

# Doing it for the Likes?

## Social Media and Professional Misconduct

Presenters: Donovan C. Walker and Justine A. Collins

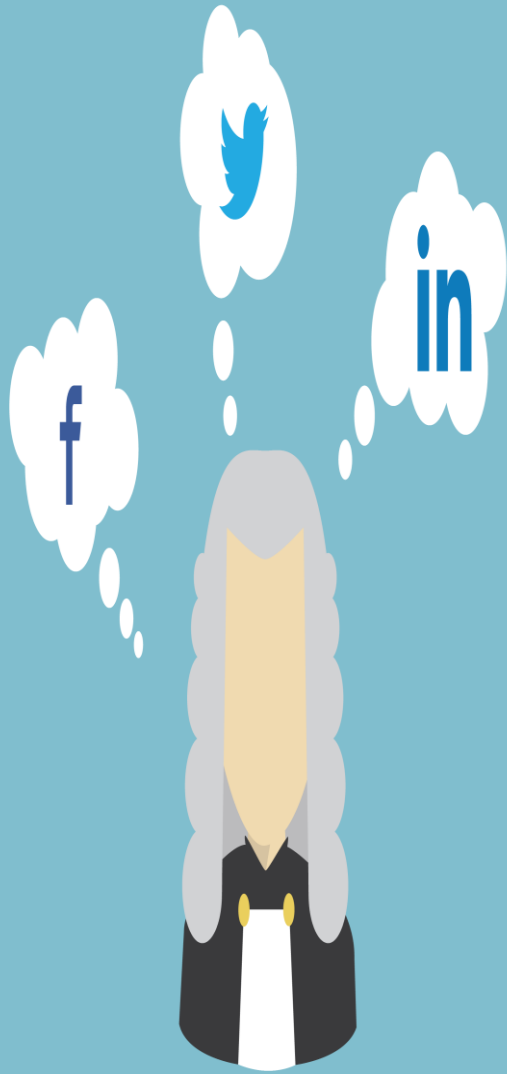


# OVERVIEW

- ❖ Social Media
- ❖ Benefits of the use of Social Media platforms in your legal practice
- ❖ Use of Social Media platforms and the duty of confidentiality
- ❖ Receiving client instructions via Social Media platforms
- ❖ Communicating via Social Media Platforms in Litigation
- ❖ Advertising and Social Media
- ❖ Guidance and tips



## SOCIAL MEDIA



- Social media are computer-mediated technologies that facilitate the creation and sharing of information, ideas, career interests and other forms of expression via virtual communities and networks.
- Websites and applications that enable users to create and share content or to participate in social networking. These forms of electronic communication allow users to create online communities to share information, ideas, personal messages, and other content (such as videos).

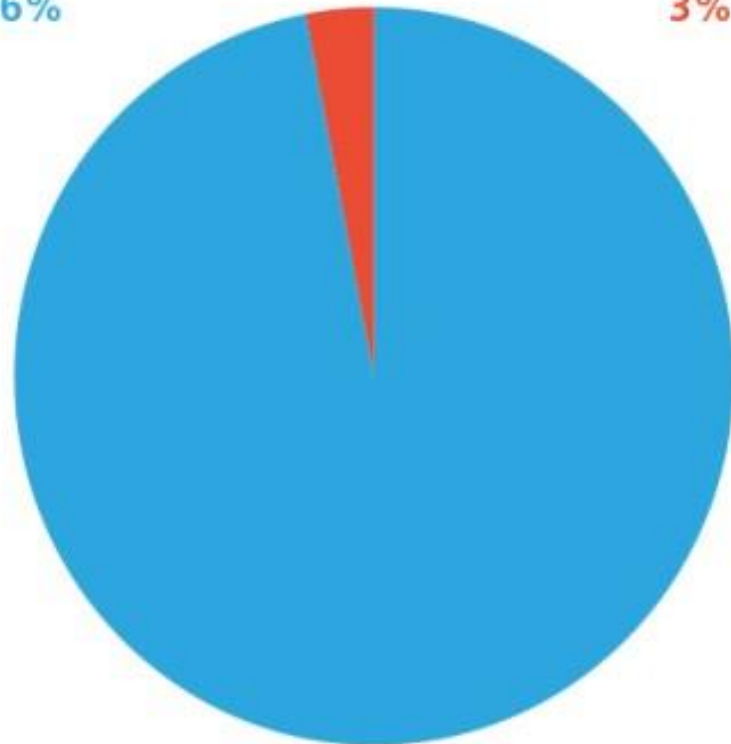


# Social Media

DO YOU USE SOCIAL MEDIA?

