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# **The Impact of Online Social Networking on the Legal Profession and Practice**

An initiative of the Legal Projects Team

February 2012

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# The Impact of Online Social Networking on the Legal Profession and Practice: February 2012

## Contents

|   |    |
|---|----|
| <b>List of boxes and figures</b>  | 5  |
| <b>Introduction</b>   | 7  |
| <b>About the survey</b>   | 7  |
| <b>Survey methodology</b>   | 7  |
| <b>About the authors</b>  | 11 |
| <b>Next steps and project plan</b>  | 11 |
| <b>Summary of findings</b>  | 12 |
| <b>Findings</b>   | 12 |
| <b>Overall view of the presence of online social networking in the legal profession</b> | 13 |
| <b>Presence of legal actors on online social networking sites</b>                       | 15 |
| <i>Lawyers</i>  | 15 |
| <i>Judges</i>   | 16 |
| <i>Jurors</i>   | 16 |
| <b>Posting of information and opinions by legal actors</b>                              | 17 |
| <i>Posting of comments by lawyers</i>   | 17 |
| <i>Posting of comments by judges</i>  | 18 |
| <i>Posting of comments by jurors</i>  | 18 |
| <i>Posting of updates by lawyers, judges, jurors and journalists</i>                    | 18 |
| <b>Endorsement of legal products</b>  | 20 |
| <b>Lawyer-client relationship</b>   | 21 |
| <b>Judicial proceedings</b>   | 21 |
| <i>Evidence in proceedings</i>  | 21 |

|  |    |
|--|----|
| <i>Jury selection</i>  | 22 |
| <i>Jury instructions</i>   | 23 |
| <b>Public perception of lawyers and the judiciary</b>                    | 23 |
| <i>Public perception of lawyers</i>                                      | 23 |
| <i>Public perception of the judiciary</i>                                | 24 |
| <b>Law students</b>  | 26 |
| <i>Relationship between law students and professors</i>                  | 26 |
| <i>Evaluation of candidates for admission to the Bar</i>                 | 26 |
| <i>Information sessions/trainings</i>                                    | 27 |
| <b>Legal employment</b>  | 28 |
| <b>Future actions – is there a need for adaptation and intervention?</b> | 29 |
| <i>Advantages versus disadvantages of online social networking</i>       | 29 |
| <i>Training course(s) for legal professionals</i>                        | 30 |
| <i>Adaptation of ethical/professional codes and standards</i>            | 30 |
| <i>Intervention of local bar organisations, societies, and councils</i>  | 31 |
| <i>Intervention of the IBA</i>   | 32 |
| <b>Conclusions and recommendations</b>                                   | 33 |
| <b>Summary of conclusions</b>  | 33 |
| <b>Recommendations/future steps</b>                                      | 33 |
| <b>Annex 1: List of Survey Questions</b>                                 | 35 |
| <b>Annex 2: Geographical regions used in this report</b>                 | 38 |
| <b>Annex 3: Further Reading</b>  | 38 |

## List of boxes and figures

### Boxes

- Box 1: *List of respondents and corresponding jurisdictions*
- Box 2: *Geographic representation of respondents*
- Box 3: *Distribution of respondents and responses by geographical region*
- Box 4: *Major findings*
- Box 5: *Major findings and conclusions*

### Figures

- Figure 1: *Do you think that online social networking presents a new set of challenges for the legal profession?*
- Figure 2: *Do you think it is acceptable for lawyers and judges to have each other as contacts ('friends', 'followers', 'following', 'connections', etc) on online social networking sites?*
- Figure 3: *Do you think judges should discontinue being online contacts ('friends', 'followers', 'connections', etc) with former colleagues comprising advocates and legal practitioners once they become judges?*
- Figure 4: *If your jurisdiction has a jury system, do you think it is acceptable for jurors and the parties and/or witnesses in a case to have each other as contacts ('friends', 'followers', 'connections', etc) on online social networking sites?*
- Figure 5: *If your jurisdiction has a jury system, do you think that jurors should be asked to deactivate their online social networking accounts during proceedings?*
- Figure 6: *Do you think it is acceptable for lawyers to post comments or opinions about judges before whom they are appearing, their clients, their cases, and/or opposing counsel on online social networking sites?*
- Figure 7: *Do you think it is acceptable for judges to post comments or opinions about the lawyers and parties appearing before them and/or pending/decided cases on online social networking sites?*
- Figure 8: *If your jurisdiction has a jury system, do you think it is acceptable for jurors to post comments or opinions about the judges, lawyers, parties, and/or cases which they are observing on online social networking sites?*
- Figure 9: *Do you think it is acceptable for lawyers, judges, jurors and/or journalists to post updates about proceedings (by posting 'status updates', 'tweeting', blogging, etc) on online social networking sites, while a matter is pending before the courts, strictly for informational purposes?*
- Figure 10: *Do you think it is acceptable for judges to state their interests and/or preferences in legal products ('like', 'fan', etc) on online social networking sites?*
- Figure 11: *Do you think that lawyers should advise their clients to close their online social networking accounts upon formation of the lawyer-client relationship?*
- Figure 12: *Do you think that lawyers should warn potential clients in advance that any communication between them over an online social networking site will not in itself establish a lawyer-client relationship?*

- Figure 13: Do you think it is acceptable for lawyers to access and use the information found on the online social networking profiles of the parties in a case, which forms part of the public domain, as evidence in proceedings?*
- Figure 14: If your jurisdiction has a jury system, do you think it is acceptable for lawyers to consider the information found on the online social networking profiles of potential jurors in selecting a jury?*
- Figure 15: If your jurisdiction has a jury system, in addition to routine instructions, do you think that jurors should receive specific instructions limiting their online communications and use of online social networking sites?*
- Figure 16: In your opinion, does lawyers' use of online social networks negatively affect the public's confidence in the integrity and professionalism of the legal profession?*
- Figure 17: In your opinion, does judges' use of online social networks negatively affect the public's confidence in the integrity and impartiality of the judiciary, thereby undermining judicial independence?*
- Figure 18: Do you think it is acceptable for law professors and current and/or prospective law students to have each other as contacts ('friends', 'followers', 'connections', etc) on online social networking sites?*
- Figure 19: Should bar associations, societies and councils consider the information found on online social networking profiles in evaluating candidates for admission to the Bar?*
- Figure 20: Do you think that law students should be informed by their law schools as to the potential risks and disadvantages associated with the use of online social networking within the legal profession (eg, the information on their online social networking accounts being seen and considered by prospective employers and/or bar organisations)?*
- Figure 21: Do you think it is acceptable for legal employers to consider the information found on online social networking profiles in evaluating potential work candidates?*
- Figure 22: Do you think that the advantages of online social networking outweigh its disadvantages in the context of the legal profession and practice?*
- Figure 23: Do you think that lawyers, judges, and law students could benefit from a training course discussing guidelines for the use of online social networking within the legal profession and practice?*
- Figure 24: Is there a need for bar associations, societies, and councils to construe guidelines regarding the use of online social networking sites within the legal profession and practice?*
- Figure 25: Is there a need for the IBA to work with member bar associations, societies, and councils to construe guidelines and toolkits regarding the use of online social networking sites within the legal profession and practice?*
- Figure 26: Issues stemming from the use of online social networking within the legal profession and practice*

# Introduction

## About the survey

In March 2011, the International Bar Association's (IBA) Legal Projects Team, based in London, took up an important global initiative to examine the presence and role of online social networking within the legal profession and practice.

The initiative was prompted by an unprecedented worldwide surge in the use of online social networking. From the crucial role it played in the Arab Spring, to the dramatic increase of super-injunctions in the UK, and its most recent use in the planning of the England riots, online social networking seems to have a recurring presence in the media and in daily life. Members of the legal profession are not immune from the ripples of such a wave. Judges have felt its momentous presence in situations involving the inclusion of material found on online social networking pages as evidence in proceedings, and the misuse of online social networking by jurors, to name a few. Private practitioners are confronted with the possibility of interacting with judges and opposing parties on such sites, while in-house lawyers are forced to adapt their internal firm policies to these topical issues. Jurors, while instructed to solely consider the information before them, feel the temptation like never before to turn to online social networks to conduct their own research of the case. Law students are also engulfed by the frenzy of such media, both when looking up to the current practices of lawyers and judges, and also when going about their ordinary matters as students, for instance when communicating with professors via such networks. In sum, every actor in the legal arena has felt some effect of online social networking on their daily practice. At present, the corresponding standard of 'appropriate' or 'acceptable' behaviour in such areas is somewhat contentious and unsettled.

As part of the initiative, a benchmark survey on the impact of online social networking on the legal profession and practice was drafted and sent to all IBA member bar organisations around the world. The survey represents a first attempt to shed light on the above issues on an international scale. Another significant indicator that led to this initiative was that many other professions have also started instituting approved policies or guidelines for monitoring use and advocating professionalism within their respective fields; for example, doctors, architects, civil servants, journalists and even some sportspersons. The IBA Legal Projects Team felt that the IBA was best placed to undertake a study of this magnitude, as it currently has over 45,000 individual lawyers and over 200 bar associations and law societies spanning all continents worldwide. In this way, it

can fairly be said to be truly representative of the international legal profession.

The objectives of the survey are:

- to consider the impact of online social networking on the legal profession and practice;
- to analyse whether there is a need for bar associations, societies and councils to come together to address this global issue and develop guidelines regarding the use of online social networking within the legal profession and practice; and
- to ascertain whether there is a need for the IBA to work with member bar associations, societies, councils and law schools to devise guidelines and toolkits regarding the use of online social networking within the legal profession and practice. A list of the survey questions is included in Annex 1.

The results of this survey are being launched for the very first time in this comprehensive report and the responses are detailed forthwith. The purpose of the present report is to foster a global discussion among bar associations on these topical and unsettled issues, in the hope of stimulating an academic dialogue and putting in place practical guidelines and parameters. This will also set the ground for a global initiative in the form of a social media project plan that will be launched at the Biennial IBA Latin American Regional Forum Conference in Bogota, Colombia in March 2012.

## Survey methodology

The survey was designed by the IBA Legal Projects Team and then offered for critique to a number of key individuals in both the legal and technological fields.

The sole focus of the survey is bar organisations, given their key involvement and prime positioning at the forefront of changes occurring in both the legal profession and the legal practice. Since they regularly interact with all of the main targeted legal actors, namely lawyers, judges and law students, it seemed only appropriate to seek their views.

The survey assessed bar associations' views on a number of important issues, including:

- The interactions between lawyers, judges and jurors on online social networks;
- The posting of comments or opinions on online social networks by lawyers, judges, jurors and journalists about one another or the cases in which they are involved;
- The effect, if any, of online communications between a lawyer and a potential or existing client on the overall notion of the lawyer-client relationship;

**BOX 1 – LIST OF RESPONDENTS AND CORRESPONDING JURISDICTIONS**

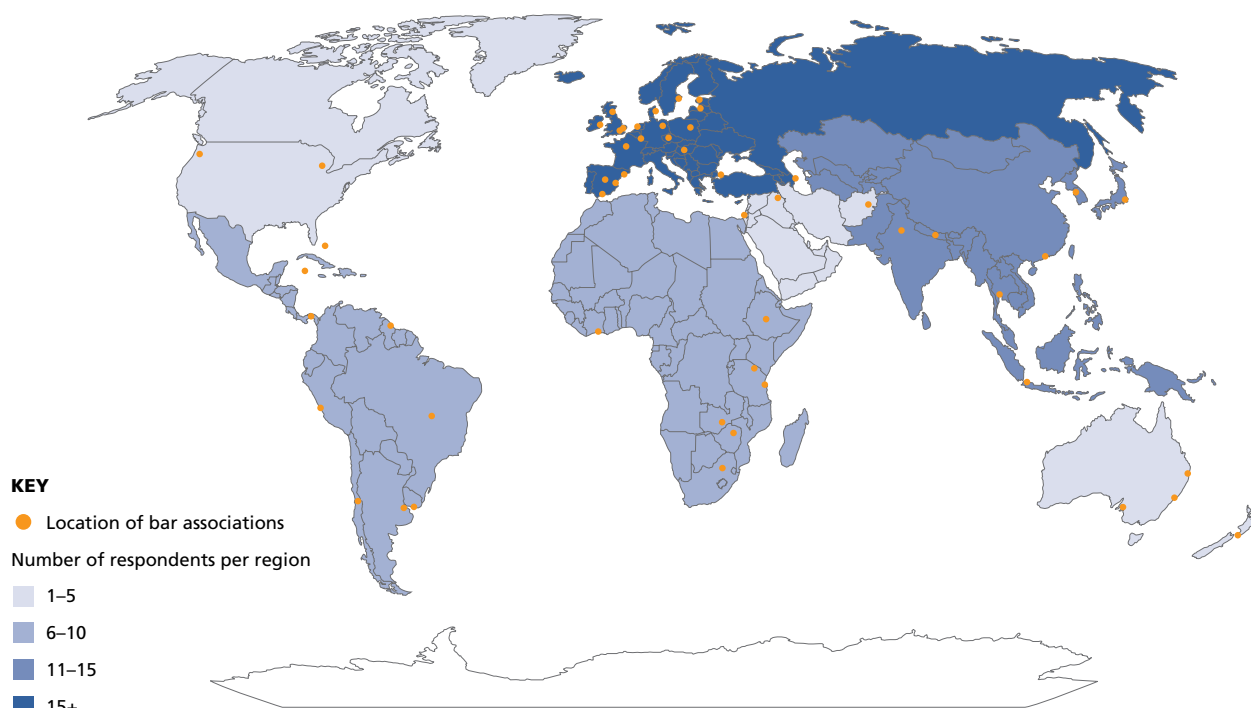
| <b>Jurisdiction</b>      | <b>Bar Association/Law Society</b>  |
|--------------------------|---|
| Afghanistan              | Afghan Independent Bar Association  |
| Argentina                | Colegio de Abogados de la Ciudad de Buenos Aires  |
| Australia                | Australian Bar Association, Law Society of New South Wales, South Australian Bar Association  |
| Azerbaijan               | Azerbaijan Lawyers Confederation  |
| Bahamas                  | Bahamas Bar Association   |
| Brazil                   | Ordem dos Advogados do Brasil   |
| Cayman Islands           | Cayman Islands Law Society  |
| Chile                    | Colegio de Abogados de Chile  |
| Czech Republic           | Czech Bar Association   |
| Denmark                  | Association of Danish Law Firms   |
| East Africa*             | East Africa Law Society   |
| England and Wales        | Bar Council of England & Wales, Law Society of England and Wales, Young Barristers Committee (of the Bar Council of England and Wales)                            |
| Estonia                  | Estonian Bar Association  |
| Ethiopia                 | Ethiopian Bar Association   |
| Europe**                 | European Young Bar Association  |
| France                   | Ordre des avocats de Paris  |
| Germany                  | German Bar  |
| Ghana                    | Ghana Bar Association   |
| Guyana                   | Guyana Bar Association  |
| Hong Kong                | Hong Kong Bar Association, Law Society of Hong Kong   |
| Hungary                  | Budapest Bar Association, Hungarian Bar Association   |
| India                    | Bar Council of India  |
| Indonesia                | Indonesian Advocates Association (PERADI)   |
| Iraq                     | Kurdistan Lawyers Association   |
| Ireland                  | Bar Council of Ireland, Law Society of Ireland  |
| Israel                   | Israel Bar Association  |
| Japan                    | Japan Bar Association, Japan Federation of Bar Associations, Tokyo Bar Association  |
| Latvia                   | Latvian Council of Sworn Advocates  |
| Luxembourg               | Ordre des avocats du barreau de Luxembourg  |
| Nepal                    | Nepal Bar Association   |
| Netherlands              | Amsterdam Bar Association   |
| New Zealand              | New Zealand Law Society   |
| Panama                   | Colegio Nacional de Abogados de Panamá  |
| Peru                     | Ilustre Colegio de Abogados de Lima   |
| Poland                   | National Chamber of Legal Advisers of Poland  |
| Scotland                 | Law Society of Scotland   |
| South Africa             | Law Society of South Africa   |
| South Korea              | Korean Bar Association  |
| Spain                    | Consejo General de la Abogacía Española, Ilustre Colegio de Abogados de Barcelona, Ilustre Colegio de Abogados de Málaga, Ilustre Colegio de Abogados de Valencia |
| Sweden                   | Swedish Bar Association   |
| Tanzania                 | Tanganyika Law Society  |
| Thailand                 | Lawyers Council of Thailand   |
| Turkey                   | Istanbul Bar Association  |
| United States of America | National Conference of Women's Bar Associations, State Bar of Michigan - International Law Section  |
| Uruguay                  | Colegio de Abogados del Uruguay   |
| Zambia                   | Law Association of Zambia   |
| Zimbabwe                 | Law Society of Zimbabwe   |

\* East Africa represents the geographical area of Eastern Africa comprising Burundi, Kenya, Rwanda, Tanzania and Uganda.

