

## Villanova University Charles Widger School of Law

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From the Selected Works of Catherine J. Lanctot

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2015

# Becoming A Competent 21st Century Legal Ethics Professor: Everything You Always Wanted to Know About Technology (But Were Afraid To Ask)

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*Catherine J. Lanctot*<sup>\*</sup>

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#### INTRODUCTION: REBOOTING LEGAL ETHICS COURSES.

We are all interested in the future, for that is where you and I are going to spend the rest of our lives. And remember, my friends, future events such as these will affect you in the future.<sup>1</sup>

We have finally hit the tipping point with respect to the use of technology within the legal profession. In the last few years, bar regulators have begun to warn attorneys that they may no longer plead ignorance of technological advances if such ignorance harms the interests of their clients. This evolving obligation seems daunting to members of our notoriously technophobic profession, as the explosion in technological development in the last twenty years has made it difficult to keep current with each change, even for experts in the field.

Law professors may be even less comfortable with the developments of the Digital Age than practitioners. Although some of us may be early adopters of new technology, many faculty members have been largely insulated from the extraordinary disruption that technology has brought to modern law practice. Of course, the dramatic effect that the Internet and digital technologies have had on every area of the law has produced changes in the substantive material we cover in our classes. But it is less certain that our current approach to teaching legal ethics adequately reflects the ongoing technological upheaval in the legal profession.

Twenty years ago, the first glimmerings of the mysterious entity called the Internet generated many new issues for discussion in our legal ethics classes. One way to think about whether we have adequately adapted our courses in response to these technological changes is to take a quick and somewhat impressionistic look back to those thrilling days of yesteryear.

Lawyers historically have been reluctant to embrace new inventions, resisting the newfangled invention of the telephone as undignified, looking skeptically at mechanical devices like typewriters, and even avoiding taking elevators.<sup>2</sup> Despite this conservatism about technology, early glimmerings

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<sup>1</sup> The Amazing Criswell, *Plan 9 From Outer Space* (Valiant Pictures 1959).

<sup>2</sup> See Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 162-65 (1999).

of how the new phenomenon of “cyberspace” might affect law practice emerged as early as 1992. That summer, a group of attorneys and law faculty experimented by holding a “conference that focused on the effects of electronic mail on law, law teaching, and law practice,” utilizing a then-radical methodology: “electronic mail: none of the participants ever left their homes or offices; none met the others face-to-face.”<sup>3</sup> As of the following year, a handful of lawyers were “logging onto online networks such as CompuServe, Prodigy, America Online, Internet and the American Bar Association's ABA/net to swap notes on trial strategy, look for jobs, schmooze with colleagues, chat about legal issues, transmit e-mail and legal documents, even troll for clients.” One commentator noted in 1993, however, that “even though many lawyers are starting to hear about cyberspace, they just don't relate it to their own practice. Nevertheless, with a new generation of computer-literate lawyers coming out of the nation's law schools, this view could rapidly change.”<sup>4</sup>

With the advent of a novel communication portal with the non-threatening name of a “home page,” law firms began to debate whether or not to create a presence on the World Wide Web. At the end of 1994, only a few law firms had braved the new technology to create their own rudimentary home pages.<sup>5</sup> The legal press began to produce articles that urged lawyers to consider incorporating electronic technology into their daily law practice.<sup>6</sup> Lawyers who were regularly using email and other

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<sup>3</sup> I. Trotter Hardy, *Symposium: Electronic Communications And Legal Change: Electronic Conferences: The Report Of An Experiment*, 6 HARV. J. LAW & TECH. 213 (1993).

<sup>4</sup> Rosalind Resnick, *A Shingle In Cyberspace; Lawyers Online Find Clients - And Some Risks*, NAT'L L.J., September 27, 1993, at 26.

<sup>5</sup> See Peter W. Martin, *Prospecting The Internet: Potential Clients, Legal Information And Expert Forums Are Waiting For Lawyers On The 'Net. An Innovator in Online Legal Services Explains Why You Need to Be There*, 81 A.B.A.J. 52 (September, 1995) (“A year and a half ago, only two U.S. law firms had a serious presence on the Internet. By mid-February of this year, 31 lawyers or law firms had “home pages” of information and graphics. Four months later, the number had doubled.”); William E. Hornsby Jr., *Ethics Rules For Ads May Cover Web Sites; If Deemed Commercial Speech, Firms' Home Pages On The 'Net Will Have To Respect State Rules*, NAT'L L.J., January 29, 1996, at 4 (“As law firms go from the Yellow Pages to home pages, they are embracing the Internet at a phenomenal pace. Five law firms had home pages on the World Wide Web as of November 1994. Seven months later, that figure was estimated at 500.”).

<sup>6</sup> See Keith Herron, *The Internet Will Help Firms Connect To Clients; New Opportunities Will Be Available When The Difficulties Of Electronic Communication Are Overcome*, NAT'L L.J., March 21, 1994, at 9 (“The Internet now provides access to many

electronic communication were seen as pioneers, with one 1994 article quoting attorney David Hirsch's description of his near-miraculous activities: "I communicate with co-counsel in other states, with clients around the country, and had a correspondence with a lawyer in France, something I would probably never do by surface mail."<sup>7</sup>

A handful of law schools also began to employ the new technology to recruit prospective students. "Forget sending for law school brochures, or sitting in a guidance counselor's office," proclaimed one article. "In the near future, all law school applicants will have to do to get information about a law school is log on to the Internet." By July 1994, at least 20 law schools were using the Internet to post their brochures.<sup>8</sup> Nevertheless, the adoption of email technology also proved to be a slow process at many law schools, with one administrator warning in 1993 that some schools "may strongly object to students communicating with professors on E-mail."<sup>9</sup>

The new technology prompted considerable interest among lawyers who were intrigued by its potential but worried about whether it was yet another fad. In 1995, I participated on a CLE panel about the Internet for the Pennsylvania Bar Institute. One indication of contemporary thinking about cyberspace is the title of my ethics presentation: "The Internet – Hip or Hype?" Although my current memory is that I was firmly on the side of "hip," I worry that I shared the concern of many attendees that day, who thought that this fancy-sounding invention might well be "hype."<sup>10</sup>

Despite these initial reservations, the embrace of certain aspects of the Internet by law firms came relatively quickly, over a period of a couple of years. But even by early 1996, when nearly 400 law firms had established some kind of Internet presence, there remained great skepticism about the technology. "[L]awyers' reservations about the Web -- that most of their

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information services, so it is important for users to have modem skills to reach those services. But the information superhighway, if constructed correctly, should reduce the need for modem knowledge. If law firms are to remain competitive, they need to communicate with their clients and reduce costs.").

<sup>7</sup> Jim Meyer, *Surfing The 'Net: The Internet Is Growing In Importance For Business And Lawyers*, 80 A.B.A.J. 100 (February 1994).