YES  
96%

NO  
3%



IS YOUR USE OF SOCIAL MEDIA PART OF A MARKETING STRATEGY?

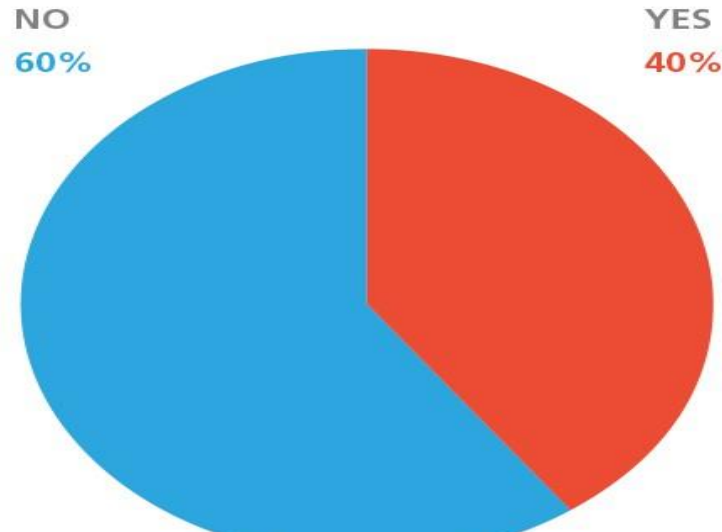
70% YES  
29% NO  
1% DON'T KNOW

ONLY 7% BELIEVE THEIR USE OF SOCIAL MEDIA MARKETING IS "VERY RESPONSIBLE" FOR BRINGING THEM NEW CLIENTS.

VERY RESPONSIBLE 7%  
SOMEWHAT RESPONSIBLE 42%  
NOT AT ALL RESPONSIBLE 34%  
DIFFICULT TO MEASURE 17%

90% of respondents to an international survey conducted by the IBA in 2012 identified a need for bar associations to develop guidelines relating to social media use

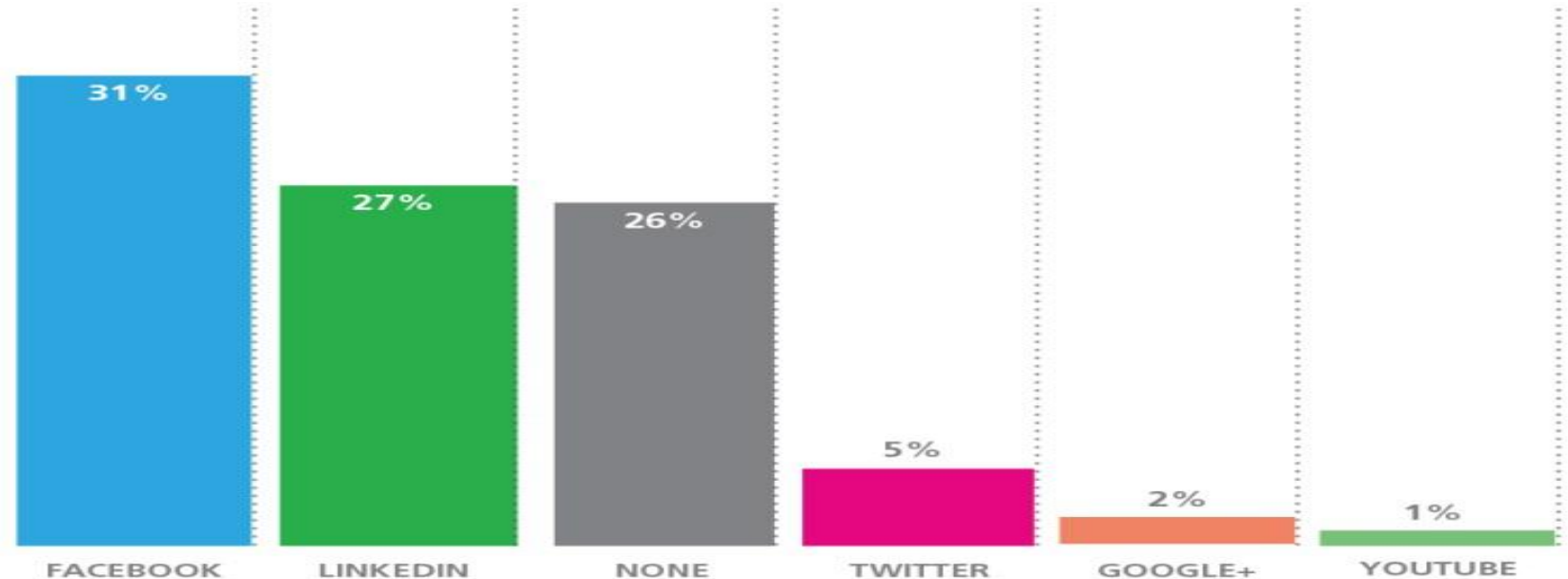
## DO YOU USE PAID SOCIAL MEDIA ADS?