\*\* Europe represents the geographical area of Europe.



## BOX 2 – GEOGRAPHIC REPRESENTATION OF RESPONDENTS



## BOX 3 – DISTRIBUTION OF RESPONDENTS AND RESPONSES BY GEOGRAPHICAL REGION

| Geographical Region                                 | Number of Respondents | Bar Organisation / Law Society  |
|---|-----------------------|---|
| Africa  | 7                     | East Africa Law Society, Ethiopian Bar Association, Ghana Bar Association, Law Society of South Africa, Tanganyika Law Society, Law Association of Zambia, Law Society of Zimbabwe  |
| Asia  | 11                    | Azerbaijan Lawyers Confederation, Hong Kong Bar Association, Law Society of Hong Kong, Bar Council of India, Indonesian Advocates Association (PERADI), Japan Bar Association, Japan Federation of Bar Associations, Tokyo Bar Association, Nepal Bar Association, Korean Bar Association, Lawyers Council of Thailand  |
| Australasia   | 4                     | Australian Bar Association, Law Society of New South Wales, South Australian Bar Association, New Zealand Law Society   |
| Europe  | 24                    | Czech Bar Association, Association of Danish Law Firms, Estonian Bar Association, European Young Bar Association, Ordre des avocats de Paris, German Bar, Budapest Bar Association, Hungarian Bar Association, Bar Council of Ireland, Law Society of Ireland, Latvian Council of Sworn Advocates, Ordre des avocats du barreau de Luxembourg, Amsterdam Bar Association, National Chamber of Legal Advisers of Poland, Consejo General de la Abogacía Española, Ilustre Colegio de Abogados de Barcelona, Ilustre Colegio de Abogados de Málaga, Ilustre Colegio de Abogados de Valencia, Swedish Bar Association, Istanbul Bar Association, Bar Council of England & Wales, Law Society of England and Wales, Law Society of Scotland, Young Barristers Committee (of the Bar Council of England and Wales) |
| Central and South America (including the Caribbean) | 9                     | Colegio de Abogados de la Ciudad de Buenos Aires, Bahamas Bar Association, Ordem dos Advogados do Brasil, Cayman Islands Law Society, Colegio de Abogados de Chile, Colegio Nacional de Abogados de Panamá, Ilustre Colegio de Abogados de Lima, Colegio de Abogados del Uruguay, Guyana Bar Association  |
| Middle East   | 3                     | Afghan Independent Bar Association, Kurdistan Lawyers Association, Israel Bar Association   |
| North America                                       | 2                     | National Conference of Women's Bar Associations, State Bar of Michigan - International Law Section  |

BOX 3 (CONTINUED)

| Number of responses | Jurisdictions  |
|---------------------|--|
| 1                   | Afghanistan, Argentina, Azerbaijan, Bahamas, Brazil, Cayman Islands, Chile, Czech Republic, Denmark, East Africa* Estonia, Ethiopia, Europe**, France, Germany, Ghana, Guyana, India, Indonesia, Iraq, Israel, Latvia, Luxembourg, Nepal, Netherlands, New Zealand, Panama, Peru, Poland, Scotland, South Africa, South Korea, Sweden, Tanzania, Thailand, Turkey, Uruguay, Zambia, Zimbabwe |
| 2                   | Hong Kong, Hungary, Ireland, United States of America  |
| 3                   | Australia, Japan, England and Wales  |
| 4                   | Spain  |

\* East Africa represents the geographical area of Eastern Africa comprising Burundi, Kenya, Rwanda, Tanzania and Uganda.

\*\* Europe represents the geographical area of Europe.

- The consideration of information found on the online social networking profiles of the parties in a case, which forms part of the public domain, as evidence in proceedings;
- The consideration by lawyers of the information found on the online social networking profiles of potential jurors, which forms part of the public domain, in selecting a jury;
- The adequateness of routine jury instructions versus the need for specific instructions limiting their online communications and use of online social networking;
- The public perception of lawyers and judges and whether such is negatively affected by their use of online social networking;
- The relationship between law students and their professors and whether such is compromised by their ‘friending’ on online social networks;
- The consideration by legal employers of the information found on online social networking pages in evaluating future candidates;
- The advantages and disadvantages of online social networking – which side outweighs the other?
- The potential need for a training course for lawyers, judges, and law students on the ethical and professional implications of online social networking; and
- The potential need for local bar organisations, societies, and councils, or, alternatively, for the IBA, to intervene in the area and construe some sort of guidelines or toolkits.

While originally drafted in English, the survey was then translated into Spanish and French, in order to allow for an increased comprehension and participation by non-English speaking jurisdictions. All three versions were available online.

Survey respondents were invited to complete the questionnaire either through the online survey

programme or by email, during the period of May to August 2011. In addition to responding to the questions in a ‘yes’ or ‘no’ manner, respondents were invited to add comments or provide information about the current practice in their own jurisdiction. Respondents represented bar associations from distinct legal systems and possessing quite different scopes: some respondent bar associations are voluntary while others are compulsory, some are regional associations while others are country-specific, etc. All comments provided by the respondent bar associations are reproduced in this report; the comments provided herein reflect the entirety of the comments provided by the respondents.

*Care must be taken when analysing the results, given that the sample of respondents is not statistically representative of all bar organisations around the world, but strictly IBA member ones.* In total, 60 IBA member bar associations from 47 legal jurisdictions participated in the survey;<sup>1</sup> a list of the countries in each geographical region used in this report is given in Annex 2.

While this survey is by no means exhaustive, it attempts to address key issues affecting the legal profession’s use of online social networking. It should be noted that many other interesting legal questions exist (eg, privacy issues) however this survey does not attempt to cover such topics, but instead focuses solely on the specific questions it addresses.

A significant number of jurisdictions declined to respond to the survey for concern of formally defining a policy on online social networking. As well, others refused because online social networking had little reach or presence in their jurisdiction. These are important considerations which must be borne in mind when analysing the survey results.

1 Of the 60 bar organisations who started the survey, not all of them completed it in full. In the analysis that follows, we use the maximum number of responses available for each question.

## About the authors

Both the survey and this report were prepared by Anurag Bana and Diana Nardelli of the IBA Legal Projects Team. The findings, interpretations and conclusions expressed do not necessarily represent the views of the IBA or its members. The IBA does not guarantee the accuracy of the data included in this publication and accepts no responsibility for any consequences of their use.

The report has been discussed with a group of IBA experts representing different constituents and committees within the organisation which includes the Bar Issues Commission (BIC), the International Bar Association's Human Rights Institute (IBAHRI) Council, the Latin American Regional Forum, the North American Regional Forum, the Media Law Committee and the Technology Law Committee.

## Next steps and project plan

In order to further examine the presence of online social networking in the legal profession, an IBA Advisory Group on Online Social Networks ('Advisory Group') comprised of professionals from different areas of expertise will be set up by the Legal Projects Team. Ideally, the Advisory Group will be composed of at least one individual from each of the following: a media law expert; a professional ethics and responsibility expert; a present or retired trial judge; a senior officer of a bar organisation; and a dean or senior-level staff member of a law school. By providing for individuals originating from diverse professions and fields who are linked together by the use of online social networking, the Advisory Group will be able to foster an exchange of ideas and comments derived from different angles and experiences.

Similarly, the nationalities of the members of the Advisory Group would be varied and representative of the different world regions in order to truly advance an international discussion and allow for guidelines that are useful to member bar associations worldwide.

As the subject is both contemporary and pressing, the Advisory Group would be formed and a first meeting convened, at the very latest, by the beginning of 2012.

While the Advisory Group is encouraged to suggest and advance issues it deems relevant, the important issues which stem from the use of online social networking within the legal profession and practice will be approached by a systemic mechanism of a project plan. The project plan will be launched at the Biennial IBA Latin American Regional Forum Conference taking place in Bogota, Colombia from 14–16 March 2012.

## Summary of findings

### BOX 4 – MAJOR FINDINGS

- Over 90 per cent of respondents found that online social networking presents a new set of challenges for the legal profession.
- Almost 70 per cent of respondents felt that it is acceptable for lawyers and judges to have each other as contacts on online social networks.
- Over 90 per cent of respondents considered it unacceptable for lawyers and judges to post comments or opinions about fellow lawyers, judges, parties, or cases in progress on online social networks.
- The vast majority of respondents from jurisdictions comprising a jury system found it unacceptable for jurors to post comments or opinions about the judges, lawyers, parties, and/or cases which they are observing on online social networking sites.
- While a majority of respondents found it unacceptable for lawyers, judges, and jurors to post updates about proceedings (by posting 'status updates', 'tweeting', blogging, etc) on online social networks while a matter is pending before the courts strictly for informational purposes, the majority deemed the conduct acceptable for journalists.
- Over 85 per cent of respondents deemed it acceptable for lawyers to access and use the information found on the online social networking profiles of the parties in a case, which forms part of the public domain, as evidence in proceedings.
- Nearly 95 per cent of respondents from jurisdictions containing a jury system thought that, in addition to routine instructions, jurors should receive specific instructions limiting their online communications and use of online social networking sites.
- Only 15 per cent of respondents felt that lawyers' use of online social networks negatively affects the public's confidence in the integrity and professionalism of the legal profession, while almost 40 per cent of respondents felt that judges' use of online social networks negatively affects the public's confidence in the integrity and impartiality of the judiciary, thereby undermining judicial independence.
- 85 per cent of respondents thought that law students should be informed by their law schools as to the potential risks and disadvantages associated with the use of online social networking within the legal profession.
- Over 75 per cent of respondents considered the advantages of online social networking to outweigh its disadvantages.
- 95 per cent of respondents thought that lawyers, judges, and law students could benefit from a training course discussing guidelines for the use of online social networking within the legal profession and practice.
- 80 per cent of respondents stated that there is a need for ethical/professional codes and standards to be adapted to online social interactions affecting the legal profession and practice, as they cannot be adequately applied in their current form.
- Over 90 per cent of respondents stated that there is a need for bar associations, societies, and councils, or, alternatively, for the IBA to construe guidelines regarding the use of online social networking sites within the legal profession and practice.

## Findings

The survey addresses the impact of online social networking on six specific groups of legal actors: lawyers; judges; jurors; journalists; law students and professors; and legal employers.

Before analysing the results, it is useful to familiarise oneself with the general terminology used on online social networking sites. Despite the fact that each social networking site comprises a distinctive terminology of its own, they are all generally premised on each user having a personal page on which that user can post information which may include, but is not limited to, the following: a personal and/or professional

profile, interests and hobbies, academic history, photos, videos and micro-blogs. Users can then add other users as contacts (ie, 'friends', 'followers', 'connections', etc), the main benefit being increased access to information about one other. Users can also interact with each other by sending public and private messages or writing directly on their own personal pages or those of other users (posting 'status updates', 'tweeting', blogging, etc). As well, users can display their interest, approval or high regard for a particular product by 'liking' it or becoming a 'fan'. Users can often choose between different privacy and

security settings, thereby allowing for a greater or lesser exposure to other users.

Where the term ‘proceedings’ is used throughout the survey questions, it refers to all the different steps in a judicial or administrative proceeding.

### Overall view of the presence of online social networking in the legal profession

Survey respondents were asked whether online social networking presents a new set of challenges for the legal profession. Approximately 92 per cent of respondents responded in the affirmative. Figure 1 represents the affirmative responses received from each world region.

This introductory question prompted a number of interesting comments from various jurisdictions.

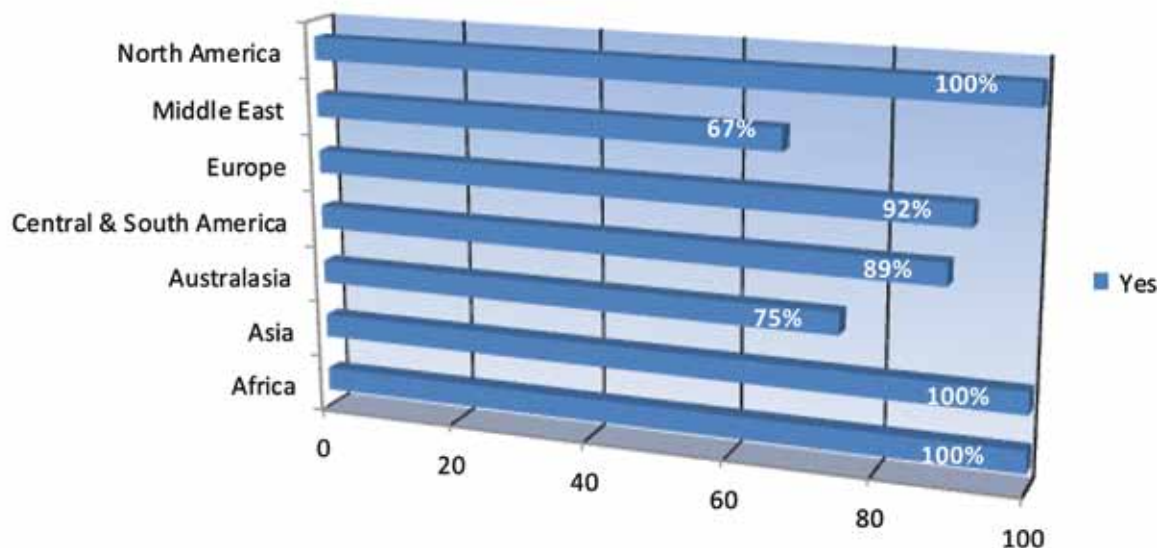
The Law Society of England and Wales outlines the advantages of online social networking in the legal profession before going on to remark that solicitors’ conduct through such media is subject to professional scrutiny:

Online social networking (OSN) provides real opportunities for the legal profession and it is important that it keeps up to date with the opportunities social media presents. There is the opportunity for direct and immediate feedback from clients who have used legal services, for conversation and interaction between practices and their clients. There are commercial benefits arising from the ability to communicate products and materials, from marketing and advertising and from a greater access to legal information and resources. There

is a much greater opportunity for professional networking, including the ability for the profession to break down geographical barriers. Although the conduct of the profession in relation to OSN should be no different to how they conduct themselves both professionally and in social situations (depending on whether OSN is being used professionally or socially), the fact that their conduct on OSN sites is monitored and recorded leaves them open to greater scrutiny. [...]

