasive nature of social media and the repeated social media mishaps occurring within the legal profession, perhaps there is an overarching cultural explanation.

A. Culture Clash?

Why are there so many stories of lawyers tripping on ethical landmines in cyberspace? Psychological studies have found that people share on social media because sharing is not only consistent with human nature, but also is often prompted by emotional arousal for which social media sharing may provide a sense of closure.¹⁶⁵ Additionally, "oversharing" stems from our basic wiring and the inherent pleasure we gain from talking about ourselves.¹⁶⁶ Thus, a lawyer's need to vent about a client, opposing counsel, or judge—conversations that traditionally occurred in a discreet, face-to-face conversation with a colleague—may now appear as a hyper-personal, disinhibited, and possibly "flaming" post on social media. As such, a lawyer's natural desire for connectedness and social feedback, another factor in why people share on social media, may underlie the impulse to post a crack hoes mother's day greeting or controversial comment about the Trayvon Martin case.

Perhaps, the problem is that the legal profession's culture is not a culture of quick *share and connects*. Contrasted with the quick and immediate nature of social media and its values of *share* and *connect* are the legal profession's values of careful *analytical thinking*, *confidentiality*, and *respect* for others as well as for the legal profession's perceived role in society. In other words, lawyers are known for careful analysis of confidential information

(Am. Inns of Court National Symposium, *The Advocate: Professional Representation in the 21st Century* 2013), available at http://home.innsocourt.org/media/37095/panel_6_handouts.pdf.

164. Kemp, *supra* note 3.

165. Courtney Seiter, *7 Social Media Psychology Studies that Will Make Your Marketing Smarter*, HUFFINGTON POST (Sept. 2, 2014, 3:52 PM), http://www.huffingtonpost.com/courtney-seiter/7-social-media-psychology_b_5697909.html; see also John Tierney, *Good News Beats Bad on Social Networks*, N.Y. TIMES (Mar. 18, 2013), <http://www.nytimes.com/2013/03/19/science/good-news-spreads-faster-on-twitter-and-facebook.html?pagewanted=all&r=0> (last visited Apr. 13, 2015). While an in-depth discussion of the psychology of social media is beyond the scope of this article, this mention of it seems not only relevant, but also widely accepted and therefore relevant to the discussion of lawyers and social media use.

166. *Id.*

rather than public sharing of private information and opinions. Some of the fundamental cultural norms of social media and the legal profession seem to directly contradict one another. On the other hand, some of the personality traits associated with lawyers such as being aggressive, competitive, and subject to suffering high degrees of psychological stress may render social media compelling as an outlet for emotionally charged opinions or as a vehicle for winning-at-all-costs legal strategies.

Moreover, the fact that the profession has not historically codified the value of cultural competency and that legal education has been criticized for failing to adequately connect analytical thinking skills with real world situations compounds the situation. Why? Because a lawyer who does not appreciate the clashing nature of social media norms with the legal profession's norms and also suffers from a general lack of cultural competency will not likely appreciate the impact of his social media post upon the vast audience that comprises social media. The public defenders who were terminated for anti-Palestinian posts may not have considered that there would be uproar from the Islamic community that voiced concern about being able to have unbiased representation for anyone in their community who might be in need of a public defender.¹⁶⁷ Thus, a lawyer who blends his professional and personal life on social media without appreciating Mark Zuckerberg's suggestion that the days of having two identities—one for work and one for home—are rapidly coming to end, is a lawyer who may be risking his reputation and career. Beyond understanding the cultural differences between social media and the legal profession, some guidelines may prove to be beneficial.