<sup>8</sup> Ken Myers, *Institutions Around The Nation Hitch A Ride On Data Highway; Law School*, NAT'L L. J., July 4, 1994.

<sup>9</sup> See Matthew Goldstein, *Bulletin Boards, E-Mail Transform Law Schools*, N.Y.L.J., November 8, 1993, at 33.

<sup>10</sup> See generally Catherine J. Lanctot and James Edward Maule, "The Internet – Hip or Hype? Legal Ethics and the Internet," in THE INTERNET FOR LAWYERS (Penn. Bar. Inst. 1995).

clients haven't started shopping for attorneys on the 'Net, that it's a high-maintenance medium and that it attracts unwelcome attention from inquisitive freeloaders -- are borne out by ample anecdotal evidence," reported the National Law Journal in early 1996. "This is exactly what corporate firms don't want," according to the communications director at Shearman & Sterling. "To me, it's like putting your phone number up on 42nd Street. Anybody can call. You don't know what's going to happen." Once a critical mass of law firms created websites, however, most others quickly followed suit, with one commentator arguing that "by mid-1997 Web addresses will be like Yellow Page Listings."<sup>11</sup>

Although it soon would become obvious that law firm home pages would "reach a wider audience than most law review articles," skepticism remained.<sup>12</sup> "In a recent survey of the largest 200 U.S. law firms, more than 85 percent had a World Wide Web page or stated that they would by mid-1996," but "when asked if the Web offered the legal industry the same opportunities as other industries as a marketing tool, only 30 percent responded affirmatively."<sup>13</sup> Indeed, in 1996, one article urged lawyers to continue to emphasize what was still seen as a highly effective method of obtaining clients – the Yellow Pages.<sup>14</sup>

As the use of the Internet grew, bar regulators began to examine this new phenomenon under the existing ethical rules. Texas was one of the first jurisdictions to take a look at lawyer home pages in 1996. Its ethics committee's oversight may have been somewhat hampered initially because "none of the 12 members of the committee belongs to a firm with a home

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<sup>11</sup> Ann Davis, *Firms Join The Web Marketing Craze; Successes And Failures Demonstrate The Dos And Don'ts Of Online Marketing Strategies*, NAT'L LAW J., Feb. 12, 1996, at 8. See Joshua D. Macht, *Hale And Dorr Surfing The Internet's New Wave; A Boston Firm Takes Off Into The Digital Age With Innovative Uses Of Information Technology*, NAT'L L. J., January 30, 1995.

<sup>12</sup> See Wendy R. Leibowitz, *As Firms Grow More Confident, Their Home Page Grow Richer*, NAT'L L. J., November 11, 1996, at 18; see Lanctot, *supra*, DUKE L.J. at 150 n.4.

<sup>13</sup> Todd A. Corham, *Uses For A Firm's Web Site Go Beyond Marketing; Large And Small Law Firms Also Use Home Pages For Recruiting And To Keep Clients Informed*, NAT'L L. J., March 25, 1996, at 12.

<sup>14</sup> Steven A. Meyerowitz, *Benefits Of Using*, N.Y. LAW J. February 27, 1996, at 32 ("It may be true that, at some point, law firms may move, in the words of William E. Hornsby Jr., the staff counsel to the ABA's Advertising Commission, from Yellow Pages to home pages. For now, though, most law firms would best be advised to concentrate on preparing effective advertisements in these time-tested print directories.")

page, [and thus] further meetings will be needed just to teach the members the new technology.”<sup>15</sup>

Some advocates of technological change attempted to predict what the legal profession of the future would be like. In 1995, the New York Law Journal published a set of articles speculating about “The Practice of Law in the Year 2025.”<sup>16</sup> “The firm of the future will be unplugged - free of wires, free of walls, free of time zones and free of locality,” suggested one author. “Only attorneys and firms that master the technology will be able to effectively navigate in the Information River, free to work with clients and ever-changing partners for short-term projects or longer term alliances.” He optimistically predicted that lawyers would be “[f]reed from the desk and the office,” and that this freedom would mean that “[t]he best and most efficient lawyers will be more accessible, more valuable to their clients, make more money and gain more pleasure doing so.”<sup>17</sup> Another article cautioned lawyers that the cutting-edge technology of the 1990’s would seem quite primitive in thirty years:

As much as technology users snobbishly recall the days of telegrams, rotary phones, teletypes, typewriters, carbon paper and the occasional use of computer service bureaus and keypunch operators, lawyers 30 years from now will look back to the 1990s with a smile and a chuckle as they remember the crude beginnings of voice mail, the reluctance to use ISDN services, emerging video and open systems standards, the enslavement to the fax machine, the love affair with cellular telephones, the way overnight courier service and traditional mail services were used, the experimentation with CD storage (often led by the firm's library staff), the use of special telephone credit cards, the primitive efforts to secure communications and information services, and the beguiling fascination of the then-new Information Superhighway.<sup>18</sup>

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<sup>15</sup> Gary Taylor, *Eyes Of Texas Are Upon Internet; State Bar Looks Into Patrolling Home Pages For Violations Of Rules*, NAT’L L. J., November 6, 1995, at 16; see William E. Hornsby Jr., *Ethics Rules For Ads May Cover Web Sites; If Deemed Commercial Speech, Firms’ Home Pages On The ‘Net Will Have To Respect State Rules*, NAT’L L.J., January 29, 1996, at 4.

<sup>16</sup> See “The Practice of Law in the Year 2025,” N.Y.L.J., April 17, 1995, at 7.

<sup>17</sup> James C. Erickson, *The Practice of Law in the Year 2025: Where Is Technology Taking The Profession?* N.Y.L.J., April 17, 1995, at 7.

<sup>18</sup> Randy Burkart & Curt Canfield, *Close Encounters Of A Different Kind; A 20/20 View Of Communications In 2025*, N.Y.L.J., *supra*.

Ronald Staudt, one of the pioneers in adapting computer technology to the classroom, boldly predicted in 1994 that, by 2001, we “will carry in our pockets a digital device that will serve as a telephone, answering machine, beeper, fax machine, word processor, rolodex, calendar, scheduler, calculator, Gameboy, Walkman and stereo television.”<sup>19</sup>

Despite rapid technological advances, many attorneys resisted changing the way they did business. In 1994, Mark Lauritsen remarked that his personal computer “had more computing power than the entire Pentagon had at its disposal throughout much of the Vietnam War. . . . And I replaced it because it was too old and slow.” Yet Lauritsen warned about “how resistant and inertial the law practice world seems to have been,” cautioning that “[c]lients eventually will refuse to tolerate poor information management practices at their lawyers' offices.”<sup>20</sup>

By the beginning of the new millennium, it was apparent that the Internet was not simply the 90’s equivalent of the 8-track tape player of the Seventies.<sup>21</sup> Use of this new technology by lawyers had already generated a variety of new ethical issues, with the initial focus on the risks of using e-mail to communicate with clients.<sup>22</sup> Questions also emerged about the possibility of inadvertent creation of attorney-client relationships through on-line interchanges between lawyers and lay people.<sup>23</sup> Bar opinions began to surface at the turn of the century to give guidance to practicing lawyers on how to deal with this new technology.