The nature of OSN, including the ability for ‘status updates’ and posting of opinions, presents challenges to several of the core duties of solicitors, as currently outlined in the 2007 [Solicitors’] Code [of Conduct 2007] (and from 6 October 2011 the SRA Handbook and Code of Conduct 2011). Solicitors have obligations to clients, to the court and to third parties with whom they have dealings on their clients’ behalf and this is reflected in the core duty, ‘You must uphold the rule of law and the proper administration of justice’. Both the core duties of integrity ‘You must act with integrity’, and independence ‘You must not allow your independence to be compromised’ could be affected by the solicitors using OSN sites. Also public confidence, ‘You must not behave in a way that is likely to diminish the trust the public places in you or the legal profession’, may be compromised by the use of OSN by the profession. However, if steps are taken to mitigate the risks these challenges present, there are real advantages to the legal profession, as noted above.

FIGURE 1: DO YOU THINK THAT ONLINE SOCIAL NETWORKING PRESENTS A NEW SET OF CHALLENGES FOR THE LEGAL PROFESSION?



The East Africa Law Society explained the reasoning behind why online social networking brings about new challenges:

This is because the law is primarily a reflection of the social values of any society, and social networking also brings along with it aspects of communication, sharing information, etc. which the legal profession must understand and position itself to address or take advantage of.

Likewise, the National Chamber of Legal Advisers of Poland felt that online social networking does in fact create new challenges, 'because it creates new opportunities for legal content delivery and it creates new opportunities for activities incompatible with the legal ethics'.

As outlined by the New Zealand Law Society, some of the potential challenges brought about by online social networking include privacy and ethical issues. The Young Barristers Committee comments that such new challenges may include 'the immediacy with which matters can be reported or commented upon'.

Recognising that new challenges do arise, the Swedish Bar Association equated online social networking with 'offline' social networking, by stating that, 'in some respects social networking is to be seen as membership in any other social organisation, inter alia, in terms of conflicts of interest, etc'.

The Guyana Bar Association adopted the view that there are not new 'challenges' as such. But rather considers that '[s]ocial networking presents a new set of issues for the legal profession'.

Despite the precise terminology employed, in the view of the Panama Bar Association, '[t]he challenges are surmountable, as proper discretion [is] required when applying current Ethics rules'.

On a slightly different note, the Cayman Islands Law Society felt that the issues raised by online social networking are not novel as such:

Social networking is simply another form of communication. We do not think it raises particularly novel issues, but there are challenges as to how the (generally well established) rules regarding communication between lawyers, judges and parties to proceedings should be applied to social networking. The mere existence of a social network connection is only an indication of a personal relationship which may exist anyway and without impropriety. It is the latter which is important, and the existing rules (in most jurisdictions at least) amply cover how personal relationships between Judges and lawyers should be conducted, how those relationships may impact whether a Judge should not hear a matter, etc.

On a similar note, the Law Society of Scotland stated the following:

Strictly speaking the challenges are not new and key issues such as preserving confidentiality and not prejudicing or interfering with the judicial process remain the same as does complying with professional codes of conduct whilst using

such sites. However, the scale of the use of social networking and rapid global dissemination of information highlight that it is important that the content posted on and the use of such sites are considered in areas such as adherence with court orders eg, injunctions preventing access/contact or the disclosure of confidential information or the existence of the order itself. Absent a new overarching legal code there will also be increasingly complex jurisdiction related considerations where information is relayed to or stored on social networking sites across the world, such as the recent Twitter cases dealing with breaching the terms of super injunctions have highlighted.

Social networking presents both positive opportunities and challenges for the legal profession. The integrity and professionalism of the legal profession must be retained which requires careful use (even on a personal basis) of such sites. Although many individuals for example will use Twitter and state that 'these views are my own and not that of my firm/company/business' this may still tarnish the reputation of their employer if particularly sensitive topics are discussed and opinions/thoughts are voiced by the individual in question.

However, social networking also presents a new platform for sharing your legal knowledge, expertise and promoting your firm/brand to a wider audience. This will lead to the possibility of new contacts, referrals which may lead on to new business.

The Ilustre Colegio de Abogados de Barcelona opined that social networks are very important for the legal profession, like for all professions. The networks with the more professional profiles, for example, LinkedIn or Twitter, can open new business opportunities for lawyers and other legal practitioners. They are also an ideal platform to increase contacts and exchange knowledge. Knowing how to manage them well is a challenge from the point of view of organisations.

The Colegio de Abogados de la Ciudad de Buenos Aires takes a modern stance and states that the legal profession cannot be unconnected to the reality of intensive use by young people of this service that establishes a new paradigm in mediums of communication.

In line with such view, the Azerbaijan Lawyer Confederation highlights that it makes its very own professional use of social networks by creating the Azerbaijani Lawyers group on Facebook to unite Azerbaijani lawyers.

Despite the many facets of globalisation, the social networking frenzy has not been able to reach all jurisdictions. For example, as commented by the Tanganyika Law Society:

Most advocates communicate with mobile or cellular phones. Although the majority of the TLS membership have e-mail addresses, only a percentage of that majority use it regularly.

As shown, many jurisdictions offered comments on this first introductory question. The responses and comments provided are in line with the view that online social networking does in fact create a new set of challenges or issues for the legal profession, which need to be addressed while all the while maintaining high standards of ethics and professionalism.

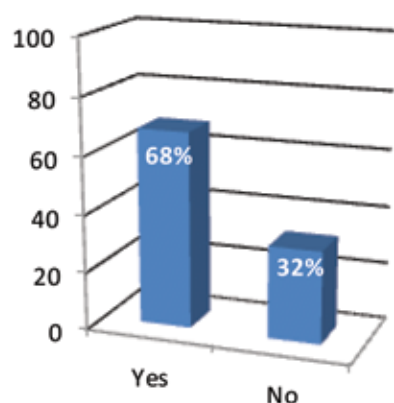
### Presence of legal actors on online social networking sites

The presence of legal actors on online social networking sites is increasingly more pronounced. While such presence may at first glance seem innocuous, a number of associated risks and compromising situations can, and often do, in fact arise, particularly with respect to the online interactions and communications between legal professionals.

#### Lawyers

The survey asked participants a series of questions relating to the appropriateness of a lawyer's contacts on an online social networking site.

FIGURE 2: DO YOU THINK IT IS ACCEPTABLE FOR LAWYERS AND JUDGES TO HAVE EACH OTHER AS CONTACTS ('FRIENDS', 'FOLLOWERS'/'FOLLOWING', 'CONNECTIONS', ETC) ON ONLINE SOCIAL NETWORKING SITES?



First, respondents were asked whether they consider it acceptable for lawyers and judges to have each other as contacts on online social networking sites. Almost 70 per cent of respondents felt that such a connection is appropriate. Of these respondents, roughly half considered it acceptable for lawyers and judges before whom they are appearing to have each other as contacts on online social networking sites during the proceedings.

An interesting perspective was put forward by the Law Society of Scotland:

An outright ban of all such contact automatically assumes that skilled professionals such as lawyers and judges would not strictly adhere to professional codes of conduct and practically a ban would be difficult to monitor and enforce (for example if the link itself and/or messages sent between the parties are private). It is the content of the discussion that is important and not the existence of the contact. Also merely following someone may be less controversial than connections/friends. Whilst it is important that justice is seen to be done there should be no real difference with social networking sites than with on one view more private contact that could be made by e-mail or phone.

A user should be sensible enough to control who can and cannot view their online social networking 'profile'. Privacy settings should be added where necessary and may be more useful depending on the nature of any ongoing transactions/court hearings. The reality is that social networking sites are not going to go away and knee jerk blanket bans are unlikely to be helpful or appropriate.

Respondents were also asked whether it is acceptable for lawyers and unrepresented opposing parties to have each other as contacts on online social networking sites. The responses were divided equally between yes and no.

The position taken by the Law Society of Scotland is as follows:

The reality is very likely that a lawyer would not have or keep a known contact with an unrepresented party and should not be discussing the details of the specific case. Professionals should be trusted to adhere to professional codes of conduct rather than banning use of social networking sites.

There are also practical difficulties with an alternative position. Many people using social media use pseudonyms or variations of names used in real life, making identification harder. There is also a difference here between 'followers' (which in some systems can be removed unless reported under nuisance / unacceptable use procedures) and 'connections' and 'friends' which usually require actual acceptance. For example, if this was deemed unacceptable it would essentially prohibit a lawyer having a 'public' Twitter account, as they can be followed without requirement of their consent.

Lastly, respondents were asked whether lawyers should deactivate their online social networking accounts during proceedings. 78 per cent of respondents responded in the negative.

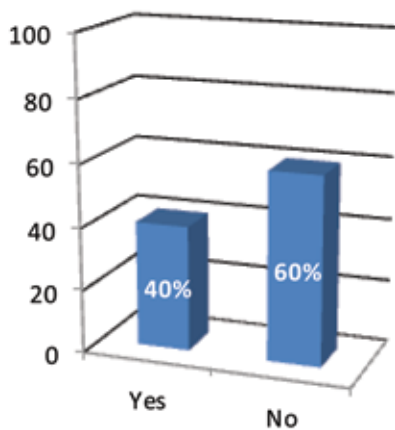
Some respondents felt that it was the content rather than the medium which was important for social networking sites. It was essential for lawyers to be professional at all times on virtual

forums and also avoid making any controversial statements or comments about proceedings that were *sub judice* in order to avoid any interference with the due process.

These results demonstrate that there is no general objection on the part of bar associations to lawyers participating in online social networking sites, and, to a lesser extent, being 'friends' with judges. However, it is arguable whether or not lawyers should be 'friends' with unrepresented opposing parties.

### Judges

FIGURE 3: DO YOU THINK JUDGES SHOULD DISCONTINUE BEING ONLINE CONTACTS ('FRIENDS', 'FOLLOWERS', 'CONNECTIONS', ETC) WITH FORMER COLLEAGUES COMPRISING ADVOCATES AND LEGAL PRACTITIONERS ONCE THEY BECOME JUDGES?



The survey asked respondents whether judges should discontinue being online contacts with former colleagues comprising advocates and legal practitioners once they become judges. 60 per cent of respondents replied in the negative.

In addition, respondents were asked whether they think judges should close their online social networking accounts once they become judges. Just over 70 per cent of respondents thought that there was no need for judges to do so.

Further, out of these respondents, just over 80 per cent felt that there was not even a need for judges to deactivate their online social networking accounts during the duration of the proceedings themselves.

It was observed that judges should be encouraged to consider their social media use to avoid any target allegations of miscarriage of justice or lack of impartiality. However such measures should be voluntary rather than mandatory. Reviewing use of social media should be part of

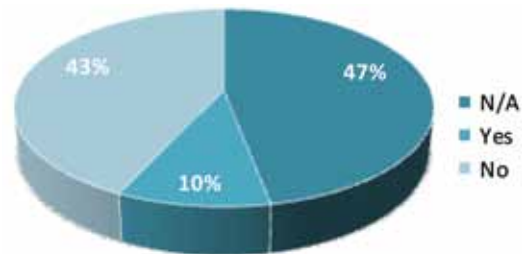
a general new consideration of relationships on becoming a judge (such as those through golf clubs, alumni associations, religious institutions and charities) rather than being seen as a new and stand-alone issue.

Therefore, as can be seen from these responses, it appears acceptable for judges to both possess an online social networking account and be connected to colleagues. While there is no clear objection to such presence, possible concern can perhaps lie in the specific content and tenor of any communications held across such networks.

### Jurors

The survey asked respondents whose jurisdiction had a jury system if they consider it acceptable for jurors and the parties and/or witnesses in a case to have each other as contacts on online social networking sites. Approximately 80 per cent of respondents from jurisdictions comprising a jury system felt that such conduct was not acceptable.

FIGURE 4: IF YOUR JURISDICTION HAS A JURY SYSTEM, DO YOU THINK IT IS ACCEPTABLE FOR JURORS AND THE PARTIES AND/OR WITNESSES IN A CASE TO HAVE EACH OTHER AS CONTACTS ('FRIENDS', 'FOLLOWERS', 'CONNECTIONS', ETC) ON ONLINE SOCIAL NETWORKING SITES?



There were suggestions from some bar organisations that it would be useful for the jury to have specific, clear guidance on online social networking issued by the judge at the start of a case.

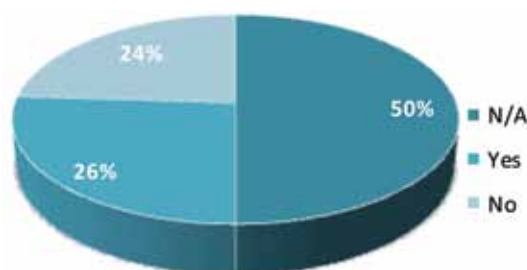
Since it is common practice to request jurors to cease all communications about the case at hand during the proceedings, with the exception of communications with fellow jurors, it is a natural extension of such practice to ponder about online communications through online social networking sites. Do communications conducted via such online media correspond to the standard definition of 'communications' and, if so, what type of monitoring is needed to ensure that such instructions are obeyed?

One possible option would be a blanket ban on online social networking during the entirety of the proceedings in the case at hand. Respondents



were asked if they thought jurors should be asked to deactivate their online social networking accounts during proceedings. Again, half of respondents replied that this question was not applicable to them because their jurisdiction did not contain a jury system. The remaining responses were split in two, with one half responding that such conduct was in fact acceptable and the rest finding the contrary.

FIGURE 5: IF YOUR JURISDICTION HAS A JURY SYSTEM, DO YOU THINK THAT JURORS SHOULD BE ASKED TO DEACTIVATE THEIR ONLINE SOCIAL NETWORKING ACCOUNTS DURING PROCEEDINGS?



On this note, the Law Society of Scotland opined that ‘jurors are not asked to separate themselves from their community at present’ and that ‘an outright ban may be easier to monitor but is not a proportionate response’. In addition, it provided the following observations:

It should be noted that jurors are no longer accommodated in a hotel while the case is ongoing. There is perhaps a greater risk of intimidation as a result of social networking sites. People with malicious intent might find it easier to identify and communicate with a juror than in the past. There should however be very clear guidance in place regarding social networking use during their involvement in the case and jurors, etc advised that the public contents of their social networking sites may be monitored. It should be ‘recommended’ that they deactivate, however this should not be mandatory. The police and courts will need to be more familiar with the risks. On a note of practicality, it is considered that the requirement to deactivate social media during, possibly lengthy, trials perhaps separating families from events (birth of a grandchild) [happening] in other countries could be a significant disincentive to willing compliance with jury duty, and may require disproportionate resource to police.