B. Cultural Competency and Social Media Guidelines for the Legal Profession

In 2012, the International Bar Association's (IBA) Legal Projects Team conducted an international survey of its member bar associations and reported its findings in *The Impact of Online Social Networking on the Legal Profession and Practice*. The survey found that "over 90 percent of respondents identified a need for bar associations, law societies and councils, or, alternatively, the IBA, to develop guidelines regarding the use of online social networking sites in the legal profession."¹⁶⁸ On May 24, 2014, the IBA

167. Running throughout the rogues gallery of lawyer's social media blunders is the tension between legal ethics and professionalism on the one hand and a lawyer's First Amendment right of free speech, which is a robust discussion that is beyond the scope of this article. See Jan L. Jacobowitz & Kelly Rains Jesson, *Fidelity Diluted: Client Confidentiality Gives Way to the First Amendment & Social Media* in Virginia State Bar, ex rel. Third District Committee v. Horace Frazier Hunter, 36 CAMPBELL L. REV. 75 (2013).

168. IBA *International Principles on Social Media Conduct for the Legal Profession*, INT'L BAR ASS'N (May 24, 2014), <http://www.ibanet.org/Document/Default.aspx?DocumentUId=27EBAC25-0D13-4318-A1C4-6B751ACA935F> (last visited Apr. 13, 2015).

published International Principles for the Legal Profession.¹⁶⁹ These principles were developed after taking into consideration varying cultural differences in the use of social media by IBA's international members and seek to resolve the "cultural clash" between social media and the legal profession.

The first of the six principles acknowledges the normative value of *independence* and suggests, "[b]efore entering into an online 'relationship', lawyers should reflect upon the professional implications of being linked publicly. Comments and content posted online ought to project the same professional independence and the appearance of independence that is required in practice."¹⁷⁰

The second principle addresses *integrity* and explains "[l]egal professionals are expected to maintain the highest standards of integrity in all dealings, including those conducted over social media. Comments or content that are unprofessional or unethical could damage public confidence, even if they were originally made in a 'private' context."¹⁷¹

The third principle is *responsibility* and pertains to understanding how social media works. In other words, lawyers should acquire competence as to the methods for engaging in social media. The third principle states:

Legal professionals should be reminded to maintain responsible use of social media based on a full understanding of the implications (noting that information published on social media is not easily removable) and, at the same time, monitor and regularly review their use of and content on social media . . .

Social media provides a platform for quick, short messages to be disseminated widely. What was intended to be humorous or frivolous may be received as a serious declaration. Bar associations and regulatory bodies should remind legal practitioners to consider the context, the potential audience and whether the comment is clear and unambiguous. As a general guidance, legal practitioners ought not to do or say something online that they would not do or say in front of a crowd. Lawyers should also be reminded that inappropriate use of social media could also lead to exposure to discrimination, harassment and invasion of privacy claims as well as exposure to claims for defamation, libel and other torts.¹⁷²

The fourth principle, *confidentiality*, pertains to the importance not only of client confidentiality, but also of the public perception that lawyers maintain confidentiality of client information. This principle recommends that, "bar associations and regulatory bodies should encourage lawyers to consider

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

client confidentiality more generally when using social media . . . [and warns that even] . . . information that locates a lawyer geographically and temporally could be used to show professional involvement with a client who does not wish to publicize that he or she is seeking legal advice.”¹⁷³

The fifth principle, *maintaining public confidence*, echoes Zuckerberg’s observation of the need for a unified identity. It states that:

[L]egal practitioners should be encouraged to monitor their online and offline conduct in the same way. Restraint should be exercised so that online conduct adheres to the same standard as it would offline in order to maintain a reputation demonstrating characteristics essential to a trusted lawyer, such as independence and integrity . . .