The rapid expansion in digital technology coincided with a fertile time for scholarship in the area of legal ethics. At one time considered to be a backwater, the field of professional responsibility had become an area of great scholarly ferment. More attention was devoted to the pedagogy of

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<sup>19</sup> Ronald W. Staudt, *The Future Of The Legal Profession: Does The Grandmother Come With It?: Teaching And Practicing Law In The 21st Century*, 44 CASE W. RES. L. REV. 499-500 (1994).

<sup>20</sup> Mark Lauritsen, *Getting Past The Future: Lawyers Must Overcome Resistance, Inertia*, N.Y.L.J., August 16, 1994, at 7.

<sup>21</sup> See Catherine J. Lanctot, *Regulating Legal Advice In Cyberspace*, 16 ST. JOHN’S J. LEG. COMM. 569, 569 (2002).

<sup>22</sup> See, e.g., David Hricik, *Lawyers Worry Too Much About Transmitting Client Confidences by Internet E-mail*, 11 GEO. J. LEGAL ETHICS 459, 462 (1998). See generally Jan L. Jacobowitz & Danielle Singer, *The Social Media Frontier: Exploring a New Mandate for Competence in the Practice of Law*, 68 U. MIAMI L. REV. 452 (2014).

<sup>23</sup> See Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147 (1999).



teaching legal ethics, as well as its substance. Nevertheless, incorporating ethical issues relating to cyberspace and technology into the classroom received relatively little focus. At the 2002 Annual Meeting of the American Association of Law Schools, for example, the Section on Professional Responsibility held a panel discussion entitled “Recommitting to Teaching Legal Ethics: Shaping Our Teaching in a Changing World.” The published articles from this symposium addressed many important issues, but there was no attention given to how to grapple with technology.<sup>24</sup> Other symposia on teaching legal ethics also focused on issues other than those produced by the technological revolution.<sup>25</sup> Although many ethics professors undoubtedly have covered some of these issues in their classes over the last twenty years, issues involving technology and law practice may often have been seen to be secondary concerns, to be covered only in the unlikely event that there was a little extra time at the end of a class hour.

No longer may we treat technology questions as the exclusive province of techies and early adopters.<sup>26</sup> The emerging notion of a “duty to Google,” holding lawyers responsible for failing to use readily available technological tools or social media, reflects the concept that the proper use

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<sup>24</sup> See, e.g., Steven H. Hobbs, *Symposium Introduction: Sharing Stories About Our Commitment to Teaching Ethic*, 26 J. LEGAL PROF. 101 (2001 / 2002); Elizabeth A. Alson, *Fundamentalism in the Legal Education Curriculum*, 26 J. LEGAL PROF. 123 (2002); Antoinette Sedillo Lopez, *Teaching a Professional Responsibility Course: Lessons Learned from the Clinic*, 26 J. LEGAL PROF. 149 (2002); Russell G. Pearce, *Legal Ethics Must be the Heart of the Law School Curriculum*, 26 J. LEGAL PROF. 159 (2002); W. Bradley Wendell, *Ethics for Skeptics*, 26 J. LEGAL PROF. 165 (2002).

<sup>25</sup> See, e.g., Symposium, *1997 W. M. Keck Foundation Forum on the Teaching of Legal Ethics*, 39 WM. & MARY L. REV. 283 (1998). Of the nine articles published as part of this symposium, written by the leading scholars in legal ethics, only one made more than minimal mention of the emerging ethical issues surrounding the Internet. See Teresa Stanton Collett, *Teaching Professional Responsibility In The Future: Continuing The Discussion*, 39 WM. & MARY L. REV. 439, 445 (1998). More recently, in 2007, an excellent written symposium on “Teaching Professional Responsibility and Legal Ethics” featured fifteen articles, none of which discussed the incorporation into the classroom of ethical issues relating to technology. See, e.g., Carol A. Needham, *Teaching Professional Responsibility and Legal Ethics: Introduction*, 51 ST. LOUIS L.J. 935 (2007).

<sup>26</sup> See Stephen Gillers, *A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L.J. 953, 962 (2012); John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform The Role Of Lawyers In The Delivery Of Legal Services*, 82 Fordham L. Rev. 3041 (2014).

of technological advances is part of an attorney's duty of competence.<sup>27</sup> A significant advance in this area came from the ABA's 2012 revision to the comments to Model Rule 1.1, in order to stress that the lawyer's duty of competence extends to technology. Paragraph 8 of the comments now provides: "To maintain the requisite knowledge and skill, **a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."<sup>28</sup>

The inclusion of the nine-word phrase highlighted above, as well as a handful of other amendments that formally acknowledge the existence of modern technology such as email, might seem to be an innocuous change.<sup>29</sup> Indeed, in its Report accompanying this amendment, the ABA's Commission on Ethics 20/20 reiterated that it "does not impose any new obligations on lawyers, but "is intended to serve as a reminder to lawyers that they should remain aware of technology." But the Report itself indicated far more urgency about the use of technology by lawyers in the future:

First, technology has irrevocably changed and continues to alter the practice of law in fundamental ways. . . . Lawyers must understand technology in order to provide clients with the competent and cost-effective services that they expect and deserve. . . .

Because of the sometimes bewildering pace of technological change, the Commission believes that it is important to make explicit that a lawyer's duty of competence, which requires the

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<sup>27</sup> See, e.g., Robert Keeling, Tami Weerasingha-Cote and John Paul Schnapper-Casteras, *Neither Friend Nor Follower: Ethical Boundaries On The Lawyer's Use Of Social Media*, 24 CORNELL J. L. & PUB. POLY 145 (2014); John G. Browning, *Facebook, Twitter, and LinkedIn - Oh My! The ABA Ethics 20/20 Commission and Evolving Ethical Issues in the Use of Social Media*, 40 N. KY. L. REV. 255, 260-61 (2013); Thomas Roe Frazer II, *Social Media: From Discovery to Marketing--A Primer for Lawyers*, 36 AM. J. TRIAL ADV. 539, 552 (2013); Betsy Lenhart, *The Seventeenth Century Meets the Internet: Using a Historian's Approach to Evaluating Documents as a Guide to Twenty-First Century Online Legal Research*, 9 J. ALWD 21, 31-35 (2012); Michael Whiteman, *The Death Of Twentieth-Century Authority*, 58 UCLA L. REV. DISC. 27 (2010); Brielynne Neumann, *Note, The 21st Century Online Carnival Atmosphere: Ethical Issues Raised by Attorneys' Usage of Social Media*, 27 GEO. J. LEGAL ETHICS 747 (2014).