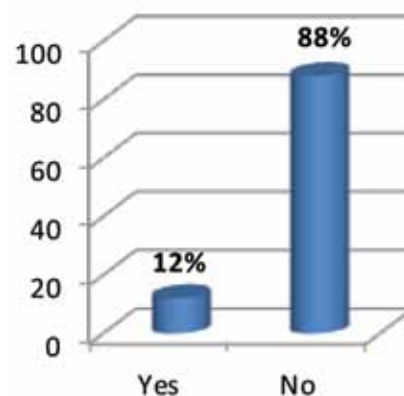
To sum up, the results indicate that bars associations in jurisdictions with a jury system generally consider it unacceptable for jurors and the parties and/or witnesses in a case to have each other as contacts on online social networking sites, while it is arguable whether jurors should be asked to deactivate their online social networking accounts during proceedings.

## Posting of information and opinions by legal actors

The most common feature of online social networks is the ability to post comments or opinions on a user’s personal page or the page of others. While such a practice has become commonplace, the posting by lawyers, judges, jurors and journalists potentially raises ethical or professional issues.

### Posting of comments by lawyers

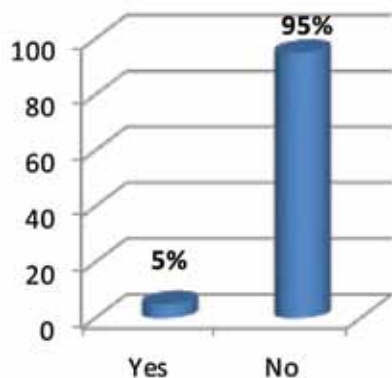
FIGURE 6: DO YOU THINK IT IS ACCEPTABLE FOR LAWYERS TO POST COMMENTS OR OPINIONS ABOUT JUDGES BEFORE WHOM THEY ARE APPEARING, THEIR CLIENTS, THEIR CASES, AND/OR OPPOSING COUNSEL ON ONLINE SOCIAL NETWORKING SITES?



Respondents were asked whether they consider it acceptable for lawyers to post comments or opinions about judges before whom they are appearing, their clients, their cases and/or opposing counsel on online social networking sites. Nearly 90 per cent of respondents found that such conduct was unacceptable.

It would amount to a clear breach of professional codes of conduct and also bring the legal profession into disrepute, particularly during live proceedings. Additionally, there were issues of preserving confidentiality and not interfering with the conduct of proceedings that were highlighted by some bar organisations. It was also noted that for some young lawyers the difference does not appear to be clear as to the type of comments which may be made in private to a professional colleague and the type that are appropriate on more public social media platforms, even if in the form of a discussion between two colleagues. The standard for social media should be the same as for a comment one would be willing to make in print or public, and better training and guidance during the qualification route for young solicitors may be of assistance.

**FIGURE 7: DO YOU THINK IT IS ACCEPTABLE FOR JUDGES TO POST COMMENTS OR OPINIONS ABOUT THE LAWYERS AND PARTIES APPEARING BEFORE THEM AND/OR PENDING/DECIDED CASES ON ONLINE SOCIAL NETWORKING SITES?**



### Posting of comments by judges

Respondents were also asked whether they think it is acceptable for judges to post comments or opinions about the lawyers and parties appearing before them and/or pending/decided cases on online social networking sites. 95 per cent of respondents found that such conduct was unacceptable.

As can be noted, respondents had a slightly more pronounced objection to the posting of comments by judges than by lawyers.

### Posting of comments by jurors

The survey asked respondents if they think it is acceptable for jurors to post comments or opinions about the judges, lawyers, parties and/or cases which they are observing on online social networking sites. While around half of respondents replied that this question was not applicable to them because their jurisdiction did not contain a jury system, the other half found that such conduct was not acceptable.

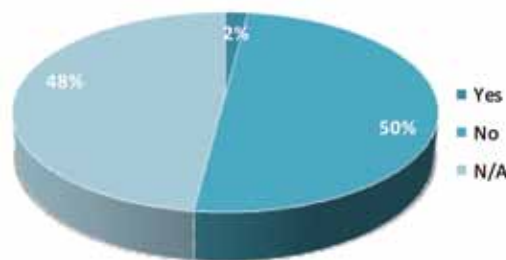
The Law Society of Scotland stated:

Although they are generally not subject to the same professional standards as a lawyer, they still must strictly abide by the obligations of the jury and not discuss their involvement in the case or face contempt charges. It is important jurors are encouraged to understand that such actions could lead to miscarriages of justice and appeals.

In a recent landmark case (*Attorney General v Fraill & Anor [2011] EWCA Crim 157*), one juror's actions went on to mark a historic event for the legal community as perhaps the first ever instance of a juror prosecuted for contempt of court for using Facebook. The High Court of England and Wales found the juror guilty of contempt of court, and

sentenced her to eight months' imprisonment. Lord Judge stated that the juror's actions were 'directly contrary to her oath as a juror and constituted flagrant breaches of the orders made by the judge for the proper conduct of the trial'. This sets a clear precedent and emits a strong message that, in order not to undermine the guarantees of a fair trial, and in furtherance of the proper administration of justice, jurors must strictly keep to their duties as impartial and unbiased decision-makers and restrain from independent research or communications.

**FIGURE 8: IF YOUR JURISDICTION HAS A JURY SYSTEM, DO YOU THINK IT IS ACCEPTABLE FOR JURORS TO POST COMMENTS OR OPINIONS ABOUT THE JUDGES, LAWYERS, PARTIES, AND/OR CASES WHICH THEY ARE OBSERVING ON ONLINE SOCIAL NETWORKING SITES?**



### Posting of updates by lawyers, judges, jurors and journalists

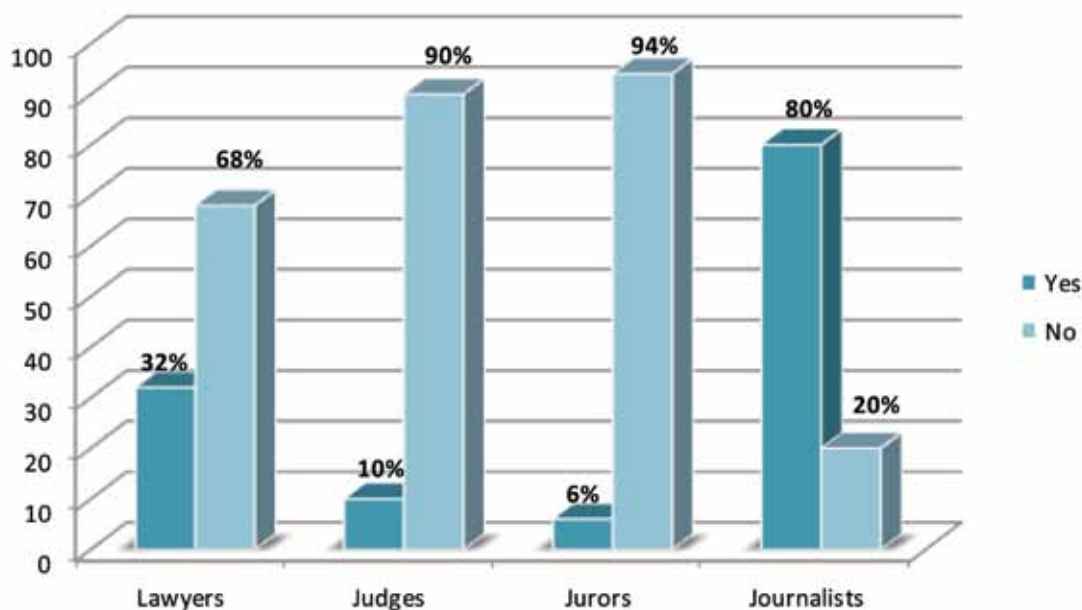
In addition to the general posting of comments and opinions, the posting of updates about the proceedings themselves, while a matter is pending before the courts, raises added concerns.

On this note, the survey asked respondents if they think it is acceptable for lawyers, judges, jurors and/or journalists to post updates about proceedings on online social networking sites, while a matter is pending before the courts, strictly for informational purposes.

With regard to lawyers, nearly 70 per cent of respondents felt that such conduct was unacceptable. With regard to judges, the respondents went even further, with 90 per cent deeming such conduct unacceptable. Similarly, close to 95 per cent of respondents felt that such conduct was unacceptable for jurors. The responses, however, were very different when the question concerned journalists. 80 per cent of respondents felt that such conduct was acceptable for journalists.

Therefore, on the whole, while most respondents deemed the posting of updates about proceedings an unacceptable practice for lawyers, judges and jurors, respondents generally felt that

FIGURE 9: DO YOU THINK IT IS ACCEPTABLE FOR LAWYERS, JUDGES, JURORS AND/OR JOURNALISTS TO POST UPDATES ABOUT PROCEEDINGS (BY POSTING 'STATUS UPDATES', 'TWEETING', BLOGGING, ETC) ON ONLINE SOCIAL NETWORKING SITES, WHILE A MATTER IS PENDING BEFORE THE COURTS, STRICTLY FOR INFORMATIONAL PURPOSES?



journalists were privileged to do so. This thinking is perhaps attributed to the fact that, in comparison to lawyers, judges and jurors, journalists do not participate first-hand in proceedings but, rather, follow the proceedings strictly for purposes of transmitting the information on to the public and making such information known to them. In contrast, lawyers, judges and jurors are directly involved in the case at hand, and therefore must appear impartial and uphold the integrity of the judicial process.

The reasoning behind such a distinction was ingeniously explained by the Ilustre Colegio de Abogados de Barcelona. In their opinion, lawyers, judges and jurors need to respect at all times the right to a defence and the presumption of innocence while a proceeding is ongoing. Anything that can affect such rights, or distort them, is not acceptable. With respect to journalists, it is important to avoid parallel trials through the media or social networks. While information professionals have the right to inform, such a right is subject to certain limits not being exceeded.

Both the Tanganyika Law Society and the Ghana Bar Association stressed the importance of upholding the actual and perceived impartiality of judges, parties and jurors, and preserving the sanctity of the judicial process, respectively.

In regards to lawyers specifically, the Young Barristers Committee feels that 'cases should probably only be commented upon by lawyers post conclusion and only if it is possible to do so without identifying the case/lawyer/judge/

client in question – unless that information is already in the public domain in which case any comment should be subject to any code of conduct guidelines dealing with commenting to the media'. However, in respect to jurors, it feels that they 'should be permitted to comment either during or after cases'.

Similarly, the Swedish Bar Association found that 'the social network itself does not endanger the independence or other professional duties of the lawyer/judge etc' but then goes on to add that 'a lawyer or a judge must never discuss or in any other way use the social network in a way that would put [his/her] independence or other professional duties in danger'.

With regards to the use of online social networking in the courtroom in general, the Law Society of England and Wales brought up a guideline issued by the Lord Chief Justice of England and Wales in December 2010: *Interim practice guidance: The use of live text-based forms of communication (including Twitter) from court for the purposes of fair and accurate reporting*. In this *Interim practice guidance*, 'live text based communication' is defined as including mobile email, social media (including Twitter) and internet-enabled laptops. A new set of practice guidance notes were issued in December 2011 where it is stated that a representative of the media or a legal commentator who wishes to use live, text-based communications from court may do so without making an application to the court. As stated by the Law Society with regard to the December 2010 interim practice guidance:

This guidance sets out that the use of live text-based communication is prohibited unless, in the exercise of its discretion, the court permits such equipment to be used. Before the use of live text-based communication is permitted, the court must be satisfied that its use does not pose a danger of interference to the proper administration of justice in the individual case. So in certain situations it will be appropriate for journalists to post updates about proceedings for information purposes. However, in the case of lawyers, judges and jurors it would not be acceptable for any of these groups of people to post updates about proceedings while a matter is before the courts, even for information purposes.

As well, the Law Society of Scotland provided the following comments:

Lawyers involved in the live proceedings, judges and jurors have vital roles and it is greatly important that these roles are maintained and seen to be maintained during the course of proceedings. Whilst 'strictly for informational purposes' should mean that no confidential information is disclosed and a status update should not interfere with judicial proceedings, there is a danger that those involved in the live proceedings could cross a line beyond that or be accused of crossing a line which could impinge upon the judicial process.

However, there should be no issue with any lawyer/judge who is not involved in the given case to discuss/comment on the proceedings from a legal point of view or the practical impact of the possible ruling.

In terms of journalists there is no issue with them fairly reporting the proceedings providing that the social networking activity does not prejudice the right to a fair trial or affect the administration of justice. In the Julian Assange (WikiLeaks) case in the UK (December 2010) the media were allowed to 'tweet' during proceedings providing that the social media use reflected the rules of 'fair and accurate reporting'. This has since been followed in Scotland during the Tommy Sheridan perjury trial. Increasingly verdicts are announced on Twitter before the parties emerge from the court to talk to the press.

In regards to journalists specifically, the Hong Kong Bar Association underlined that their posting on online social networks is 'in no way different from reporting in newspapers only'. In addition, the Bar Council of England & Wales pointed out that 'journalists [are] subject to observing general media restrictions'.

Interestingly enough, the Colegio de Abogados de la Ciudad de Buenos Aires drew no distinction between the legal actors mentioned.

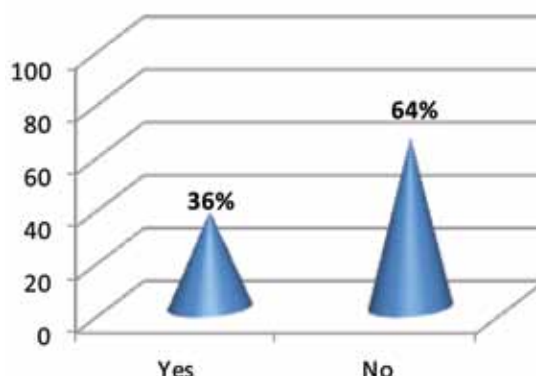
According to the Colegio, prudence should always serve as a guide to the use of any means of mass communication, especially during the course of the proceedings of which they are a part. Similarly, the Indonesian Advocates Association (PERADI) treated all communications in the same manner, irrespective of their source, by deeming them all appropriate 'provided that such information being posted is not classified or confidential'.

It is also interesting to note the view of the Colegio de Abogados del Uruguay who grouped lawyers and journalists together and deemed their use of online social networking in the above context acceptable. In their view, the opinions of lawyers and journalists do not compromise the image or opinion of the judiciary, while any opinion of a judge may be misunderstood or wrong. However, lawyers should omit any type of expression that would imply undue pressure on opposing parties, colleagues and judges.

### Endorsement of legal products

Another feature of online social networking sites is that users can display their interest, approval or high regard for a particular product by 'liking' or becoming a 'fan' of the product. Products can range anywhere from a legal text, to a film or musical group.

FIGURE 10: DO YOU THINK IT IS ACCEPTABLE FOR JUDGES TO STATE THEIR INTERESTS AND/OR PREFERENCES IN LEGAL PRODUCTS ('LIKE', 'FAN', ETC) ON ONLINE SOCIAL NETWORKING SITES?



The survey asked respondents whether it is acceptable for judges to state their interests and/or preferences in legal products on online social networking sites. Almost two thirds of respondents (64 per cent) felt that such conduct was unacceptable for judges.