**40%**  
USE PAID SOCIAL ADS

**31%**  
USE A CONTENT SHARING PLATFORM

## WHICH DO YOU THINK ARE THE MOST EFFECTIVE SOCIAL MEDIA PLATFORMS FOR BRINGING IN NEW BUSINESS?



## IBA PERSPECTIVE ON SOCIAL MEDIA USE



- Social media presents both opportunities and challenges for legal practitioners
- IBA principles created because social media presents a platform for legal professionals to promote the administration of justice, by engaging the public in legal practice and debate
- Provides for real-time legal updates to a vast audience
- “These are qualities that show that social media can be misused giving rise to conduct capable of eliciting disciplinary concerns as well.”

*Source:- IBA International Principles on Social Media Conduct for the Legal Profession (2014)*

**THE ETHICAL  
DILEMMA**

## THE DILEMMA



## THE ETHICAL DILEMMA

“ The social media disruption of the legal industry is quite simple to explain: the way we communicate has changed and potential clients are no longer flipping through the Yellow Pages, cold calling, or going door-to-door to look for legal services. With 76% of law firms in USA with an online presence, it can come as no surprise that potential clients are looking online to find legal representation. Widely recognized as an efficient marketing and client development tool, social media unquestionably has its benefits when it comes to the practice of law, but it also serves as a virtual minefield for potential ethical violations.”

*Source:- Jessica Weltge and Myra McKenzie Harris, ABA Paper, March, 2017*

# Potential Benefits of Social Media?





# Richard Susskind Views on the Future of Law and Technology

- Professor Richard Susskind claimed that IT and the internet were about to precipitate huge changes in legal practice and the administration of justice.
- Attorneys would have to package and sell their expertise in innovative ways for a very different market for legal knowledge and expertise.
- Susskind envisioned:
  - virtual legal libraries
  - Rise of multimedia
  - E-mail to be primary means of client communication

## Benefits of Social Media Use in Legal Practice

- Enhanced client care from facilitation of electronic communication
- “Clicks and Mortar” practice
- Facilitates more efficient service of court documents
- Social Media Research – KYC and AML requirements
- Creation of new practice areas: social media in employment, technology law etc.

# Does the duty of Competence for Attorneys extend to Social Media Use?

## USA

- American Bar Association Model Rules of Professional Conduct
- Competent representation is the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
- Duty of competence requires lawyers to “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”
- 14 states have formally recognized that the competency requirement extends specifically to social media

Does the duty  
of  
Competence  
for Attorneys  
extend to  
Social Media  
Use?

United Kingdom

- Law Society of England and Wales and Solicitors Regulatory Authority recognize the requirement for competent representation of solicitors
- but does not extend specifically to social media use.

Does the duty  
of  
Competence  
for Attorneys  
extend to  
Social Media  
Use?

The Legal Practitioners' Practice Rules 2002: Zambia

- **Rule 35(1)(a):** A practitioner shall in all professional activities be courteous and act promptly, conscientiously, diligently and **with reasonable competence** and take all reasonable and practicable steps **to avoid unnecessary expense or** waste of the court's time and to ensure that professional engagements are fulfilled

Does the duty  
of  
Competence  
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extend to  
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Canons of Professional Ethics: Jamaica

- **Canon IV:** An attorney shall act in the best interest of his client and represent him **honestly, competently and zealously** within the bounds of the law. He shall preserve the confidence of his client and avoid conflicts of interest.
- **Canon VIII (b):** Where in any particular matter explicit ethical guidance does not exist, an Attorney shall determine his conduct by **acting in a manner that promotes public confidence** in the integrity and efficiency of the legal system and the legal profession.