As with offline activity, lawyers have personal autonomy over their private affairs. The difference with online social media is that a lawyer’s life and activities may be exposed more widely to public gaze, which may have the effect of highlighting the key characteristics of the lawyer. It is essential that bar associations and regulatory bodies ensure that lawyers appreciate these key characteristics and risks when pursuing their personal social life online. In addition, because it is common to use a variety of social media, bar associations and regulatory bodies should remind lawyers to consider whether the sum total of their social media activity portrays a legal professional with whom clients can entrust their affairs.¹⁷⁴

The sixth and final principle, *policy*, calls upon law firms and other legal offices to develop clear policy guidelines for employees as to social media use. This principle serves as reinforcement of the concept that social media culture is distinct from the culture of the legal profession and therefore must be thoughtfully integrated in the legal profession.¹⁷⁵

The IBA has not only identified competence, integrity, confidentiality, and maintaining the public trust as characteristics of the legal profession, but has also sought to explain the nuances of social media to assist attorneys in avoiding the undertow when human nature encourages a lawyer to express himself online without regard to his offline professional identity and the cultural norms of the legal profession. Awareness is an essential ingredient in avoiding the quick expression of a thought or feeling consistent with the

173. *Id.*

174. *IBA International Principles on Social Media Conduct for the Legal Profession*, INT’L BAR ASS’N (May 24, 2014), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=27EBAC25-0D13-4318-A1C4-6B751ACA935F>.

175. *Id.*

culture of social media, but the expression of which will ultimately clash with normative values in the legal profession.

VIII. THE ROLE OF AWARENESS

As discussed above, becoming culturally competent requires a heightened awareness in the moment. Pausing to consider another person's cultural context and how it might be influencing that person's communication is essential. Likewise, an awareness of an individual's own cultural predispositions and biases is a critical component of cultural competency. Awareness is necessary not only in dealing with clients, opposing counsel, judges, and jurors, but also when engaging in the culture of social media. Both aspects of cultural competency come into play. Awareness of the manner of self-expression of the communicator and awareness of the potential reaction of the recipients of the communication are required. The IBA's social media principles for the legal profession focus on both the need to maintain fundamental values of the legal profession and the fact that awareness of these values and the norms of social media culture are the formula for successfully integrating these two cultures.¹⁷⁶

In his book, *The Eighth Habit: From Effectiveness to Greatness*, Stephen Covey describes awareness as the realization that there is a space between an event and a person's response to that event.¹⁷⁷ Covey notes that the understanding that an individual may pause in this space had a dramatic impact upon his orientation in the world.¹⁷⁸ Dr. Daniel Siegel explains that by pausing to gain insight into what is influencing your thought process, you may be able to reflect and more consciously deliberate to thoughtfully decide upon a response rather than quickly react in a regrettable manner.¹⁷⁹

In "Thinking, Fast and Slow," Daniel Kahneman describes the process of thinking about our thinking, or "meta-awareness."¹⁸⁰ He explains that correcting errors that originate in our intuitive, implicit thinking is simple in principle, but in actuality requires a considerable investment.¹⁸¹

The simple principle is "to recognize the signs that you are in a cognitive minefield, slow down, and ask for reinforcement" from the conscious, deliberate aspect of your mind—the slow thinking system.¹⁸² Kahneman further explains:

176. *Id.*

177. STEPHEN R. COVEY, *THE 8TH HABIT: FROM EFFECTIVENESS TO GREATNESS* 42 (2004).

178. *Id.*

179. See DANIEL J. SIEGEL, *THE MINDFUL BRAIN—REFLECTION AND ATTUNEMENT IN THE CULTIVATION OF WELL-BEING* 327 (2007).

180. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 417 (2011).

181. *Id.*

182. *Id.*

Unfortunately, this sensible procedure is least likely to be applied when it is needed most. We would all like to have a warning bell ring loudly whenever we are about to make a serious error, but no such bell is available . . . The voice of reason may be much fainter than the loud and clear voice of an erroneous intuition, and questioning your intuitions is unpleasant when you face the stress of a big decision. More doubt is the last thing that you want when you are in trouble . . . The upshot is that it is much easier to identify a minefield when you observe others wandering into it than when you are about to do so.¹⁸³