As highlighted by the Cayman Islands Law Society, the nature of the product may be of special relevance to the question at issue:

This may depend on the nature of the product. A Judge's endorsement of 'legal products' (especially if those are branded by or otherwise linked to particular firms) could be problematic, if in the future those products come under scrutiny in litigation which may involve the relevant firms. There may be certain products that a judge could safely endorse, such as series of law reports or research websites such as BAILII [British and Irish Legal Information Institute].

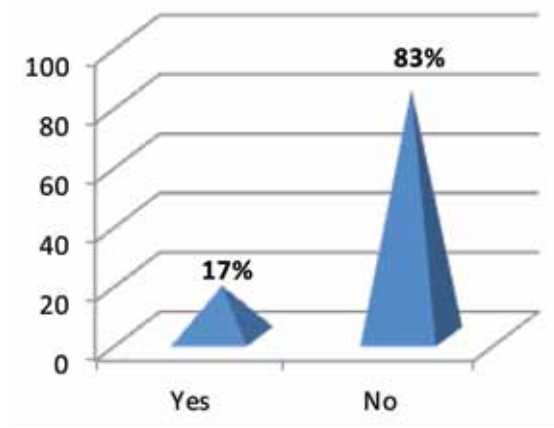
Further examples were stated by some respondents, like the endorsement of a particular expert witness service provided by an individual may not be appropriate whereas 'liking' of general IT systems might have some other issues. Care should also be taken around competition law implications.

### Lawyer-client relationship

As detrimental evidence can often be obtained through the online social networking accounts of parties or witnesses in a case, respondents were asked whether lawyers should advise their clients to close their online social networking accounts upon formation of the lawyer-client relationship. Over 80 per cent of respondents felt that this would be unnecessary.

Respondents were also asked whether lawyers should warn potential clients in advance that any communication between them over an online social networking site will not in itself establish a lawyer-client relationship. Almost 70 per cent of respondents felt that such a practice was desired.

FIGURE 11: DO YOU THINK THAT LAWYERS SHOULD ADVISE THEIR CLIENTS TO CLOSE THEIR ONLINE SOCIAL NETWORKING ACCOUNTS UPON FORMATION OF THE LAWYER-CLIENT RELATIONSHIP?



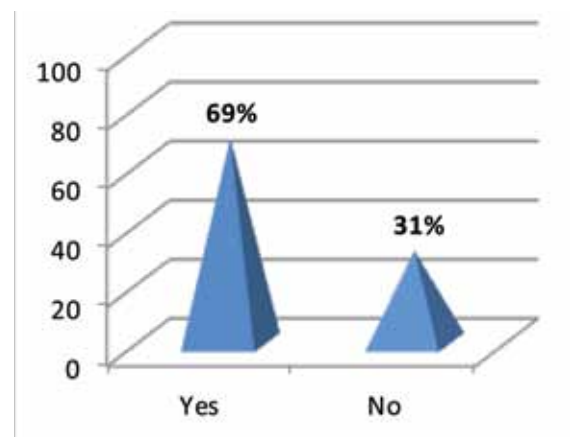
## Judicial proceedings

### Evidence in proceedings

The survey asked respondents whether they think it is acceptable for lawyers to access and use the information found on the online social networking profiles of the parties in a case, which forms part of the public domain, as evidence in proceedings. Just over 85 per cent of respondents felt that such practice was indeed acceptable.

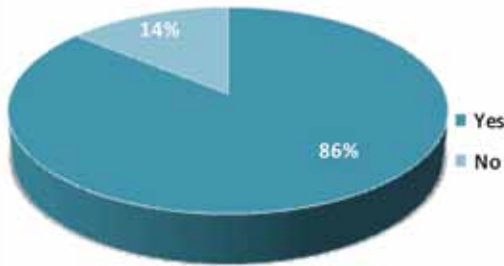
As expressed by the Law Society of England and Wales, 'subject to legal restrictions, the information found on OSN profiles is in the public domain already and there seems no reason why it should not be used as evidence in proceedings'. Similarly, the Young Barristers Committee agreed that such publicly available material 'is a source of evidence which may contain disclosable material and should be investigated by investigators/ prosecutors/ police as a matter of course'.

FIGURE 12: DO YOU THINK THAT LAWYERS SHOULD WARN POTENTIAL CLIENTS IN ADVANCE THAT ANY COMMUNICATION BETWEEN THEM OVER AN ONLINE SOCIAL NETWORKING SITE WILL NOT IN ITSELF ESTABLISH A LAWYER-CLIENT RELATIONSHIP?



While deeming the practice acceptable, some respondents went on to differentiate between information that is part of the public domain and information obtained under false pretences, a key distinction in this regard.

FIGURE 13: DO YOU THINK IT IS ACCEPTABLE FOR LAWYERS TO ACCESS AND USE THE INFORMATION FOUND ON THE ONLINE SOCIAL NETWORKING PROFILES OF THE PARTIES IN A CASE, WHICH FORMS PART OF THE PUBLIC DOMAIN, AS EVIDENCE IN PROCEEDINGS?



If this information is part of the ‘public domain’ then it is free to use and it is up to the Court to decide to allow the evidence to be considered or not and the weight to be given to it (which may include factoring in the informal context in which the communication was made). If the information is obtained under false pretences, for example, if a lawyer pretended to be someone else on a social networking site to gain information, then that may mean the evidence is inadmissible.

Many bar organisations adopted the view that individuals need to be prudent and conscious of what information they place on their online social networking pages, as such information becomes part of the public domain and is thus ‘fair game’ for lawyers to use as evidence in proceedings. As stated by the Hong Kong Bar Association, such information is ‘no different from any publicly available materials subject always to careful verification’. Similarly, the Indonesian Advocates Association (PERADI) felt that, ‘as part of public domain which is open to public, the information can certainly be used as evidence in proceedings’, while the Bar Council of England & Wales stated that, ‘if in the public domain no privilege can attach’.

Moreover, the Ilustre Colegio de Abogados de Barcelona took the view that the public in general needs to be aware of what it places on social networks, and with what visibility. In this sense, it needs to know what risks exist when it makes certain information public. From there, the use that lawyers make with the public information they can find on the social network will depend on the particular case.

While deeming the practice acceptable, some bar associations have added conditions. For instance, the Estonian Bar Association allowed the practice ‘only if it is in accordance with corresponding legislation’, while the Colegio de Abogados del Uruguay stressed that it is essential that the information found is truly public, and not private, or restricted.

In contrast, the Kurdistan Lawyers Association good-naturedly informed that its ‘jurisdiction

will only rely on the personal [evidence] in court proceedings and won’t take information of the public domain as real proof’.

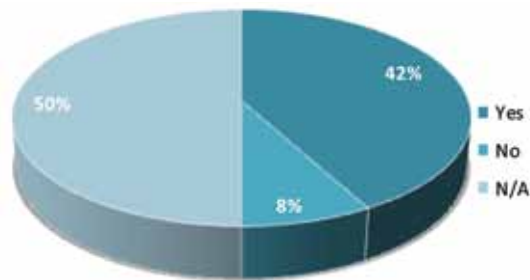
### Jury selection

The survey then asked respondents whether it is acceptable for lawyers to consider the information found on the online social networking profiles of potential jurors in selecting a jury. More than 80 per cent of respondents from jurisdictions containing a jury system considered such a practice unacceptable.

As postulated by the Ilustre Colegio de Abogados de Barcelona, while such a practice is not acceptable, it would be prudent for legal actors to carry out preventative work to warn those jurors (or potential jurors) of the risks that may arise from the public parts of their social networking profiles.

As asserted by the Hong Kong Bar Association, the information found on the online social networking pages of potential jurors is ‘no different from any publicly available materials subject always to careful verification’.

FIGURE 14: IF YOUR JURISDICTION HAS A JURY SYSTEM, DO YOU THINK IT IS ACCEPTABLE FOR LAWYERS TO CONSIDER THE INFORMATION FOUND ON THE ONLINE SOCIAL NETWORKING PROFILES OF POTENTIAL JURORS IN SELECTING A JURY?



It is noteworthy to mention that such a practice might not even be an issue for some jurisdictions that employ a jury system. In the English legal system, for example, even though a jury system is used, the particular practice of jury selection by lawyers is not utilised. As stipulated by the Law Society of England and Wales, the twelve jurors that make up a jury are ‘randomly selected using the electoral registers’ and there is therefore ‘no opportunity for those selecting the jury to use information found on OSN sites to influence the choice of jurors’. Similarly, the Law Society of Scotland provided the following information and comments about the practice in Scotland:

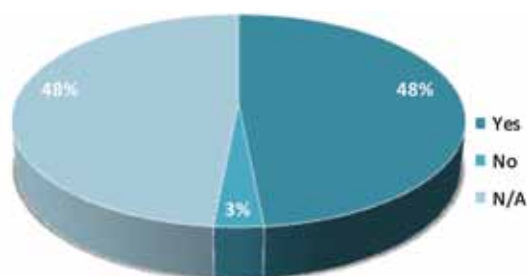
This could not happen under the present system in Scotland, and it is very attractive to say no to this

question as it could lead to greater delay in jury selection and put members of the public under a high degree of scrutiny for what may well be throw away comments that could be taken out of context. However if someone has a public profile in which comments and views on the key issue to be determined, for example, racial, religious or homophobic views where these are relevant to the crime involved, there may be rare cases where it is appropriate for that information to be taken into account. Lawyers would need to be upfront with the court as to the reasons for the objections to the juror and where that information was obtained, possibly with the juror allowed to comment/respond. Again guidance from the local bar association/law society on this may be useful to local practitioners.

### Jury instructions

Respondents were also asked whether they think that, in addition to routine instructions, jurors should receive specific instructions limiting their online communications and use of online social networking sites. Nearly 95 per cent of respondents from jurisdictions employing a jury system thought that additional instructions would indeed be beneficial.

FIGURE 15: IF YOUR JURISDICTION HAS A JURY SYSTEM, IN ADDITION TO ROUTINE INSTRUCTIONS, DO YOU THINK THAT JURORS SHOULD RECEIVE SPECIFIC INSTRUCTIONS LIMITING THEIR ONLINE COMMUNICATIONS AND USE OF ONLINE SOCIAL NETWORKING SITES?



As highlighted by the Law Society of England and Wales, jurors in its jurisdiction are instructed on their responsibilities as jurors and receive specific instructions regarding social media: ‘You must not discuss or post comments about any trial on social media websites like Facebook or Twitter – even after the trial has finished. This is contempt of court.’

On this note, both the Law Society of England and Wales and the Law Society of Scotland mentioned the recent and newsworthy *Frail* case in England.<sup>1</sup> In this case, a juror was found guilty of contempt of court for communicating with an acquitted defendant over Facebook and consequently imprisoned for eight months. As a result of such misuse, the prosecution against the other parties in the case was discontinued and large sums of money were wasted. The Law Society of Scotland commented that the *Frail* case highlights that ‘there should be specific instructions issued to jurors re[garding] their use of online communications and social networking’.

According to the Ilustre Colegio de Abogados de Barcelona, more than limit, the instructions should warn the parties in general of the risks that may arise from their comments on social networks during proceedings.

While recognising the need for specific juror instructions, the Bar Council of England & Wales cautioned that such instructions ‘must be realistic’ and that ‘jurors need to understand the dangers of a general enquiry and any prohibition should be closely limited’.

According to the Association of Danish Law Firms, there is indeed a need for specifically tailored juror instructions ‘but only because the use of social media is still relatively new’. This comment suggests that specific jury instructions should be delivered on an interim basis, only for such time until the issue becomes more widely known and settled.

While acknowledging the need for specific instructions, the Panama Bar Association made the following comparison: ‘Use the same rules as a telephone: social media may be used for all communications except those related to the case.’

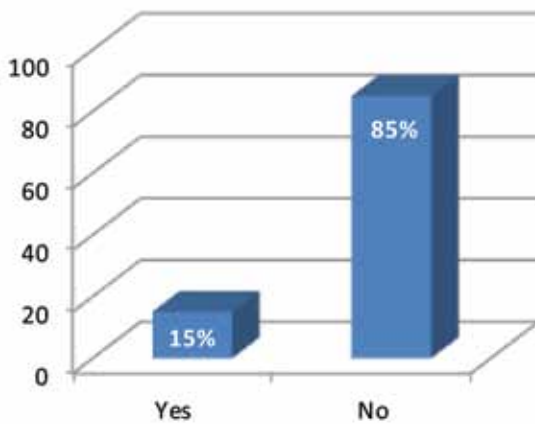
## Public perception of lawyers and the judiciary

### Public perception of lawyers

Respondents were asked whether, in their opinion, lawyers’ use of online social networks negatively affects the public’s confidence in the integrity and professionalism of the legal occupation. Only 15 per cent of respondents responded in the affirmative.

<sup>1</sup> *Attorney General v Frail & Anor* [2011] EWCA Crim 1570 (16 June 2011).

FIGURE 16: IN YOUR OPINION, DOES LAWYERS' USE OF ONLINE SOCIAL NETWORKS NEGATIVELY AFFECT THE PUBLIC'S CONFIDENCE IN THE INTEGRITY AND PROFESSIONALISM OF THE LEGAL PROFESSION?



The Indonesian Advocates Association (PERADI), the Association of Danish Law Firms, the Estonian Bar Association, the Young Barristers Committee, and the South Australian Bar Association all took the view that lawyers' use of online social networking does not necessarily or automatically impact the public perception of the legal profession, but that such a question depends on other factors, such as the specific nature of the use or the particular comments being made by the lawyer.

A number of respondents outlined that lawyers' use of online social networking does not affect the public perception as long as such use is responsible (Bar Council of England and Wales) or appropriate (State Bar of Michigan International Law Section). As enunciated by the Swedish Bar Association, such use, in principle, does not affect the public perception, 'but if the social network is not used in a sensible and professional way, it may affect the public's confidence'.

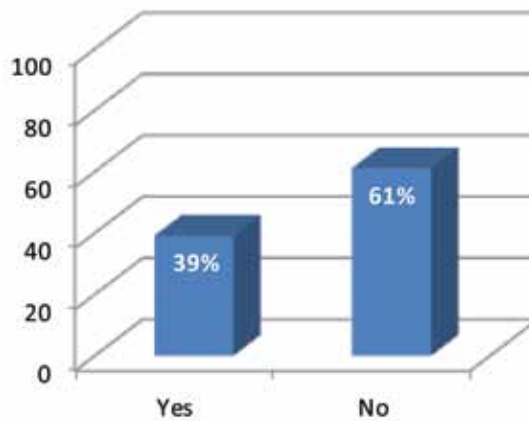
According to the view of the Ilustre Colegio de Abogados de Barcelona, lawyers' presence on online social networks not only enhances the public perception of the legal profession, but also contributes to modernising it, so long as a good use is being made. Similarly, the Panama Bar Association felt that, in addition to not negatively affecting the public perception of lawyers, 'social networks [make] the legal profession more reachable and [bypass] the media bias'.

However, as cautioned by the East Africa Law Society, 'use of social networks by lawyers must be limited to their personal interests, or probably just updating clients of the developments in a case; lawyers can also use the social networks for consultation and research amongst themselves'.