<sup>28</sup> Model Rule of Prof. Conduct 1.1, para. 8 (emphasis added).

<sup>29</sup> One prominent scholar asserted: "The proposed changes do not change. They articulate what change technology has already made." See James E. Moliterno, *Ethics 20/20 Successfully Achieved Its Mission: It "Protected, Preserved, And Maintained,"* 47 AKRON L. REV. 149 (2014)

lawyer to stay abreast of changes in the law and its practice, includes understanding relevant technology's benefits and risks. Comment [6] of Model Rule 1.1 (Competence) implicitly encompasses that obligation, but **it is important to make this duty explicit because technology is such an integral – and yet at times invisible – aspect of contemporary law practice.** The phrase “including the benefits and risks associated with relevant technology” would offer greater clarity regarding this duty and emphasize the growing importance of technology to modern law practice.<sup>30</sup>

The concerns echoed those made in a comprehensive report issued by the New York State Bar Association's Task Force on the Future of the Legal Profession in 2011, which warned that “too many lawyers are torn between not wanting to be early adopters and dreading being left behind. The result is that some lawyers fail to optimize the tools they have, let alone take advantage of the most appropriate tools available.”<sup>31</sup>

Not surprisingly, the concept that technology is an “integral” part of contemporary law practice, requiring mastery by attorneys who wish to remain competent, has been viewed as a “wake-up call” for the legal profession.<sup>32</sup> The reaction has been surprisingly swift. Commentators now proclaim: “Lawyers can't be Luddites any more.”<sup>33</sup> Several states, including Delaware and Pennsylvania, have incorporated the amendment to 1.1 into their state ethics rules, and more are sure to follow.<sup>34</sup> One general

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<sup>30</sup> ABA Commission on Ethics 20/20, Report, at 3, 8 (2012) (emphasis added).

<sup>31</sup> Report of the New York State Bar Association's Task Force on the Future of the Legal Profession at 99 (April 2, 2011). The Report identifies a number of areas with which lawyers should become familiar, including cloud computing, mobile computing, virtual law firms, online advertising and social media, extranets, enterprise search, and e-filing. *Id.* at 100-11.

<sup>32</sup> See, e.g., Matt Nelson, *New Changes To Model Rules A Wake-Up Call For Technologically Challenged Lawyers*, INSIDE COUNSEL, March 13, 2013 (“Unfortunately, many attorneys tend to avoid technology-related issues that fall outside their comfort zone and relinquish important decisions to other departments without proper legal analysis.”); Browning, *supra*, 40 N. KY. L. REV. at 262.

<sup>33</sup> Debra Cassens Weiss, *Lawyers Have Duty to Stay Current on Technology's Risks and Benefits, New Model Ethics Comment Says*, ABA JOURNAL LAW NEWS NOW (Aug. 6, 2012); see Darla W. Jackson, *Lawyers Can't Be Luddites Anymore: Do Law Librarians Have a Role in Helping Lawyers Adjust to the New Ethics Rules Involving Technology?* 105 LAW LIBR. J. 395 (2013).

<sup>34</sup> Delaware modified its rule on January 15, 2013. Jackson, *supra*. Pennsylvania followed suit in October 2013. Josh J.T. Byrne, *Attorneys, Technology, Ethics and Professional Liability* June 23, 2014. Virginia is currently considering the same change.

counsel has imposed a “technology competency audit” on outside law firms before retaining them, and cuts their billing rates until they pass.<sup>35</sup> At its 2014 Annual Meeting, the ABA presented a CLE program entitled “The Low Tech Lawyer’s Guide to Ethical Competence in a Digital Age.”<sup>36</sup> The possibility of a legal malpractice claim or bar discipline for incompetence with respect to technology now poses a real threat, with one prominent practitioner in the area warning that the evolving duty of competence in technology could “become a new standard of practice in the context of legal malpractice.”<sup>37</sup> At a well-attended session of LegalTech New York, 2014, federal judges cautioned that lawyers who fail to master technology could be engaging in “slow career suicide.” U.S. Magistrate Judge James C. Francis of New York’s Southern District bluntly asserted: “The absence of technical knowledge is a distinct competitive disadvantage.” U. S. Magistrate Judge John M. Facciola (D.D.C.) asked: “Why hire a lawyer who doesn’t even have the technological competence to complete simple, everyday tasks like converting a Microsoft Word document into a PDF? . . . Lawyers better get crackin’. There’s an awful lot to know.”<sup>38</sup>

As the legal profession finally comes to grips with the necessity of technological competence, the law schools must also keep pace with this new focus. Richard Granat and Stephanie Kimbro, both experts on virtual law practice, have called upon law schools to train law students for the new world of practice in a “radically changing legal market,” with a particular stress on emerging technologies. They argue:

Practicing law today requires both knowledge of how these new technologies can be used to make lawyers more effective in serving clients, and an understanding of how the Model Rules of Professional Conduct impose limits on the design and delivery of legal services. It follows that if law schools are charged with

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[http://www.vsb.org/pro-guidelines/index.php/rule\\_changes/item/amendments\\_to\\_rules\\_1.1\\_1.6](http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/amendments_to_rules_1.1_1.6)

<sup>35</sup> D. Casey Flaherty, *Could You Pass This In-House Counsel’s Tech Test? If The Answer Is No, You May Be Losing Business*, A.B.A.J. (July 17, 2013)

<sup>36</sup> James Podgers, *You Don’t Need Perfect Tech Knowhow For Ethics’ Sake—But A Reasonable Grasp Is Essential*, A.B.A.J. LAW NEWS NOW, Aug 9, 2014.

<sup>37</sup> James Podgers, *Are Old Ethics Rules Stifling Innovations In Legal Services Delivery And Marketing?* A.B.A.J. LAW NEWS NOW, Aug 8, 2014 (quoting Richard Granat).