Cultivating awareness and understanding the psychological theories that impact interpersonal relationships and decision-making are areas of growing interest in the legal profession. Jennifer Robbennolt and Jean Sternlight's book, *Psychology for Lawyers*, is part of the growing literature advancing the idea that not only should law students and lawyers be taught cultural competency, but also they should learn about cognitive psychology and emotional intelligence to increase self-awareness and improve effectiveness.¹⁸⁴ Robbennolt and Sternlight begin their book with Judge Learned Hand's observation in a 1911 opinion. Judge Hand wrote, "[h]ow long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance."¹⁸⁵

Robbennolt and Sternlight have embraced Judge Hand's suggestion and provided an in-depth exploration of the value for lawyers of learning more about psychology, "the science of how people think, feel and behave."¹⁸⁶ They suggest that, "[l]awyers who can harness the insights of psychology

183. *Id.* at 417.

184. See generally JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* (2012); see also Alan Lerner, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible Choices*, 23 Q.L.R. 643 (2004); PAUL BREST & LINDA HAMILTON KRIEGER, *PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT—A GUIDE FOR LAWYERS AND POLICY MAKERS* 481 (2010); Kristen Holmquist, *Challenging Carnegie*, 61 J. LEGAL EDUC. 363 (2012); Andrew Perlman, *A Behavioral Theory of Legal Ethics* (Suffolk Univ. Law Sch. Research Paper No. 13-31, 2013), available at <http://ssrn.com/abstract=2320605>; Susan Swaim Daicoff, *Expanding the Lawyer's Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law*, 52 SANTA CLARA L. REV. 795 (2012).

185. ROBBENOLT & STERNLIGHT, *supra* note 184, at 1 (citing *Parke-Davis & Co. v. H. K. Mulford Co.*, 189 F. 95, 115 (1911)).

186. See *id.*

will be more effective interviewers and counselors, engage in more successful negotiations, conduct more efficient and useful discovery, more effectively persuade judges and others through their written words, better identify and avoid ethical problems, and even be more productive and happier.”¹⁸⁷

Robbennolt and Sternlight explain heuristics that impact decision-making and the variables that result in ethical lapses,¹⁸⁸ which may occur “more easily and less intentionally than we might imagine.”¹⁸⁹ It is critical to maintain an awareness of the underlying psychology at play and the fact that the influence of certain aspects of legal practice, such as zealous client advocacy, may contribute to an ethical lapse.¹⁹⁰ Awareness of the ethics rules, as well as prior planning, also contribute to more effective and ethical decision-making.¹⁹¹ Prior planning tools that may be used include identifying beneficial resources, anticipating pressure,¹⁹² and employing the psychological strategy of implementation.¹⁹³ An “implementation intention” may be useful for lawyers who are highly engaged in social media and want to avoid impulsively sharing thoughts that are better left unpublished. Robbennolt and Sternlight explain:

[a]n implementation intention is an if-then statement that specifies how we will behave in a future situation. In particular the statement anticipates and articulates a specific triggering circumstance or feeling followed by a detailed statement of what we will do on that occasion [W]e might say, when I feel myself under pressure to make a concession, I will tell Joe that I need to make a phone call and take a five-minute break.” When the trigger occurs the response is automatic. Specifying the trigger as well as the specifics of the behavioral response in this way has been shown to be effective in furthering the desired goal-directed behavior.¹⁹⁴

Another strategy for cultivating awareness is mindfulness, the development of non-judgmental awareness in the moment, which is growing in popularity in the legal community. Mindfulness enhances awareness of thoughts, feelings, and bodily sensations that are experienced in the present moment, which impact our decision-making and often go unnoticed. The legal profession is embracing mindfulness practice to provide tools to assist in engaging

187. *Id.*

188. *Id.* at 392.

189. *Id.* at 385. (An explanation of these phenomena, while fascinating, is beyond the scope of this article).

190. *See id.* at 393.

191. ROBBENNOLT & STERNLIGHT, *supra* note 184, at 413.

192. *Id.*

193. *Id.* at 111.