Further, the Colegio de Abogados de la Ciudad de Buenos Aires suggests that education is needed on the correct use of online social networking and bar associations should ensure compliance with the relevant ethical standards.

*Public perception of the judiciary*

FIGURE 17: IN YOUR OPINION, DOES JUDGES' USE OF ONLINE SOCIAL NETWORKS NEGATIVELY AFFECT THE PUBLIC'S CONFIDENCE IN THE INTEGRITY AND IMPARTIALITY OF THE JUDICIARY, THEREBY UNDERMINING JUDICIAL INDEPENDENCE?



When asked whether, in their opinion, judges' use of online social networks negatively affects the public's confidence in the integrity and impartiality of the judiciary, thereby undermining judicial independence, almost 40 per cent of respondents responded in the affirmative.

Respondents seemed to think that the public perception of judges is more negatively affected than that of lawyers by their use of online social networking. This can perhaps be explained by the neutral, independent, and detached role that ought to be assumed by judges, as opposed to the more partial and interested position of lawyers.

According to the Law Society of England and Wales, the use of online social networking affects neither the public's confidence in the integrity and professionalism of the legal profession nor the public's confidence in the integrity and impartiality of the judiciary:

[...] there are challenges for the profession with the use of OSN sites, particularly as the legal profession is one that needs to adopt high standards of integrity and professionalism. The conduct of the profession on OSN sites should be no different to how they conduct themselves professionally and socially, although it may be that some additional guidance is needed on the specific risks associated with the use of OSN generally. One specific challenge is that the use of OSN in the profession will be extremely varied, for example the nature of the OSN site eg, whether it is social or professional, and the nature of the comment/opinion. Also, the use of OSN sites is global with many countries using the same OSN sites, eg, Facebook. This may make it difficult for the profession to adopt a



uniform approach to using OSN in terms of guidance, although the profession has conduct requirements that they must uphold. If there is awareness in the profession of the challenges and risks surrounding the use of OSN and these are addressed, there seems no reason why the use of OSN should negatively affect the public's confidence in the integrity and professionalism of the legal profession. Furthermore, the use of OSN is a developing and growing area. If it is viewed as a positive development by the public then there may be a corresponding expectation that the legal profession should embrace it as part of their working practices.

[...]

as long as there is an awareness of the issues around the use of OSN and these are addressed, there seems no reason why judicial independence should be undermined by the use of OSN.

Some respondent bar associations felt that the judiciary's use does not, in itself, necessarily (PERADI) or automatically (Association of Danish Law Firms) negatively affect its public perception.

As with the previous question, a number of respondents outlined that the public's perception of the judiciary is unaffected by its use of online social networking so long as such use is responsible (Bar Council of England and Wales) or appropriate (State Bar of Michigan International Law Section).

An interesting distinction between content and medium also emerged from the responses indicating that it is the content of any profile page and comments made which could reduce public confidence rather than the medium itself. Sensible use of such mediums adhering to

professional codes of conduct should enhance the reputation of lawyers with potential clients and society at large as it demonstrates that the profession is moving with the times and does not exist in a vacuum from society.

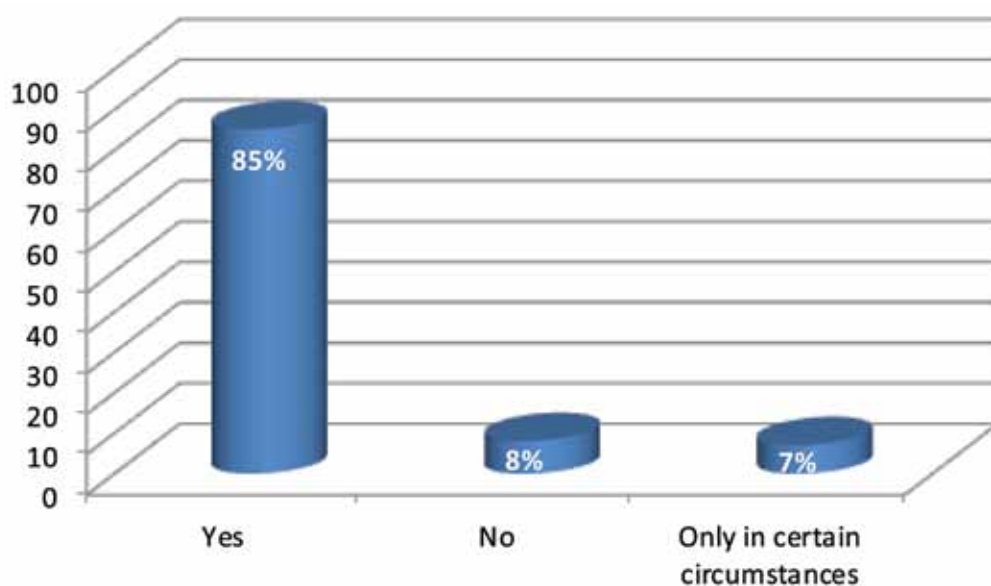
As expressed by the Estonian Bar Association and the Colegio de Abogados del Uruguay, whether or not the judiciary's use of online social networking affects the public's perception depends entirely on the particular use made by the judiciary of the social network. Further, the Colegio de Abogados del Uruguay cautions that, by its very function, the judiciary must be sparing in its use and public exposure since its contacts can later be misused to argue against its impartiality; although its behaviour may be appropriate, it can nevertheless adversely affect the public confidence.

Similarly, the Young Barristers Committee and the Cayman Islands Law Society expressed that the question turns on the specific content of the information posted by the judiciary on online social networking sites. According to the Young Barristers Committee, if no comments are made about the cases that appear before that judge, then the public perception is not negatively affected. Likewise, the Cayman Islands Law Society expressed the following opinion:

Use of online social networks does not itself make any difference – it is what is posted there, and to some extent the nature of the network chosen that could affect confidence. It is a matter of judgement.

Voicing the contrary view, other bar associations such as the German Bar felt that such use by the judiciary can potentially negatively affect its public

FIGURE 18: DO YOU THINK IT IS ACCEPTABLE FOR LAW PROFESSORS AND CURRENT AND/OR PROSPECTIVE LAW STUDENTS TO HAVE EACH OTHER AS CONTACTS ('FRIENDS', 'FOLLOWERS', 'CONNECTIONS', ETC) ON ONLINE SOCIAL NETWORKING SITES?



perception. The Kurdistan Lawyers Association stated that the judiciary's use 'should be on a limited base and basically concentrate on legal issues and not involve unnecessary subjects which may affect the integrity and confidence of the public'. Likewise, the Panama Bar Association opined that, 'just like in non-electronic media, judges should speak solely by their decisions, which may also be placed online depending on privacy concerns'.

## Law students

### *Relationship between law students and professors*

The survey asked respondents whether they think it is acceptable for law professors and current and/or prospective law students to have each other as contacts on online social networking sites. 85 per cent of respondents found such a practice acceptable; less than ten per cent deemed it unacceptable.

Some respondents felt that social networking sites could be used to reinforce positive professional relationships between professors and students, provided that law professors' online profiles are appropriate for student viewing. These sites can also act as an accessible platform to discuss and share materials and as a convenient tool for communicating course information and engaging student participation.

According to the view of the Colegio de Abogados de la Ciudad de Buenos Aires, once again, prudence

is the standard. Thus, if professors and students go about being connections in a prudent manner, which would probably imply maintaining the relationship at a professional level, such behaviour would be acceptable.

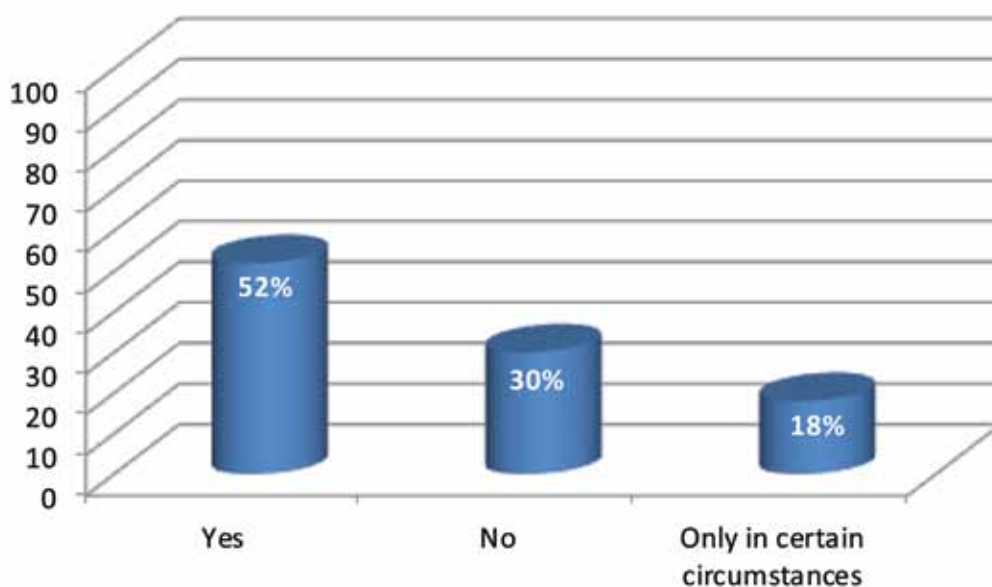
However, other bar associations retained a more conservative approach on the issue and found the behaviour acceptable only in certain circumstances. For instance, the Kurdistan Lawyers Association felt that such behaviour is appropriate but only with regards to the legal and curriculum subjects. As well, the Ordre des avocats de Paris deemed such 'friending' acceptable only in professional situations, such as the follow up of courses and the management of course curriculums, while the Ilustre Colegio de Abogados de Barcelona reserved such behaviour for professional questions that are related to the university such as sharing notes.

### *Evaluation of candidates for admission to the Bar*

The survey then asked respondents if bar associations, societies and councils should consider the information found on online social networking profiles in evaluating candidates for admission to the Bar. A little over half of respondents encouraged such a practice, while 30 per cent of respondents felt that it shouldn't occur.

The actual context of the communication is essential to assess the consideration of the information available in public domain such as the informal social nature, timing and the necessary circumstances of the communication.

FIGURE 19: SHOULD BAR ASSOCIATIONS, SOCIETIES AND COUNCILS CONSIDER THE INFORMATION FOUND ON ONLINE SOCIAL NETWORKING PROFILES IN EVALUATING CANDIDATES FOR ADMISSION TO THE BAR?



The Ordre des avocats de Paris highlighted that it is often difficult to ignore extremely negative information found online and, in that case, to ask candidates to comment on certain points to thus avoid any misunderstandings.

Once again, some bar associations opted to consider such behaviour acceptable only in certain circumstances. For instance, the Tanganyika Law Society and the Japan Federation of Bar Associations defined such circumstances as when the information found is directly related to the character and fitness of the candidate, while the Latvian Council of Sworn Advocates characterised such circumstances as when the information found involves the candidate's good reputation. Similarly, the Colegio de Abogados del Uruguay deemed the practice acceptable only if the information which appears online compromises the ethical integrity of the candidate, while the Bar Council of England & Wales considered such practice acceptable only 'if the profile reveals characteristics which would otherwise disqualify' the candidate. As well, the Indonesian Advocates Association (PERADI) stated that such practice should be carried out only 'if the information found is useful for evaluating the candidates'. While viewing the practice acceptable, the Law Society of England and Wales restricted it 'only to the extent that this is allowable under the UK's data protection framework'. On a slightly different note, the Ilustre Colegio de Abogados de Valencia thought the practice to be acceptable when 'checking public data only'. Further, the East Africa Law Society noted that such practice is 'subject to verification, and the rules of natural justice'.

The Cayman Islands Law Society provided an interesting view on the issue:

They should not routinely review it any more than they routinely review personal websites, published materials, or many other types of information that might be in the public domain. But if material posted on OSNs that calls into question a person's fitness for admission comes to their attention, it should of course be considered, as would, for example, an inappropriate advertisement placed in printed media.

By the same token, the Hong Kong Bar Association found the practice entirely appropriate as it viewed the information found on online social networks as 'no different from any publicly available materials subject always to careful verification'.

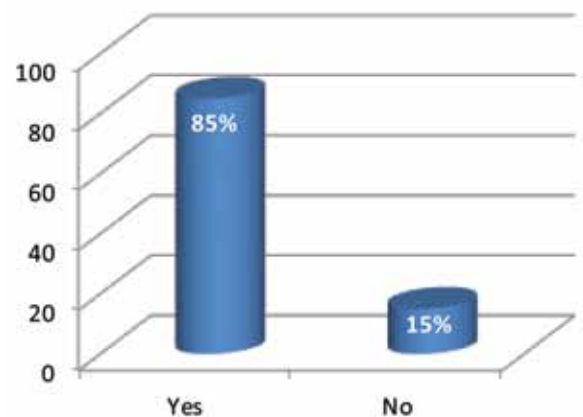
Interestingly enough, the Israel Bar Association pointed out that 'the Bar Association needs to verify the information... found on the online social network'.

### *Information sessions/trainings*

Respondents were also asked whether they think that law students should be informed by their law schools as to the potential risks and disadvantages associated with the use of online social networking

within the legal profession (eg, the information on their online social networking accounts being seen and considered by prospective employers and/or bar organisations). 85 per cent of respondents responded in the affirmative.

FIGURE 20: DO YOU THINK THAT LAW STUDENTS SHOULD BE INFORMED BY THEIR LAW SCHOOLS AS TO THE POTENTIAL RISKS AND DISADVANTAGES ASSOCIATED WITH THE USE OF ONLINE SOCIAL NETWORKING WITHIN THE LEGAL PROFESSION (EG, THE INFORMATION ON THEIR ONLINE SOCIAL NETWORKING ACCOUNTS BEING SEEN AND CONSIDERED BY PROSPECTIVE EMPLOYERS AND/OR BAR ORGANISATIONS)?



As expressed by the Ilustre Colegio de Abogados de Barcelona, specific training on online social networks is missing. The Colegio de Abogados de la Ciudad de Buenos Aires took this position one step further and stated that training sessions are absolutely necessary and that it is an obligation of law schools just as much as bar associations. Similarly, the Association of Danish Law Firms opined that '[t]he information is relevant for everybody and should not necessarily be targeted towards law students'.

The Cayman Islands Law Society had the following opinion:

In an ideal world such instruction might be desirable, but the risks should be obvious. The relevance and application of rules of ethics to the use of online social networks should however be incorporated in ethics/professional conduct courses....

The Law Society of Scotland provided an interesting and forward-looking comment:

As we are going to increasingly encounter generations for whom social networking is the norm and for whom to a large degree the lid has been lifted on the concept of privacy and the boundaries between social and professional life eroded it would be valuable for such guidance

to be issued. This is particularly the case where bar associations and potential employers may consider such materials.

There is a role to be played by the IBA, CCBE, local bar associations/law societies and by the academic and training community. Care should be taken to promote both the positive reasons for an online presence and engagement, and the risks, and to set both of these in the context of other social interactions, publications, etc, rather than treating social media in isolation.

Other bar associations, such as the Young Barristers Committee, felt that such a training course was unnecessary.

Taken as a whole, the results indicate that law students should be informed by their law schools as to the potential risks and disadvantages associated with the use of online social networking within the legal profession. Perhaps the simplest manner by which to accomplish this would be to append an information module or lecture into an already in place professional ethics or media/technology law school course. Alternatively, such information could be covered in a special stand-alone seminar, offered on either a voluntary or compulsory basis.