<sup>38</sup> Joe Dysart, *Catch Up With Tech Or Lose Your Career, Judges Warn Lawyers*, A.B.A.J. LAW NEWS NOW, Apr 1, 2014.

training law students to become competent lawyers then law school curriculum must address the intersection of information technology and law practice. It must also provide law students with a basic understanding of how to assess the risks and benefits of technological advances.<sup>39</sup>

Other commentators have cautioned that failure to prepare today's law students for the challenges of using technology in the practice of law does them a grave disservice.<sup>40</sup> The NYSBA's Task Force Report recommended that "law schools and firms increase (or begin) the education and training of lawyers about practical ways to use technology in their practices," explaining that "law schools can better serve their students and the profession by offering instruction in a broader range of technological subjects and integrating such classes into the requirements for graduation."<sup>41</sup>

Legal ethics professors are uniquely situated to impress upon our students the obligation to understand the risks and benefits of technology in the practice of law. But before we can carry out this obligation, we need to be sure that we have achieved competence in this area ourselves. This may be unwelcome news for many colleagues, especially those who still harbor a little bit of the Luddite spirit that has always been a part of the legal profession.<sup>42</sup> Even those of us who have been receptive to new technology may feel overwhelmed at the idea of getting up to speed on the current use of technology in law practice. After all, those of us in academia operate at a

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<sup>39</sup> Richard Granat & Stephanie Kimbro, *The Teaching Of Law Practice Management And Technology In Law Schools: A New Paradigm*, 88 CHI.-KENT L. REV. 757, 764 (2013).

<sup>40</sup> See, e.g., Jon M. Garon, *Legal Education in Disruption: The Headwinds and Tailwinds of Technology*, 45 Conn. L. Rev. 1165 (2013); Oliver R. Goodenough, *Developing An E-Curriculum: Reflections On The Future Of Legal Education And On The Importance Of Digital Expertise*, 88 CHI.-KENT L. REV. 845, 863 (2013); Helia Garrido Hull, *Legal Ethics For The Millennials: Avoiding The Compromise Of Integrity*, 80 U.M.K.C. L. REV. 271 (2012); Renee Newman Knake, *Democratizing Legal Education*, 45 CONN. L. REV. 1281 (2013); Judith Maute, *Facing 21st Century Realities*, 32 MISS. C. L. REV. 345 (2013); Brittany Stringfellow Otey, *Millennials, Technology, and Professional Responsibility: Training a New Generation in Technological Professionalism*, 37 J. LEG.PROF. 199 (2012-13); Christina Parajon Skinner, *The Unprofessional Sides of Social Media and Social Networking: How Current Standards Fall Short*, 63 S.C. L. REV. 241 (2011);

<sup>41</sup> NYSBA Task Force, *supra*, at 99.

<sup>42</sup> See Michele R. Pistone & John J. Hoeffner, *No Path But One: Law School Survival in an Age of Disruptive Technology*, 59 WAYNE L. REV. 193 (2013).

significant remove from the daily operations of law firms. While our professional technological concerns may focus on whether or not to ban laptops in the classroom, or how to prevent students from cheating on exams with their smartphones, practicing attorneys must confront on a daily basis a variety of ethical issues that would never even have been contemplated ten years ago, from scrubbing metadata from documents to worrying about breaches of confidentiality through Facebook posts to assessing the risks of cloud computing.<sup>43</sup>

There is no reason to fear. Incorporating current issues about technology into our legal ethics classes can be done without wholesale revision of our courses, and without taking a crash course in Computer Programming 101.<sup>44</sup> Although some law schools do offer specialized classes that cover these issues, such as “Social Media and the Law,”<sup>45</sup> or “Mindful Ethics: Professional Responsibility for Lawyers in the Digital Age,”<sup>46</sup> these issues should not be solely the province of specialists. Indeed, as I demonstrate below, the ethical use of modern technology should be an integral part of the curriculum at all American law schools.

In order to encourage my colleagues to take up this challenge, I offer my own recent experiment in this area. I have always enjoyed teaching legal ethics, despite the outdated mythology that holds it to be the least popular course in law school, and have found that students will respond

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<sup>43</sup> See Andrew Perlman, *The Twenty-First Century Lawyer’s Evolving Ethical Duty of Competence*, 22 Prof. Lawyer, No. 4 at 1 (2014).

<sup>44</sup> See generally Simon Canick, *Infusing Technology Skills Into The Law School Curriculum*, 42 Cap. U.L. Rev. 663 (2014).

<sup>45</sup> John G. Browning, who is a frequent analyst in the area of social media and the law, teaches a course at Southern Methodist University Law School on Social Media and the Law, which includes a segment on ethical issues. John G. Browning, *Facing Up To Facebook In the Classroom*, 43 SYLLABUS, Issue 3 (Spring 2012). Among the law schools reporting similar courses are Columbia (Social Media and the Law seminar, [http://web.law.columbia.edu/courses/L8106#.U7QctbE8d\\_A](http://web.law.columbia.edu/courses/L8106#.U7QctbE8d_A)), Dayton (“Social Media Law: [http://www.udayton.edu/law/registrar/course\\_descriptions.php](http://www.udayton.edu/law/registrar/course_descriptions.php)), Texas (Law and Social Media: [http://www.utexas.edu/law/sao/courses/class\\_desc.php?ccyys=20132&unique\\_num=29177](http://www.utexas.edu/law/sao/courses/class_desc.php?ccyys=20132&unique_num=29177)); University of New Hampshire: <http://law.unh.edu/courses/social-media-and-the-law/582>; and Pace, with this blog: <http://socialmediablwg.blogs.law.pace.edu/about-us/>.

<sup>46</sup> Jan Jacobowitz teaches this course at the University of Miami. <http://www.law.miami.edu/faculty-administration/jan-jacobowitz.php?op=1>; the syllabus is at [http://www.themindfullawstudent.org/mindful%20ethics/mindful\\_ethics\\_2014\\_syllabus.html](http://www.themindfullawstudent.org/mindful%20ethics/mindful_ethics_2014_syllabus.html)

positively to the material if they can see how it connects directly to their future lives as practicing attorneys.<sup>47</sup> I have generally followed what Anita Bernstein has termed “pitfalls pedagogy,” focusing students’ attention on the dangers and vulnerabilities involved in the practice of law.<sup>48</sup> My preferred metaphor for the mandatory course in legal ethics has been to compare it to another mandatory course required for a highly desirable license: Drivers’ Education. A legal ethics course may have many objectives, but the principal purpose must be to serve as a course in defensive driving for future attorneys, teaching them not only the black-letter rules of the road, but also how to avoid dangerous situations that may not be apparent to the inexperienced driver.

As a veteran teacher of our mandatory legal ethics course, I have incorporated issues about technology into my class for many years. Nevertheless, I became increasingly aware that countless technological issues that were emerging in daily law practice received little or no attention in the classroom. I worried that my students were not crash-proof when it came to technology and that I had not examined the full range of possible pitfalls confronting them once they entered the practice of law.

In 2013, I decided that it was time to make a change. I set a personal goal of incorporating some question about modern use of technology into every class period, using new hypotheticals, recent bar opinions, or review of on-line materials. I found this experiment to be a great success. Not only did my yellowing class notes benefit from a self-imposed makeover, but I also found that the students were more engaged with the subject matter each day. By the end of the semester, I felt confident that my students had received a firm foundation in the law governing lawyers, as well as greater appreciation for how those legal principles were likely to be applied to the technological developments of the future.