# Duty of Confidentiality



## Duty of Confidentiality

- **Principle 4** of IBA Principles on Social Media conduct for the Legal Profession(2014):
  - ❖ it is important that lawyers can be trusted with confidential information and the public perceives this
  - ❖ Social media platforms are not appropriate for dealing with client data or other confidential information unless they are satisfied that they can protect such data in accordance with their professional, ethical and legal obligations
- It is a breach of the general law of confidentiality and the Canons of Ethics for an Attorney, without the consent of the client given after full disclosure, to disclose confidential information belonging to the client.



## Duty of Confidentiality

*Prince Jefri Bolkiah v KPMG (A firm)* [1999] 1 All ER 517

- It is a duty to keep the information confidential, not merely to take all reasonable steps to do so.
- It is not merely a duty not to communicate the information to a third party. It is a duty not to misuse it.
- Client cannot be protected entirely from accidental or inadvertent disclosure
- But the client is entitled to prevent his solicitor from exposing him from any avoidable risk

## Canons of Ethics: Jamaica

### Duty of Confidentiality

- **Canon IV(t):** An Attorney shall not knowingly reveal a confidence or secret of his client, or use a confidence or secret of his client
  - (1) to the client's disadvantage; or
  - (2) to his own advantage; or
  - (3) to the advantage of any other person unless in any case it is done with the consent of the client after full disclosure.
- **Canon I(b):** An Attorney shall at all times maintain the honour and dignity of the profession and shall abstain from behaviour which may lend to discredit the profession of which he is a member.
- Breach of these Canons constitute Professional Misconduct

## The Legal Practitioners' Practice Rules 2002: Zambia

**Rule 35(2)** : Whether or not the relation of practitioner and client continues, a practitioner:

- shall preserve the confidentiality of the clients' affairs
- shall not without the prior consent of the client or as permitted by law lend or reveal the contents of the client's instruments or communicate to any third person (other than an associate or any of the staff in the practice of the practitioner who need to know it for the performance of their duties) information which has been entrusted to the practitioner in confidence or
- shall not use such information to the practitioner's clients' detriment or to the practitioner's advantage or to another clients' advantage.

**Rule 41:** breach of any of the rules may constitute professional misconduct or conduct unbecoming a practitioner

## Duty of Confidentiality

## How can Attorneys breach duty of confidentiality?

- Casually commenting on day-to-day activities
- Use of geo-tagging in social media posts or photos that may inadvertently reveal your geographic location when traveling on confidential client business
- Cookies, spyware, web bugs, hidden identifiers and other similar devices eg: *Mossack Fonseca*
- Not paying attention to terms and conditions/privacy policies of social media platforms
  - ❖ Principle 3 of IBA Principles-Responsibility: Legal practitioners have responsibility to understand the use of social media. Bar Associations should encourage members to assess the privacy settings of any social media account, whether personal or professional.
- Deliberately posting information which reveals client confidences

## Breach of Confidentiality via Social Media Platforms

*Re Kristine Ann Peshek Matter (2009) (No. 6201779)*

- An Illinois public defender found this out the hard way, being found to have unethically revealed confidential details about a case in disciplinary proceedings, when she posted comments such as:
- “This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because ‘he’s no snitch’” and “Huh? You want to go back and tell the judge that you lied to him, you lied to the pre-sentence investigator, you lied to me?”
- The attorney ultimately lost her job and was suspended from the practice of law for three months

# Personal Profiles and Professional Misconduct



## Personal vs Professional Profile

- Attorneys are never truly “off duty” from their ethical obligations to clients, especially due to the “fiduciary nature of the legal profession”.
- Posts on social media, even personal social media sites, are rarely, if ever truly private.
- Statements made in a Facebook post cannot be assumed to be confidential, even if the Facebook site is a “personal” site
- Attorneys must be careful not to bring the reputation into disrepute on their personal profiles, even if there are separate professional and personal profiles

# IBA Principles

- Principle 2: Integrity

- ❖ Legal Professionals are expected to maintain the highest standards of integrity in all dealings, including those conducted over social media.
- ❖ Encourage members to think about the impact social media could have on a lawyer's professional reputation
- ❖ Comments or content that are unprofessional or unethical could damage public confidence, even if they were originally made in a 'private' context

## Principle 5: Maintaining Public Confidence

- ❖ Legal 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 offline to maintain a reputation essential to a trusted lawyer, such as independence and integrity.