## Legal employment

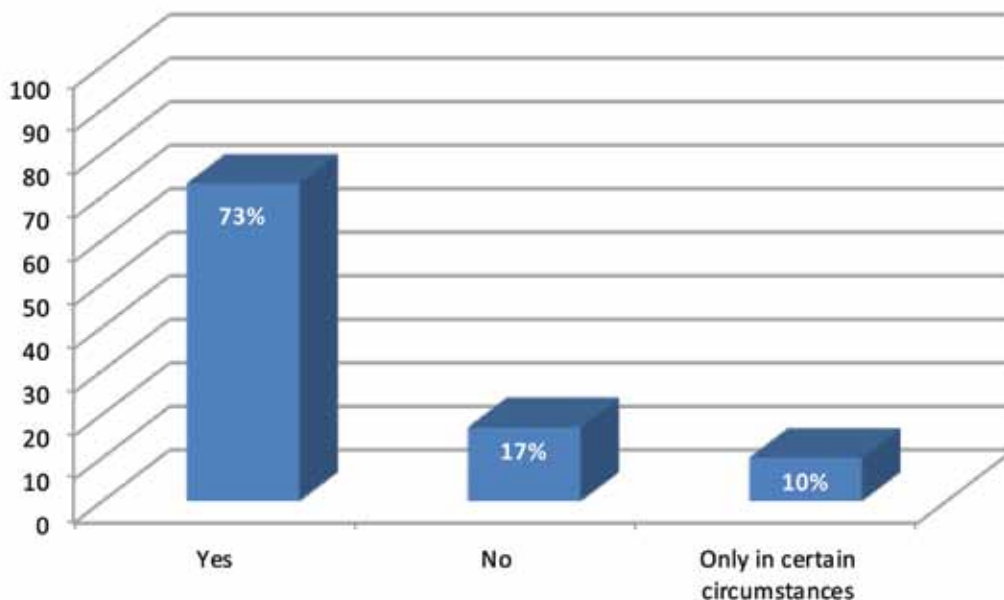
When asked if it is acceptable for legal employers to consider the information found on online social networking profiles in evaluating potential work candidates, over 70 per cent of respondents deemed such practice acceptable, with only under 20 per cent objecting to such conduct.

While considering the consideration acceptable ‘only to the extent that this is allowable under the UK’s data protection framework’, the Law Society of England and Wales provided the following insight:

If this is permitted, it has the potential to reflect both positively on potential work candidates eg, if a person displays experience or connections on an OSN site which may be relevant to the job they are applying for, or negatively on potential work candidates eg, if a person has unsuitable or inappropriate information on an OSN site.

In explaining the reasoning behind why it considers such practice acceptable, the Colegio de Abogados del Uruguay stated that, when a person makes information public, he exposes himself to others knowing such information about him. Just as individuals establish hobbies, personal interests,

FIGURE 21: DO YOU THINK IT IS ACCEPTABLE FOR LEGAL EMPLOYERS TO CONSIDER THE INFORMATION FOUND ON ONLINE SOCIAL NETWORKING PROFILES IN EVALUATING POTENTIAL WORK CANDIDATES?



etc in job interviews or CVs, that same information can be retrieved from online social networks to analyse the candidate’s profile.

Once more, the Ordre des avocats de Paris highlighted that it is often difficult to ignore the extremely negative information found online and, in that case, to ask candidates to comment on certain points to avoid any misunderstandings.

The Hong Kong Bar Association found the practice entirely appropriate as it viewed the information found on online social networks as ‘no different from any publicly available materials subject always to careful verification’.

Again, some bar associations opted to consider such behaviour acceptable only in certain limited circumstances. For instance, the Tanganyika Law

Society found such practice acceptable '[i]f the information on the social networking site establishes a candidate's competence or propensity to undertake illegal activities and things of that nature', while the Bar Council of England & Wales restricted the practice to situations where 'the [online] profile reveals characteristics which would otherwise disqualify'. In addition, the Ilustre Colegio de Abogados de Valencia deemed the practice acceptable only if the employer has legal permission to do so. Further, the East Africa Law Society noted that such practice is 'subject to verification, and the rules of natural justice such as giving everyone [the] opportunity to be heard'.

### Future actions – is there a need for adaptation and intervention?

#### *Advantages versus disadvantages of online social networking*

Online social networking presents both advantages and disadvantages for the legal profession and practice. On the one hand, it offers an increased access to legal information and resources, presents a virtual forum for legal discussion and debate, allows for a number of advertising and marketing opportunities, and permits the expansion of a lawyer's client base

and professional contacts. On the other hand, a lack of privacy and a potential perception of lack of judicial independence, as well as risks of defamation, libel, and slander are some of its disadvantages.

On this note, the survey asked respondents if they think that the advantages of online social networking outweigh its disadvantages. Over 75 per cent of respondents replied in the affirmative. Figure 22 represents the affirmative responses received from each world region.

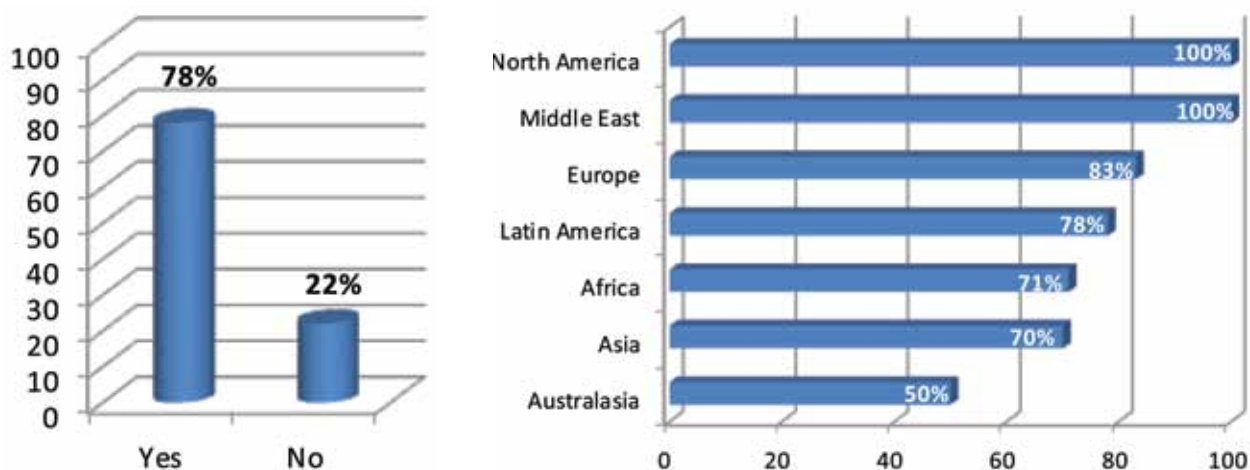
The Law Society of England and Wales took a very firm stance on the matter by stating:

Overall, the advantages of OSN, outlined in question 1, outweigh the disadvantages. There are clearly challenges to the core duties of solicitors – the rule of law and proper administration of justice, integrity, independence and public confidence – through use of OSN. However, there is no reason why these challenges cannot be considered and addressed with additional guidance being produced for the profession if necessary.

The Colegio de Abogados del Uruguay stated that it did not believe that the advantages 'outweigh' the disadvantages as such, but rather that we are simply dealing with a tool whose limits should be well known by its users.

The Law Society of Scotland once again adopted a very forward-looking response:

FIGURE 22: DO YOU THINK THAT THE ADVANTAGES OF ONLINE SOCIAL NETWORKING OUTWEIGH ITS DISADVANTAGES IN THE CONTEXT OF THE LEGAL PROFESSION AND PRACTICE?



At present the uptake of social networking has been largely social and is likely to remain so for at least the foreseeable future. However the medium is not going to diminish and increasing numbers of professionally focussed sites are emerging and thus professionals need to be able to harness the advantages that can be obtained in making new contacts/keeping

in touch with existing contacts whilst being very live to the potential disadvantages. Recent experience with the terms of injunctions being blatantly breached via Twitter and prosecutions collapsing due to contact between a juror and acquitted party are clearly serious issues that need to be addressed and the dangers posed by such social networking.

The Tanganyika Law Society opined the following:

In general, perhaps yes, but with regard to the legal profession, it might be more difficult for judges and lawyers to maintain an image of professionalism, independence, or impartiality if their personal/private/social information can be accessed by anyone. However, if the legal profession and the public can be sensitized on the benefits of social networking, then perhaps the perceptions may not be so grave. Either that, or the judges and lawyers should be told of the ramifications of posting information, which can prove potentially damaging or disparaging etc.

An interesting perspective was put forward by the Panama Bar Association:

Social networks now make evident what currently occurs hidden from the view of others (past relationships, undue behaviour) and therefore allows public scrutiny for the benefit of the public at large.

While recognising that the advantages do overtake the disadvantages, the Law Society of Zimbabwe cautioned that 'proper use and clear understanding of what matters to put within the public domain and those that can remain relatively private' must be exerted. Likewise, the Japan Federation of Bar Associations felt that the advantages probably outweigh the disadvantages 'but we have to be careful of too many disadvantages'.

In contrast, the Colegio de Abogados de la Ciudad de Buenos Aires felt that the advantages of online social networking do not outweigh their disadvantages for now and until more concrete rules as to its use are put in place.

### *Training course(s) for legal professionals*

Respondents were then asked whether they think that lawyers, judges, and law students could benefit from a training course discussing guidelines for the use of online social networking within the legal profession and practice. 95 per cent of respondents welcomed the idea.

A number of bar associations such as the Tanganyika Law Society and the Ilustre Colegio de Abogados de Barcelona commented on the necessity for such a course. The Law Society of England and Wales felt that, 'it would be very helpful if there was more guidance for the profession on the use of OSN within the legal profession, including the potential benefits and risks to using it'. As suggested by the Cayman Islands Law Society, the course 'should be included in general training on professional ethics'.

The Panama Bar Association postulated that the 'nuances of social networks still have to be explained to judicial officials and public'. Similarly, the Law Society of Scotland expressed the following view:

It is to be hoped that most practising lawyers and judges will be familiar with the format of social networking sites. However guidance and training recommending a consistent use and setting out

guidelines would be welcome, bearing in mind that 'one size fits all' will not be a solution here. In particular, law students who have grown up with social networking as the norm could benefit from being made aware of the implications that the contents of their profiles could have on their professional career.

As expressed by the Indonesian Advocates Association (PERADI), 'the training is for the good of the legal profession itself'.

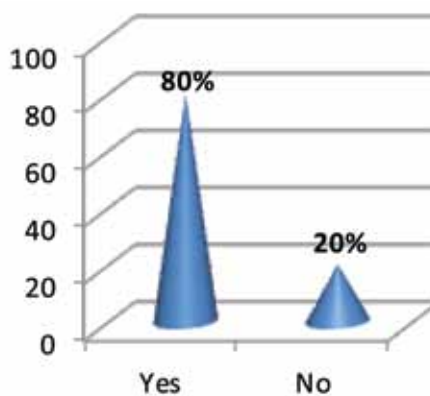
In recognising the need for training programmes on the issue, the National Chamber of Legal Advisers of Poland revealed its own e-learning training programme for legal advisers entitled 'Social Media and Lawyers', which discusses the 'advantages and disadvantages (ethics problems) about social media'.

As per the Law Society of Zimbabwe, such course would be beneficial and would address the issue raised in the previous question in the sense that legal professionals would be instructed on the proper use of online social networking and gain a clear understanding of the distinction between matters which should be placed in the public domain and those which should otherwise remain relatively private.

### *Adaptation of ethical/professional codes and standards*

Given that most present ethical/professional codes and standards presently in place do not account for the 'e-society', the survey asked respondents if they think that ethical/professional codes and standards need to be adapted to online social interactions affecting the legal profession and practice or if they can be adequately applied in their current form. 80 per cent of respondents felt that an adaptation is indeed required, while the remainder felt it was unnecessary.

FIGURE 23: DO YOU THINK THAT LAWYERS, JUDGES, AND LAW STUDENTS COULD BENEFIT FROM A TRAINING COURSE DISCUSSING GUIDELINES FOR THE USE OF ONLINE SOCIAL NETWORKING WITHIN THE LEGAL PROFESSION AND PRACTICE?



A number of bar associations recognised the ever changing nature of information technology and the consequent need to continuously adapt ethical/professional codes and standards. The Ilustre Colegio de Abogados de Barcelona clearly stated that the implementation of social networks makes it necessary to review the codes of ethics of the profession. As per the Law Society of England and Wales, '[online social media] is an increasingly growing area and one that the whole legal profession should be aware of and be considering.' Similarly, the Colegio de Abogados del Uruguay opined that existing rules should be reinterpreted in light of this new medium of information which can be achieved by providing more information about the features, limitations and risks of the use of networks.

While opining that adaptation is required, the Young Barristers Committee pointed out that 'Most codes of conduct should already have a policy on commenting to the media. The same or very similar guidelines apply to social media.'

Meanwhile, the Cayman Islands Law Society felt that 'Express indication that general rules covering interactions also apply to interactions carried out through OSNs would be sensible.'

While advocating that adaptation is in fact required, the Law Society of Scotland qualified such revision to very limited circumstances:

Widescale overhaul of existing codes of conduct should not be required with basic fundamental principles remaining in place. Care should be taken not to create specific policies and rules relating to social media which ignore analogous situations perfectly permissible for many years. However it would be useful to clarify that such codes also apply to on line communications and for practical examples and guidance to be issued. Similarly, the Panama Bar Association opined that only minor adaptations are required and that the 'analogies of non-electronic life should prevail'.

Lastly, the National Chamber of Legal Advisers of Poland had the following position:

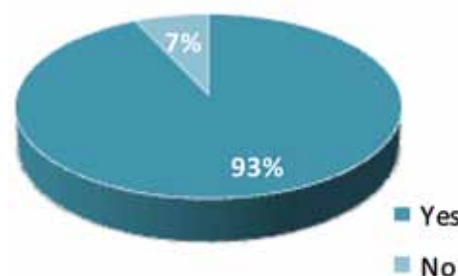
'General principles can be adapted to national ethical principles, but we can't regulate ethnic rules exact rules because of technological changes are too quick.'

### *Intervention of local bar organisations, societies, and councils*

Respondents were asked whether there is a need for bar associations, societies, and councils to construe guidelines regarding the use of online social networking sites within the legal profession and practice. 93 per cent of respondents found in favour of such a need.

A number of bar associations, such as the Association of Danish Law Firms, have commented that such guidelines would indeed be helpful for the legal profession. As per the Ilustre Colegio de Abogados de Barcelona, bar associations should develop a set of recommendations or suggestions.

FIGURE 24: IS THERE A NEED FOR BAR ASSOCIATIONS, SOCIETIES, AND COUNCILS TO CONSTRUE GUIDELINES REGARDING THE USE OF



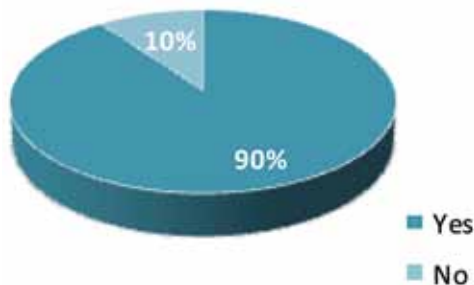
### ONLINE SOCIAL NETWORKING SITES WITHIN THE LEGAL PROFESSION AND PRACTICE?