I am convinced that it is time for all of us to take a hard look at what we cover in our twenty-first century legal ethics classes. With technological competence becoming more important for lawyers with each passing year, we do our students a disservice if we do not prepare them adequately for their future in the law. Integrating ethical issues arising from technology can be readily accomplished if we commit ourselves to carrying out this

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<sup>47</sup> The mandatory Professional Responsibility course is legendary for its supposed unpopularity. “No other law school class is regarded - by students, faculty, and associate deans alike - as this much of a chronic nuisance, and instructors who teach it have been resenting its unpopularity in print for years.” See Anita Bernstein, *Pitfalls Ahead: A Manifesto For The Training Of Lawyers*, 94 CORNELL L. REV. 479 (2009).

<sup>48</sup> Anita Bernstein, *Pitfalls Ahead: A Manifesto For The Training Of Lawyers*, 94 CORNELL L. REV. 479 (2009).

objective. In short, it's time for all of us to reboot our courses to meet the challenges of a rapidly changing profession.

Before we can ensure that our students are competent to enter a world of rapid and disruptive technological change, we need to be sure that we are competent ourselves. To that end, I provide below an overview of the landscape of technological issues currently affecting the practice of law, with a brief summary of the ethical issues they present. I have included many cautionary tales of lawyers who ignored their ethical responsibilities, which are the legal ethics equivalent of the Drivers' Ed films that show the gruesome consequences of drinking and driving on prom night. Although a full discussion of the merits of these countless ethical issues is beyond the scope of this paper, it is also my hope that the many scholarly possibilities presented by them will spur other colleagues to action.

## I. INTEGRATING TECHNOLOGY QUESTIONS INTO THE LEGAL ETHICS CURRICULUM

### A. *Bar Admission.*

I begin my legal ethics course by reviewing the character and fitness questions on the state bar application. Issues relating to bar admission, particularly questions relating to inquiry into character and fitness, are of great interest to law students. Starting a legal ethics course with this topic ensures full engagement by students and serves as an immediate reminder that joining the legal profession will impose substantial burdens on them that they may not have anticipated. The inevitable debate over the relevance of these questions, as well as the right of bar regulators to make any inquiry whatsoever into the nebulous question of "character," can be very effective in establishing some of the principal themes of the course on the first day of class.

The explosion in use of social media, especially by the generation now graduating from law school, has produced some novel problems for bar examiners. One area of recent concern is whether the postings of bar applicants in various forms of social media should be taken into account when investigating character and fitness.<sup>49</sup>

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<sup>49</sup> See Samuel Vincent Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281, 284 (2011); Michelle Morris, *The Legal Profession, Personal Responsibility, and the Internet*, 117 YALE L.J. (Pocket Part 54 2007); Kathleen Elliot Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just "Face" It*, 41 U. MEM. L. REV. 355, 358 (2010); Jessica Belle, Note, *Social Media Policies for Character and Fitness Evaluations*, 8 WASH. J.L. TECH. & ARTS 107 (2012); Dina Epstein, Note, *Current Development 2007-2008: Have I Been Googled?: Character And Fitness In The Age Of Google, Facebook, And YouTube*, 21 GEO. J. LEGAL ETHICS 715



In 2009, the Florida Board of Bar Examiners adopted a rule that would permit access to the social media postings of certain applicants, on a case-by-case basis. The situations in which such information has been deemed to be relevant include: 1) “applicants who are required to establish rehabilitation . . . so as to ascertain whether they displayed any malice or ill feeling towards those who were compelled to bring about the proceeding leading to the need to establish rehabilitation;” 2) “applicants with a history of substance abuse/dependence . . . to as to ascertain whether they discussed or posted photographs of any recent substance abuse;” 3) applicants whose past conduct raises “significant candor concerns” including not telling the truth on employment applications or resumes; 4) applicants whose past conduct might raise concerns about unauthorized practice of law; and 5) applicants who have disclosed “involvement in an organization advocating the overthrow of a government in the United States to find out if they are still involved in any related activities.”<sup>50</sup>

An even more sweeping proposal had been under consideration by the Florida Board of Bar Examiners, which would have required all bar applicants to provide access to their social media accounts.<sup>51</sup> Even the less intrusive version now in effect provoked considerable controversy when it was adopted in 2009, and it has yet to receive wider support in other jurisdictions.<sup>52</sup>

As of early 2015, Florida appears to be the only jurisdiction to have adopted a rule requiring disclosure of social media postings by bar

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(2008); Tal Harari, Note, *Facebook Frenzy Around The World: The Different Implications Facebook Has On Law Students, Lawyers, And Judges*, 19 ILSA J INT'L & COMP L 1 (2012); Angela O'Brien, Note, *Are Attorneys and Judges One Tweet, Blog, or Friend Request Away From Facing a Disciplinary Committee?*, 11 LOY. J. PUB. INT. L. 511, 513 (2010); Amy-Kate Roedger, Note, *Wall Posts, Status Updates, and the Bar: How Social Networking Impacts Character and Fitness Requirements*, 35 J. LEGAL PROF. 145 (2010); Jonathan Sabin, Note, *Every Click You Make: How The Proposed Disclosure Of Law Students' Online Identities Violates Their First Amendment Right To Free Association*, 17 J.L. & POL'Y 699 (2009).

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[http://www.floridasupremecourt.org/pub\\_info/documents/2009\\_FBBE\\_Character\\_Fitness\\_Response.pdf](http://www.floridasupremecourt.org/pub_info/documents/2009_FBBE_Character_Fitness_Response.pdf)

<sup>51</sup> See Report, Florida Board of Bar Examiners re Consideration of the Final Report of the Character and Fitness Commission at 4-6 (July 21, 2009) (available on-line at [http://www.floridasupremecourt.org/pub\\_info/documents/2009\\_FBBE\\_Character\\_Fitness\\_Response.pdf](http://www.floridasupremecourt.org/pub_info/documents/2009_FBBE_Character_Fitness_Response.pdf))

<sup>52</sup> See Jan Pudlow, *Examiners' Facebook Policy Sets Cyberworld All Atwitter*, FLA. BAR NEWS (September 15, 2009); Belle, supra, at 114.

applicants. Nevertheless, law students ought to be on notice about possible professional repercussions from their online lives. In addition, the issues raised by the Florida rule provide an excellent vehicle for reviewing long-standing concerns about character and fitness inquiries by bar regulators.

### B. *Creating Attorney-Client Relationships Online.*

Inadvertent creation of an attorney-client relationship is an area that has also been affected by technological changes. Most casebooks present the well-known case of *Togstad v. Vesely, Otto, Miller & Keefe*, which illustrates how an office consultation with a lay person might later be deemed to have created a professional relationship.<sup>53</sup> For many years, I have used this case as a springboard for discussion of what I call “*Togstad* online,” where we examine the many ways in which activity in cyberspace could inadvertently generate a professional relationship.