Personal vs  
Professional  
Profile



## Personal Profiles and Professional Misconduct

- Ian Millard, an unregistered barrister posted a tweet on Twitter (having previously identified himself on Twitter as a barrister) which was seriously offensive and was likely to diminish the trust and confidence which the public places in barristers
- “‘Two cab drivers guilty of refusing to pick up blind man and guide dog’. Muslims again. Wake up, UK!’”
- “Strange seeing Dominic Grieve, who reminds me of the days when many/most Conservative MPs were English gentlemen, not Jews or yobs.”
- Tweet depicted a swastika and the words “Juden sind hier unerwünscht” the English translation of which is “Jews unwanted [or not wanted] here.”
- Bar Standards Board disbarred him.

# Client Communications



## IBA Principles

- Principle 3: Responsibility – to clarify use of social media
  - ❖ When lawyers present themselves online as legal professionals, it is possible that statements may be relied upon as legal advice and for retainers to be inadvertently created
  - ❖ Lawyers may assume liability in engaging in the unauthorized practice of law in jurisdictions where the lawyer is not licensed to practice.

## Unintended Attorney-Client Relationship?

- Ethical risks may arise when giving legal advice or opinions on social media, especially when it may create an unintended attorney-client relationship.
- Q&A session on Twitter or a blawg post and other certain social media communications may create a prospective client-lawyer relationship
- a consultation is likely to have occurred if a lawyer specifically requests or invites the submission of information about a potential representation
- Need for a proper disclaimer or a reasonably understandable warning that would limit the lawyer's obligations
- Need to clarify the jurisdiction where the lawyer is licensed to practice/ capacity in giving legal information

# Client Communications

- It is an attorney's responsibility to make it clear to the website visitor or potential client that an attorney-client relationship either has or has not been created.
- Attorneys must exercise caution and restraint when social media users seek to communicate and obtain legal advice on social media
- client can make the initial contact via social media but formalize relationship with a written engagement letter

# Social Media Communications in Litigation



# Social Media Communications in Litigation

## IBA Principles

- Principle 1: Independence
  - ❖ Professional independence is integral to legal practice
  - ❖ Social media creates a context in which lawyers may form visible links to clients, judges, and other lawyers.
  - ❖ Before 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.

## Social Media Communications in Litigation

### Legal Practitioners' Practice Rules 2002 (Zambia)

**Rule 32:** (1) A practitioner shall not-

(a) engage in conduct whether in pursuit of the profession or otherwise which is:

(i) dishonest or otherwise discreditable to a practitioner;

(ii) prejudicial to the administration of justice; or

(iii) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute;

(2) A practitioner has a duty to the Court to ensure that the proper and efficient administration of justice is achieved.



# Social Media Communications in Litigation

## Canons of Professional Ethics : Jamaica

- **Canon V:** an Attorney has a duty to assist in maintaining the dignity of the Courts and the integrity of the administration of justice.

## Social Media Communications in Litigation

- **Canon V (h):** An Attorney shall not give, lend or promise anything of value to a Judge, juror or official of a tribunal before which there is a pending matter in which he is engaged.
- **Canon V(i):** In any proceeding in a Court an Attorney shall not communicate or cause any other person to communicate with a juror as to the merits of such proceedings, and shall only do so with a Judge or person exercising Judicial functions:-
  - (i) in the normal course of the proceedings, or
  - (ii) where authorised by law, or the practice of the Courts or with the consent of the parties.

## Zealous Advocate?

- it may be tempting for Attorneys to use any avenue possible during litigation
- “friending” witnesses, parties, judges and jurors through Facebook to collect personal information
- Sending a friend request on Facebook to uncover information about a witness, if it is a private account
- Attorneys must be careful not to engage in unethical behavior even if it would benefit the client.

## Zealous Advocate?

### Friending Opposing Parties, Witnesses or Jurors?

- New York Bar Association that it is unethical for attorneys or those working on the attorney's behalf to make friend requests of jurors and contact jurors during trials
- San Diego Bar Association stated that "friending" potential witnesses could be considered an improper *ex parte* communication
- San Diego County Bar Association rejected the argument that "friending" or submitting an access request to a represented opposing party on social media is not an ethics violation because it is the same as accessing the public website of an opposing party

## Friending a Judge:

## Diverging Views?

*Law Offices of Herssein and Herssein, P.A. d/b/a Herssein Law Group and Reuven T. Herssein v. United Services Automobile Association*

Case No.: 2015-015825-CA-43 (Florida Supreme Court Case No. SC17-1848).

- In 2017, the District Court of Appeals upheld the denial of a motion to disqualify Justice Beatrice Butchko because she was friends with an attorney for one of the witnesses/potential parties.
- The attorney was also a former judge with whom she worked before he resigned as a circuit judge.