The Law Society of England and Wales advanced that, 'associations, societies and councils have an important role in providing guidance to the legal profession and this is an area where additional guidance on some of the issues would be beneficial.'

Once again, the Law Society of Scotland expressed the following view:

It is to be hoped that most practising lawyers and judges will be familiar with the format of social networking sites. However guidance and training recommending a consistent use and setting out guidelines would be welcome, bearing in mind that 'one size fits all' will not be a solution here. In particular, law students who have grown up with social networking as the norm could benefit from being made aware of the implications that the contents of their profiles could have on their professional career. In contrast, the Swedish Bar Association opined that no such measures are necessary 'as the situation is today, but this may change in the future'.

FIGURE 25: IS THERE A NEED FOR THE IBA TO WORK WITH MEMBER BAR ASSOCIATIONS, SOCIETIES, AND COUNCILS TO CONSTRUE GUIDELINES AND TOOLKITS REGARDING THE USE OF ONLINE SOCIAL NETWORKING SITES WITHIN THE LEGAL PROFESSION AND PRACTICE?



### *Intervention of the IBA*

When respondents were subsequently asked whether there is a need for the IBA to work with member bar associations, societies, and councils to construe guidelines and toolkits regarding the use of online social networking sites within the legal profession and practice, 90 per cent of respondents replied in the affirmative.

According to the Law Society of England and Wales, and the Swedish Bar Association, such intervention would be helpful. Similarly, the Kurdistan Lawyers Association felt that such work on the part of the IBA ‘would share the legal ideas, experiences and knowledge among the members’. Further, the Ilustre Colegio de Abogados de Barcelona stated that the IBA’s intervention would be advisable, especially for creating guidelines that are as uniform as possible. On a similar note, the Panama Bar Association found in favour of the IBA’s involvement, adding that it would be even more useful if ‘translations into other UN languages’ were also made.

The Tanganyika Law Society stated that it would be very useful for the IBA to work with it to construe some guidelines ‘given that the use of technology is still relatively novel and the laws have not kept pace with technological advancements in Tanzania’.

Others bars, while recognising the need for involvement on the part of the IBA, were a bit more reticent to the actual extent of such involvement, carefully drawing the line between the IBA’s involvement and local involvement. For instance, the New Zealand Law Society opined that such involvement ‘would be useful but may need to be adapted for local conditions’, while the Cayman Islands Law Society felt that ‘relatively limited guidance should be sufficient and can be left to bar associations to introduce’. In line with this restrained approach, the Law Society of Scotland provided the following comments:

Local bar associations will be best placed to provide guidance taking into account local codes of conduct and practice. It may be helpful for the IBA to provide general comments and guidance but to be of most benefit local more tailored guidance would be welcome.

In stark contrast, a small number of bar associations entirely rejected the possibility of involvement by the IBA. As stated by the Estonian Bar Association, such involvement is not needed ‘at the moment, [but] maybe in future’. Such reticence may be explained by the fact that the issue of online social networking within the legal profession has not reached the same magnitude in all countries.

As reflected in the responses to the last two questions, there is overall a pressing need for bar associations, societies, and councils, and, alternatively, for the IBA to step in and construe some type of guidelines regarding this topical area. However, the exact magnitude and extent of this work remains to be determined.



## Conclusions and recommendations

### Summary of conclusions

As technology rapidly evolves, the key question is whether the legal profession can keep pace with such developments, and, in doing so, what safeguards or controls are needed to ensure that ethical and professional standards are maintained.

### Recommendations/future steps

The recommendations and future steps have been mentioned at the beginning of this report under 'Next steps and project plan'. It is reiterated here that an IBA Advisory Group on Online Social Networks ('Advisory Group') comprised of

### BOX 5 – MAJOR FINDINGS AND CONCLUSIONS

- Although over 90 per cent of respondents found that online social networking presents a new set of challenges for the legal profession, such challenges are not to be viewed entirely as disadvantages. In fact, over 75 per cent of respondents considered the advantages of online social networking to outweigh its disadvantages.
- Almost 70 per cent of respondents felt that it is acceptable for lawyers and judges to have each other as contacts on online social networks.
- Over 90 per cent of respondents considered it unacceptable for lawyers and judges to post comments or opinions about fellow lawyers, judges, parties, or cases in progress on online social networks.
- The vast majority of respondents from jurisdictions comprising a jury system found it unacceptable for jurors to post comments or opinions about the judges, lawyers, parties, and/or cases which they are observing on online social networking sites.
- While a majority of respondents found it unacceptable for lawyers, judges, and jurors to post updates about proceedings (by posting 'status updates', 'tweeting', blogging, etc.) on online social networks while a matter is pending before the courts strictly for informational purposes, the majority deemed the conduct acceptable for journalists.
- Over 85 per cent of respondents deemed it acceptable for lawyers to access and use the information found on the online social networking profiles of the parties in a case, which forms part of the public domain, as evidence in proceedings.
- Nearly 95 per cent of respondents from jurisdictions containing a jury system thought that, in addition to routine instructions, jurors should receive specific instructions limiting their online communications and use of online social networking sites.
- Only 15 per cent of respondents felt that lawyers' use of online social networks negatively affects the public's confidence in the integrity and professionalism of the legal profession, while almost 40 per cent of respondents felt that judges' use of online social networks negatively affects the public's confidence in the integrity and impartiality of the judiciary, thereby undermining judicial independence. As can be seen from these responses, the use by lawyers and judges of online social networking does not appear to be detrimental to the public opinion of confidence. However, there needs to be more clarification and guidance on the extent of such uses.
- The overall conclusions from the responses demonstrate that, while there are presently obvious lacunas and differences in opinions brought about by the use of online social networking (e.g. 'friending' between different legal actors, posting of comments or opinions), the overall use is, on the whole, beneficial (e.g. the transmission of information by journalists through online social networks). The challenges thus lie in delineating the boundaries for such use and creating some sort of guidelines or toolkits.
- 85 per cent of respondents thought that law students should be informed by their law schools as to the potential risks and disadvantages associated with the use of online social networking within the legal profession.
- 95 per cent of respondents thought that lawyers, judges, and law students could benefit from a training course discussing guidelines for the use of online social networking within the legal profession and practice.
- 80 per cent of respondents stated that there is a need for ethical/professional codes and standards to be adapted to online social interactions affecting the legal profession and practice, as they cannot be adequately applied in their current form.
- Over 90 per cent of respondents stated that there is a need for bar associations, societies, and councils, or, alternatively, for the IBA to construe guidelines regarding the use of online social networking sites within the legal profession and practice.

professionals from different areas of expertise will be set up by the Legal Projects Team to further examine the presence of online social networking in the legal profession. The Advisory Group will be composed of at least one individual from each of the following: a media law expert; a professional ethics and responsibility expert; a present or retired trial judge; a senior officer of a bar organisation; and a dean or senior level staff member of a law school. By providing for individuals originating from diverse professions and fields who are linked together by the use of online social networking, the Advisory Group will be able to foster an exchange of ideas and comments derived from different angles and experiences.

Similarly, the nationalities of the members of the Advisory Group would be varied and

representative of the different world regions in order to truly advance an international discussion and allow for guidelines that are useful to member bar associations worldwide.

As the subject is both contemporary and pressing, the Advisory Group would be formed and a first meeting convened, at the very latest, by the beginning of 2012.

The important issues which stem from the use of online social networking within the legal profession and practice will be approached by a systemic mechanism of a project plan (see Figure 26). The project plan will be launched at the Biennial IBA Latin American Regional Forum Conference taking place in Bogota, Colombia from 14–16 March 2012.

FIGURE 26: ISSUES STEMMING FROM THE USE OF ONLINE SOCIAL NETWORKING WITHIN THE LEGAL PROFESSION AND PRACTICE



## Annex 1: List of Survey Questions

### Introduction

1. Do you think that online social networking presents a new set of challenges for the legal profession?

Yes  No

### Presence on online social networking sites

2. Do you think it is acceptable for lawyers and judges to have each other as contacts ('friends', 'followers'/'following', 'connections', etc) on online social networking sites?

Yes  No

3. If you answered 'yes' to the previous question, do you think it is acceptable for lawyers and judges *before whom they are appearing* to have each other as contacts ('friends', 'followers', 'connections', etc) on online social networking sites *during proceedings*?\*

\*Throughout this survey, 'proceedings' refers to all the different steps in a judicial or administrative proceeding.

Yes  No

4. Do you think it is acceptable for lawyers and unrepresented opposing parties to have each other as contacts ('friends', 'followers', 'connections', etc) on online social networking sites?

Yes  No

5. Do you think lawyers should deactivate their online social networking accounts *during proceedings*?\*

\*Throughout this survey, 'proceedings' refers to all the different steps in a judicial or administrative proceeding.

Yes  No

6. Do you think judges should discontinue being online contacts ('friends', 'followers', 'connections', etc) with former colleagues comprising advocates and legal practitioners once they become judges?

Yes  No

7. Do you think that judges should close their online social networking accounts once they become judges?

Yes  No

8. If you answered 'no' to the previous question, do you think judges should deactivate their online social networking accounts *during proceedings*?\*

\*Throughout this survey, 'proceedings' refers to all the different steps in a judicial or administrative proceeding.

Yes  No

9. If your jurisdiction has a jury system, do you think it is acceptable for jurors and the parties and/or witnesses in a case to have each other as contacts ('friends', 'followers', 'connections', etc) on online social networking sites?

Yes  No

N/A – Jurisdiction does not have a jury system

10. If your jurisdiction has a jury system, do you think that jurors should be asked to deactivate their online social networking accounts *during proceedings*?\*

\*Throughout this survey, 'proceedings' refers to all the different steps in a judicial or administrative proceeding.

Yes  No

N/A – Jurisdiction does not have a jury system

### Posting of information and opinions

11. Do you think it is acceptable for *lawyers* to post comments or opinions about judges before whom they are appearing, their clients, their cases, and/or opposing counsel on online social networking sites?

Yes  No

12. Do you think it is acceptable for *judges* to post comments or opinions about the lawyers and parties appearing before them and/or pending/decided cases on online social networking sites?

Yes  No

13. If your jurisdiction has a jury system, do you think it is acceptable for *jurors* to post comments or opinions about the judges, lawyers, parties, and/or cases which they are observing on online social networking sites?

- Yes       No  
 N/A – Jurisdiction does not have a jury system

14. Do you think it is acceptable for *lawyers, judges, jurors and/or journalists* to post updates about proceedings (by posting ‘status updates’, ‘tweeting’, blogging, etc) on online social networking sites, while a matter is pending before the courts, *strictly for informational purposes*?

- Yes       No

Lawyers  
Judges  
Jurors  
Journalists

Comments (optional):

### Endorsement of legal products

15. Do you think it is acceptable for judges to state their interests and/or preferences in legal products (‘like’, ‘fan’, etc) on online social networking sites?

- Yes       No

### Lawyer-client relationship

16. Do you think that lawyers should advise their clients to close their online social networking accounts upon formation of the lawyer-client relationship?

- Yes       No

17. Do you think that lawyers should warn potential clients in advance that any communication between them over an online social networking site will not in itself establish a lawyer-client relationship?

- Yes       No

### Judicial proceedings

18. Do you think it is acceptable for lawyers to access and use the information found on the online social networking profiles of the parties in a case, which forms part of the public domain, as evidence in proceedings?

- Yes       No

Comments about the practice in your jurisdiction (optional):

19. If your jurisdiction has a jury system, do you think it is acceptable for lawyers to consider the information found on the online social networking profiles of potential jurors in selecting a jury?

- Yes       No

N/A – Jurisdiction does not have a jury system

Comments about the practice in your jurisdiction (optional):

20. If your jurisdiction has a jury system, in addition to routine instructions, do you think that jurors should receive specific instructions limiting their online communications and use of online social networking sites?

- Yes       No

N/A – Jurisdiction does not have a jury system

Comments about the practice in your jurisdiction (optional):

### Public perception of lawyers and the judiciary

21. In your opinion, does lawyers’ use of online social networks negatively affect the public’s confidence in the integrity and professionalism of the legal profession?

- Yes       No

Comments (optional):

22. In your opinion, does judges’ use of online social networks negatively affect the public’s confidence in the integrity and impartiality of the judiciary, thereby undermining judicial independence?

- Yes       No

Comments (optional):

## Law students

23. Do you think it is acceptable for law professors and current and/or prospective law students to have each other as contacts ('friends', 'followers', 'connections', etc) on online social networking sites?

Yes  No

Only in certain circumstances; please specify:

24. Should bar associations, societies and councils consider the information found on online social networking profiles in evaluating candidates for admission to the Bar?

Yes  No

Only in certain circumstances; please specify:

25. Do you think that law students should be informed by their law schools as to the potential risks and disadvantages associated with the use of online social networking within the legal profession (eg, the information on their online social networking accounts being seen and considered by prospective employers and/or bar organisations)?

Yes  No

Comments (optional):

## Legal employment

26. Do you think it is acceptable for legal employers to consider the information found on online social networking profiles in evaluating potential work candidates?

Yes  No

Only in certain circumstances; please specify:

## Conclusions

27. Do you think that the advantages of online social networking (eg, access to legal information and resources, forum for legal discussion, advertisement and marketing, expansion of client base and professional contacts) outweigh its disadvantages (eg, lack of privacy, potential perception of lack of judicial independence, risks of defamation, libel, and slander) in the context of the legal profession and practice?

Yes  No

Comments (optional):

28. Do you think that lawyers, judges, and law students could benefit from a training course discussing guidelines for the use of online social networking within the legal profession and practice?

Yes  No

Comments (optional):

29. Do you think that ethical/professional codes and standards need to be adapted to online social interactions affecting the legal profession and practice or can they be adequately applied in their current form?

Adaptation is required

No adaptation is required

Comments (optional):

30. Is there a need for bar associations, societies, and councils to construe guidelines regarding the use of online social networking sites within the legal profession and practice?

Yes  No

Comments (optional):

31. Is there a need for the IBA to work with member bar associations, societies, and councils to construe guidelines and toolkits regarding the use of online social networking sites within the legal profession and practice?

Yes  No

Comments (optional):

## Annex 2: Geographical regions used in this report

Geographical regions in this report are composed by the following respondent jurisdictions:

**Africa:** Ethiopia, Ghana, South Africa, Tanzania, Zambia and Zimbabwe

**Asia:** Azerbaijan, Hong Kong, India, Indonesia, Japan, South Korea, Nepal and Thailand

**Australasia:** Australia and New Zealand

**Europe:** Czech Republic, Denmark, Estonia, Europe (ie, a European association), France, Germany, Hungary, Ireland, Latvia, Luxembourg, Netherlands, Poland, Spain, Turkey and United Kingdom

**Central and South America (including the Caribbean):** Argentina, Bahamas, Brazil, Cayman Islands, Chile, Guyana, Panama, Peru and Uruguay

**Middle East:** Afghanistan, Iraqi Kurdistan and Israel

**North America:** United States of America

## Annex 3: Further Reading

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