Young lawyers today are far more likely to encounter *Togstad* issues in an online context than in the mythical “cocktail party” hypothetical so often invoked in discussions of this question. It is important for them to understand that an attorney who provides specific legal advice to a lay person on-line could later be held to have created an attorney-client relationship with that person, depending on the level of specificity and the degree of reasonable reliance, and they must beware that on-line disclaimers alone might not suffice to avoid this result.<sup>54</sup> The danger can arise in a number of contexts, including online discussion groups, websites that solicit questions from lay people for response by attorneys, and law firm websites that permit prospective clients to ask legal questions.<sup>55</sup>

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<sup>53</sup> 291 N.W.2d 686 (Minn.1980).

<sup>54</sup> See generally Catherine J. Lanctot, *supra*, *Attorney-Client Relationships In Cyberspace: The Peril And The Promise*, DUKE L. REV. (1999).

<sup>55</sup> Lanctot, *supra*. See, e.g., Judy Cornett, *The Ethics of Blawging: A Genre Analysis*, 41 LOY. U. CHI. L.J. 221, 249-55 (2009); Grace M. Giesel, *The Attorney-Client Relationship in the Age of Technology*, 32 MISS. C. L. REV. 319 (2013); David Hricik, *The Speed of Normal: Conflicts, Competency, and Confidentiality in the Digital Age*, 10 COMP. L. REV. & TECH. J. 73 (2005); see generally Susan R. Martyn, *Accidental Clients*, 33 HOFSTRA L. REV. 913 (2005); Katy Ellen Deady, Note, *Cyberadvice: The Ethical Implications of Giving Professional Advice over the Internet*, 14 GEO. J. LEGAL ETHICS 891 (2001); Douglas K. Schnell, Note, *Don't Just Hit Send: Unsolicited E-Mail and the Attorney-Client Relationship*, 17 HARV. J. LAW AND TECH 533 (2004); Sarah Wallace, Note: *Current Development 2007-2008: Lawyers Don't Always Ask For It: Elaborating On The Iowa Ethics Opinion 07-02 Approach To Unsolicited E-Mails And Model Rule 1.18*, 21 GEO. J. LEGAL ETHICS 1113 (2008); Note and Comment, *Legal Advice Given Over the Internet and Intranet: How Does this Practice Affect the Lawyer-Client Relationship?*, 27

A number of bar opinions have addressed this question in recent years. On August 5, 2010, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 10-457, entitled "Lawyer Websites."<sup>56</sup> That opinion cautioned that "lawyers who answer fact-specific legal questions may be characterized as offering personal legal advice, especially if the lawyer is responding to a question that can reasonably be understood to refer to the questioner's individual circumstances." The opinion distinguished this conduct from that of a lawyer who "poses and answers a hypothetical question," and urges that "lawyers who provide general legal information include statements that characterize the information as general in nature and caution that it should not be understood as a substitute for personal legal advice."<sup>57</sup>

Many state bar opinions have also addressed this question, warning lawyers to include disclaimers and to avoid providing specific legal advice. An early opinion from the District of Columbia Bar in 2002 concluded: "Lawyers wishing to avoid formation of attorney-client relationships through chat rooms or similar Internet communications should limit themselves to providing legal information and should not seek to elicit or respond to the specifics of particular individuals' situations. Click-through disclaimers, . . . though helpful in avoiding inadvertent formation of attorney-client relationships, may not prevent the formation of such relationships in cases in which subsequent on-line communications involve a consumer asking for and an attorney providing specific legal advice."<sup>58</sup> Recent bar opinions have taken a similar approach.<sup>59</sup>

It is unclear whether these admonitions have proved effective in regulating attorney conduct in online settings.<sup>60</sup> Presenting these issues as

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RUTGERS COMPUTER & TECH. L.J. 205 (2001).

<sup>56</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457.

<sup>57</sup> *Id.* at 3.

<sup>58</sup> D.C. Bar, Opinion No. 316 (2002), located at <http://www.dcbbar.org/bar-resources/legal-ethics/opinions/opinion316.cfm>; [Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Op. 1998-2 \(1998\)](#); [State Bar of Ariz. Comm. on Rules of Prof'l Conduct, Op. 97-04 \(1997\)](#).

<sup>59</sup> *See, e.g.*, Florida Bar Standing Committee On Advertising, Advisory Opinion A-00-1 (revised) (2010); New York State Bar Opinion 899 (December 21, 2011); North Carolina Bar Opinion; 2011 Formal Opinion 8 (July 2011); South Carolina Ethics Advisory Opinion 12-03.

<sup>60</sup> Professor Ronald Rotunda has argued that the ABA's ineffective attempts to regulate attorney participation in chat rooms under the solicitation rules illustrate its

part of a general discussion of the formation of attorney-client relationships provides greater context for students to understand the risks involved.

### C. Confidentiality.

Confidentiality is a central aspect of the attorney-client relationship, and the complexities produced by this obligation receive a great deal of attention in legal ethics courses. The question of inadvertent disclosure of confidential information about a client has always been an area of concern, although the hypotheticals we veterans have used to illustrate these pitfalls have evolved over the years. Some of us may have begun our teaching careers by warning students about accidentally including privileged documents in a box full of papers to be produced to attorneys. Later, we may have warned about the risks of the “misdirected fax,” a means of communication almost unknown to our students today. When email came into widespread use by attorneys, we cautioned about inadvertent disclosures through that medium.

With so much confidential information held in digital form today, guarding against inadvertent disclosure has become an issue of enormous consequence.<sup>61</sup> Indeed, law firms have been on the front lines of this issue as clients demand greater attention to issues of cybersecurity.<sup>62</sup> The ABA’s

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organizational weaknesses in addressing technological change. See Ronald D. Rotunda, *Applying The Revised ABA Model Rules In The Age Of The Internet: The Problem Of Metadata*, 42 HOFSTRA L. REV. 175, 189 (2013).

<sup>61</sup> See, e.g., Philip J. Favro, *Inviting Scrutiny: How Technologies Are Eroding The Attorney-Client Privilege*, 20 RICH. J.L. & TECH. 2; Michael McNerney & Emilian Papadopoulos, *America The Virtual: Security, Privacy, And Interoperability In An Interconnected World: Article: Hacker's Delight: Law Firm Risk And Liability In The Cyber Age*, 62 AM. U.L. REV. 1243 (2013); David G. Ries, *Cybersecurity for Attorneys: Understanding the Ethical Obligations*, LAW PRACTICE TODAY (2012); Anne Klinefelter, *When To Research Is To Reveal: The Growing Threat To Attorney And Client Confidentiality From Online Tracking*, 16 VA. J.L. & TECH. 1 (2011); John D. Comerford, *Current Development 2005-2006: Competent Computing: A Lawyer's Ethical Duty To Safeguard the Confidentiality and Integrity of Client Information Stored on Computers and Computer Networks*, 19 GEO. J. LEGAL ETHICS 629 (2006); Ash Mayfield, *Decrypting the Code of Ethics: The Relationship Between an Attorney's Ethical Duties and Network Security*, 60 OKLA. L. REV. 547 (2007).