194. *Id.* at 111–12.

in the pause, “thinking about ones thinking”, and responding more thoughtfully.¹⁹⁵

As discussed above, once an individual develops an enhanced self-awareness, he may better analyze his relationship to other cultures, obtain knowledge about other cultures, and further develop the skills to recognize and adapt to the distinction in the moment. This formula is true for any cross-cultural exchange, but traveling in the land of social media is more like being a traveler in a foreign land than it is sitting directly across from a client where perhaps it is easier to practice and engage in Bryant and Koh Peters’ five habits of the culturally competent lawyer.¹⁹⁶ When using social media, a lawyer should be aware not only of aligning his conduct to the norms of the legal profession, but also must consider the culture sensitivities of the virtually unlimited culturally diverse audience.

It is not possible to apply cultural competence skills to consider all ages, ethnicities, nationalities, sexual preferences, vocations, education levels, socio-economic levels, and other traits of the people to whom a lawyer may be “speaking” through status updates, tweets, Instagram pictures, and YouTube videos. Thus, lawyers need to be aware that using prejudicial, biased language even in jest, posting controversial comments about a group of people such as the Palestinians, or unprofessionally posting and commenting on a client’s underwear¹⁹⁷ are social media posts that can quickly be viewed by hundreds or even thousands of people, depending upon privacy settings as well as other social media sharing methodologies. Moreover, whatever you post is permanent.¹⁹⁸ In other words, *lawyers beware: you are what you post.*

195. Jan L. Jacobowitz, *The Benefits of Mindfulness for Litigators*, 39 ABA LITIG. J. 2 (2013), available at http://www.americanbar.org/publications/litigation_journal/2012_13/spring/benefits-mindfulness.html; see also JAN L. JACOBOWITZ, *Mindfulness and Professionalism*, in THE ESSENTIAL QUALITIES OF A PROFESSIONAL LAWYER (Amer. Bar Ass’n, Ctr. Prof’l Responsibility 2013); Jan L. Jacobowitz & Scott Rogers, *Mindful Ethics—A Pedagogical and Practical Approach to Teaching Legal Ethics, Developing Professional Identity, and Encouraging Civility*, 4 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS (2014); SCOTT ROGERS & JAN L. JACOBOWITZ, MINDFULNESS AND PROFESSIONAL RESPONSIBILITY: A GUIDE BOOK FOR INTEGRATING MINDFULNESS INTO THE LAW SCHOOL CURRICULUM 13 (2012); Nicole E. Ruedy & Maurice E. Schweitzer, *In the Moment: The Effect of Mindfulness on Ethical Decision Making*, 95 J. BUS. ETHICS 73 (2010); HALLIE N. LOVE & NATHALIE MARTIN, YOGA FOR LAWYERS: MIND-BODY TECHNIQUES TO FEEL BETTER ALL THE TIME 100 (2014).

196. BRYANT & PETERS, *supra* note 44.

197. Neil, *supra* note 151.

198. Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES MAG. (July 21, 2010), http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&_r=0.

VIII. CONCLUSION

There is a robust literature dedicated to cultural awareness and cultural competence. The role of the lawyer and the cultural norms of the legal profession also command an enormous body of scholarly writing and analysis. Finally, there is an increasing amount of research and literature revolving around the impact of the digital age and the culture of social media. Ultimately, this article is about raising awareness. Awareness of the value for lawyers who are willing to develop cultural competence. Awareness of the benefit for lawyers who understand the normative values of the legal profession and recognize how those values may align or contrast with personal values and the context in which they practice. Awareness that a competent lawyer must be knowledgeable about both the advantages and pitfalls of using social media in the effective practice of law. Finally, awareness in the moment so that a lawyer may pause and calibrate his cultural competency such that his words remain true to his intention and identity, whether it be online or offline.

*Speak clearly, if you speak at all; carve every word before you let it fall.*¹⁹⁹

—Oliver Wendell Holmes Sr.

199. BRAINYQUOTE, <http://www.brainyquote.com/quotes/quotes/o/oliverwend122641.html> (last visited Apr. 13, 2015).