- The District Court of Appeals stated:

“A random name drawn from a list of Facebook ‘friends’ probably belongs to casual friend, an acquaintance, an old classmate, a person with whom the member shares a common hobby, a ‘friend of a friend’ or even a local celebrity like a coach. An assumption that all Facebook ‘friends’ rise to the level of a close relationship that warrants disqualification simply does not reflect the current nature of this type of electronic social networking”

- Subject to discretionary review at the Florida Supreme Court

## Friending a Judge:

## Diverging Views

*Domville v. State, 103 So. 3d 184 (Fla. 4th DCA 2012)*

- Criminal defendant's effort to disqualify a judge in 2012 whom the defendant alleges is a Facebook friend of the prosecutor assigned to his case.
- The relationship caused defendant to believe that the judge could not “be fair and impartial.”
- Granted writ of prohibition, stating that:  
“The issue, however, is not whether the lawyer actually is in a position to influence the judge, but instead whether the proposed conduct, the identification of the lawyer as a “friend” on the social networking site, conveys the impression that the lawyer is in a position to influence the judge. “
- Court concluded that such identification in a public forum of a lawyer who may appear before the judge conveys this impression and therefore was not permitted.

## Diverging Views?

### Friending a Judge?

- In the Caribbean, for example, it may be very easy to be Facebook friends with members of the judiciary given the small size of those Bar Associations
- Consider that our ethical obligations require attorneys not to directly or indirectly influence judges in his client's favour
- New York State Bar Guidance: A lawyer may connect or communicate with a judicial officer on social media websites **PROVIDED** that the purpose is not to directly or indirectly influence the judge, and that reasonable efforts are taken to ensure that there is no *ex parte* or other prohibited communication

## Zealous Advocate?

- **Canon V (j) (Jamaica):** An Attorney shall endeavour always to maintain his position as an Advocate and shall not either in argument to the Court or in address to the jury assert his personal belief in his client's innocence or in the justice of his cause or his personal knowledge as to any of the facts involved in the matter under investigation.
- **Rule 35 (3) (Zambia):** A practitioner shall not, in relation to any current matter in which the practitioner is or has been briefed, offer the practitioner's personal view or opinion to or in any news or current affairs media upon the facts of or the issues arising in that matter.
- Must refrain from posting salacious or degrading material about on-going litigation on social media



## Zealous Advocate?

### Case from Bermuda- Takiyah Burgess

- A young Bermudian prosecutor was fined US\$1,000 and admonished by the island's Bar Council after comments she made on the popular social networking site, Facebook:

"is in court ready for the lies"

"is listening to a pack of lies"

while the defendant was giving evidence.

- The Bar Council launched its own complaint against her, leading to the establishment of a disciplinary tribunal that found her guilty of two counts of improper conduct.

# Social Media and Advertising



## Advertising Rules

### Legal Practitioners (Publicity) Rules 2017 (Zambia)

- **Rule 5** : Practitioners should not advertise in a manner that is likely to diminish public confidence in the legal profession or to bring the legal profession into disrepute

### Canons of Professional Ethics (Amendment) Rules 1998 (Jamaica)

- **Canon II(d)**:An Attorney may advertise in connection with the attorney's practice, provided that such advertising shall not be misleading or deceptive or likely to mislead or deceive or likely to create an unjustified expectation

shall not be vulgar, sensational or of such frequency or otherwise such as would or would be likely to adversely affect the reputation or standing of any attorney or the legal profession;

# Advertising Rules

## Zambia

**Rule 22.** (1) An advertisement placed in, stored in or transmitted through the electronic media or internet or placed on a website shall comply with these Rules.

(2) The advertisement referred to in sub-rule (1) shall—

(a) contain approved information regarding the practitioner

or the practitioner's firm;

(b) be stored by the practitioner for twelve months from the date of placement or transmission through the electronic media; and

(c) be available for inspection upon request by the Council or the Legal Practitioners' Committee.

WORST AD  
EVER?

# ADVERTISING ON SOCIAL MEDIA

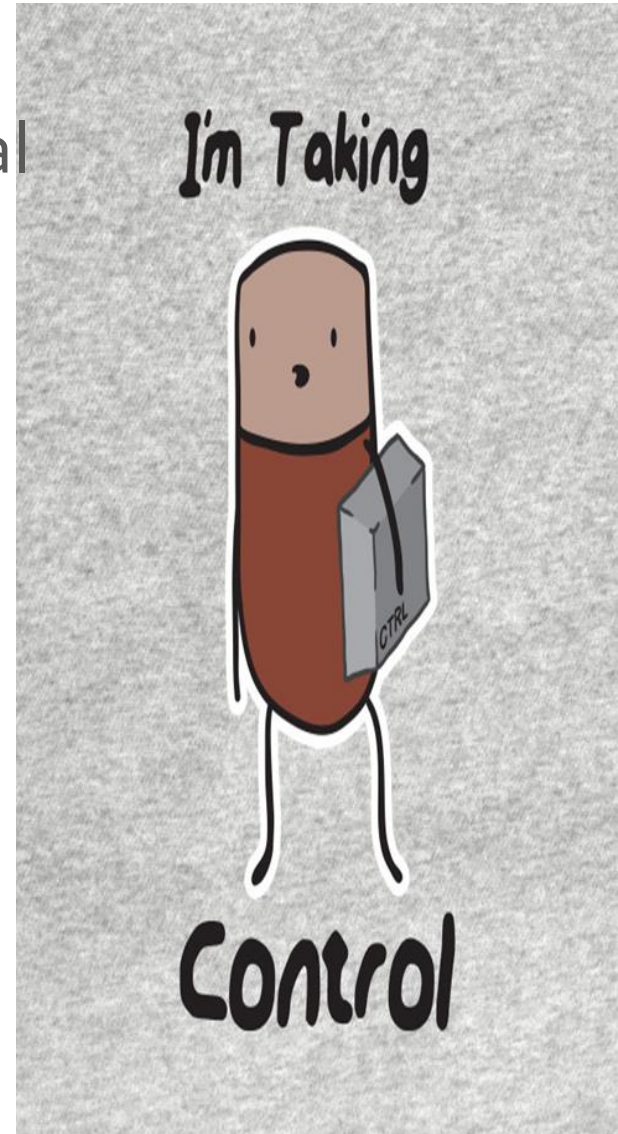


<https://www.youtube.com/watch?v=GmZiqwRnwtM>

# CONCLUSION

- “Social media presents both opportunities and challenges for legal practitioners....[and] should be used at all times in a manner that is consistent with the lawyer’s obligations under the rules of professional responsibility, as well as broader considerations of the administration of justice.”

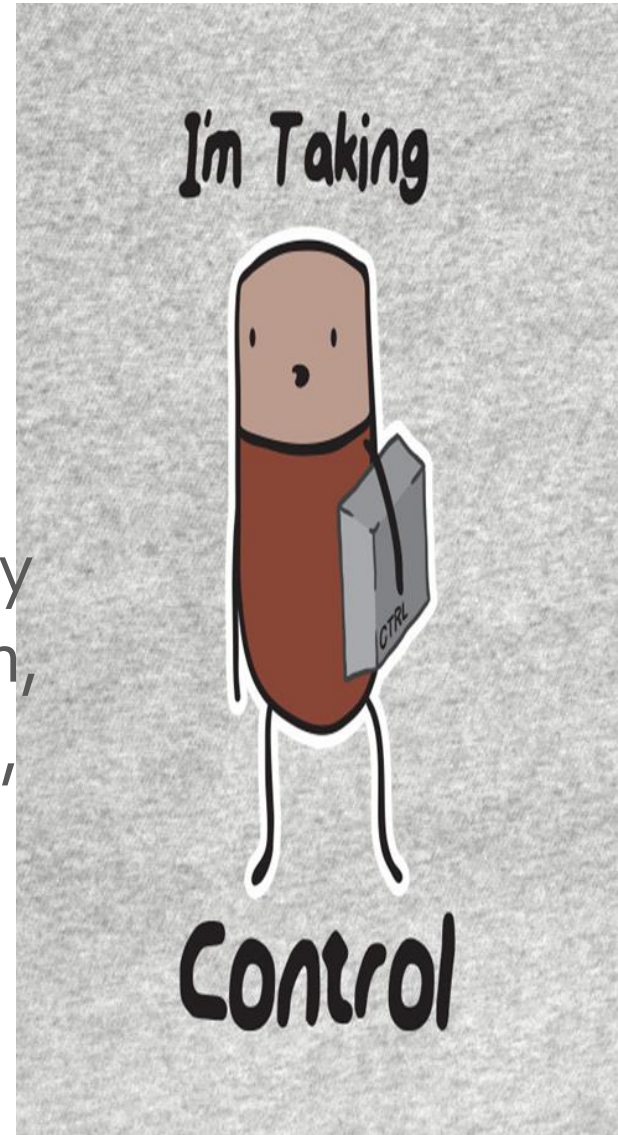
*Source:- IBA International Principles on Social Media Conduct for the Legal Profession (2014)*



# CONCLUSION

## IBA Principles on Social Media Conduct

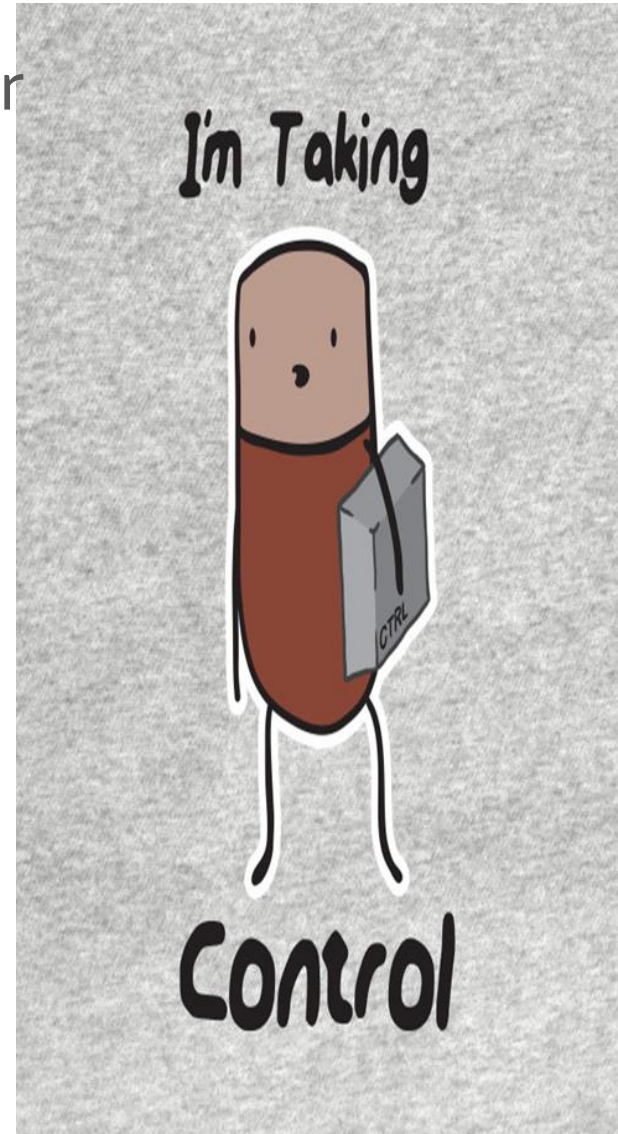
1. Independence
2. Integrity
3. Responsibility:
  - To understand use of social media
  - To clarify use of social media
  - To use social media appropriately
  - To adhere to practice, promotion, advertising and solicitation rules, codes and legislation in use
  - To avoid conflicts of interest
4. Confidentiality
5. Maintaining Public Confidence
6. Policy





# TAKING CONTROL - TIPS

- Professional Guidelines and Standards – CLA and IBA Principles, Zambia Law Association and Jambar
- Employment Contracts – Requiring employees to allow access to social media sites – monitoring and removing offensive material. Social Media Policy.
- Learning the technology – How to gather evidence, preserve data, present evidence. Training
- Social media etiquette.
- Following applicable Legal Practitioners Rules and Canons of Ethics also applies to Social Media presence.



## TAKING CONTROL - TIPS

- Being responsible with and responsive to Social Media.
- Using social media as a professional tool.
- Maintain productivity - blocking certain sites on firm servers.
- Avoid giving professional undertakings and other professional commitments on presently unorthodox platforms.
- Avoid using terms such as “specialist” – unless you are.
- Avoid social media contact with judges- particularly during a trial.



# TAKING CONTROL - TIPS

- Disclaimers are necessary.
- State Jurisdiction of your online advice/posts.
- Do not post or share or re-post defamatory, confidential, protected IP content and “fake news”.
- Keep your social media professional – do not post something you do not want an employer, client, co-worker to see/read.
- Adapt to technology but remember the ethical canons governing Attorneys-at-Law.



# HMF

HART MUIRHEAD FATTA

ATTORNEYS-AT-LAW

[dcwalker@hmf.com.jm](mailto:dcwalker@hmf.com.jm)

[jacollins@hmf.com.jm](mailto:jacollins@hmf.com.jm)

(876)929-9677

[www.hmf.com.jm](http://www.hmf.com.jm)

Remember,  
Do it for the Love,  
not for the Likes!

## Questions?