<sup>62</sup> In November 2013, the American Lawyer’s AmLawTech Survey revealed that 86% of respondents worried more about security threats than they did just two years earlier. Alan Cohen, *A Secure Location: Data Security Has Become A Top Concern For Law Firm Technology Chiefs*. AMERICAN LAWYER, November 1, 2013. The New York Times reported in March 2014 that clients are “asking law firms to fill out lengthy 60-page questionnaires detailing their cybersecurity measures, while others are doing on-site

2012 revision of Model Rule 1.6 of the Model Rules of Professional Conduct and its comments illustrates the growing concern within the legal profession about inadvertent disclosure of confidential information. Model Rule 1.6 now includes a new paragraph (c), which provides: “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” The Comments now include a new paragraph 18, entitled “Acting Competently to Preserve Confidentiality,” which clarifies the importance of guarding against such disclosures. Paragraph 18 appears to provide a safe harbor for a lawyer who “has made reasonable efforts to prevent the access or disclosure.” Among the factors to be considered in determining the reasonableness of the lawyer’s efforts are “the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).” Clients may also require special security measures for confidential information.<sup>63</sup>

The ease with which digital information may be disclosed accidentally and the potential gravity of such disclosures must be taken into account in a modern course in legal ethics.<sup>64</sup> Here are a few areas that merit coverage in our discussions on confidentiality, so that our students may be sensitized to the concept of making “reasonable efforts” to guard against inadvertent disclosure.

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inspections. Other companies are asking law firms to stop putting files on portable thumb drives, emailing them to nonsecure iPads or working on computers linked to a shared network in countries like China and Russia where hacking is prevalent, said the people briefed on the matter.” Matthew Goldstein, *Law Firms Are Pressed On Security for Data*, N.Y. TIMES, March 27, 2014, Sec. B, p. 1.

<sup>63</sup> Rule 1.6 (c), and paras. 18, 19, ABA MODEL RULES OF PROF’L CONDUCT (as amended August 2012).

<sup>64</sup> See, e.g., Kristin J. Hazelwood, *Technology and Client Communications: Preparing Law Students And New Lawyers To Make Choices That Comply With The Ethical Duties Of Confidentiality, Competence, And Communication*, 83 MISS. L.J. 245, (2014). See generally Kersten Roehsler Kortbawi & Henal Patel, ed., *2012 Symposium: Ethical Issues In E-Discovery, Social Media, And The Cloud*, 39 RUTGERS COMPUTER & TECH. L.J. 125, 136 (2013); Peter A. Joy & Kevin C. McMunigal, *The Ethical Risks Of Technology*, 27 CRIM. JUST. 57 (2012).

## 1. Using Unsecured Wi-Fi When Working On Client Matters.

A good place to start is with the question of unsecured Wi-Fi. Most students are familiar with using Wi-Fi, but may not be aware of how its use could compromise confidential information. With the explosion in use of portable devices to access the Internet, coupled with a dramatic increase in people working outside traditional office settings, the risks of unsecured Wi-Fi usage have generated concern among practicing lawyers.<sup>65</sup>

A useful source for generating discussion on this question is California State Bar Opinion 2010-179, which addressed the following scenario: “Client has asked for Attorney’s advice on a matter. Attorney takes his laptop computer to the local coffee shop and accesses a public wireless Internet connection to conduct legal research on the matter and email Client. He also takes the laptop computer home to conduct the research and email Client from his personal wireless system.” The opinion carefully reviews the many concerns about this question, noting that “guidance to attorneys in this area has not kept pace with technology.” Rather than provide a definitive resolution of this question, which hinges in large measure on existing technology, the Opinion provides a list of factors to determine when using Wi-Fi without encryption programs could be considered to be reasonable.<sup>66</sup>

My students had a lot to say about this opinion. For some of them, it was a revelation that opening up an iPad at the local Starbucks to work on a client matter might generate a violation of the ethical rules. Law students should be made aware of the issues created by doing client work in a coffee shop or on a subway car, or even using a home network that is not secure. At a minimum, we should ensure that our students understand the basic concerns here, in the same way that we hope that they understand the traditional admonition not to discuss confidential client business in the office elevator.

## 2. Avoiding Inadvertent Disclosure of Metadata.

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<sup>65</sup> See, e.g., Mark Bassingthwaighe, *Unsecured ‘Free’ Wi-Fi? Be Worried. Be Very Worried*, Solo Practice University website (February 19, 2013); Ben Kerschberg, *Your Ethical And Legal Duties When Using Wireless Networks*, FORBES (on-line) (December 12, 2011). One commentator has argued that hacking unsecured Wi-Fi violates the Federal Wiretap Act, and thus it is reasonable for lawyers to assume that their communications are protected. Dane S. Ciolino, *Why Lawyers Should Stop Worrying About Using Public Wi-Fi*, LOUISIANA LEGAL ETHICS (online) (September 11, 2013).

<sup>66</sup> State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2010-179 (2010).

Among the many issues that owe their existence to the technological advances of the last few decades is the proper use of “metadata” – information that is embedded electronically in a document but is not visible to the naked eye. The ethical issues that have emerged from metadata have generated much discussion in recent years, raising concerns not only about reasonably protecting client information, but over whether it is ethical for the receiving lawyer to use such metadata.<sup>67</sup> The first ABA Formal Opinion on this issue was issued in 2006, although that opinion largely straddled the competing concerns about not altering documents produced in discovery, but also not furnishing more information than was lawfully requested.<sup>68</sup> Since 2006, at least eighteen other jurisdictions have also issued bar opinions on metadata, and there is an ABA website regularly compiling the opinions to provide guidance to practicing attorneys.<sup>69</sup>

The ABA’s website provides a chart that analyzes bar opinions on metadata by comparing their answers to three main questions: “What is the sender’s duty when transmitting metadata? May the recipient review or “mine” metadata? Must the recipient notify sender if metadata is found?” There remains a significant split within the legal profession as to the resolution of these questions. I found that using this chart in class was an

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<sup>67</sup> For an excellent recent discussion of this question, see Ronald D. Rotunda, *Applying The Revised ABA Model Rules In The Age Of The Internet: The Problem Of Metadata*, 42 HOFSTRA L. REV. 175 (2013). See also Steven C. Bennett & Jeremy Cloud, *Coping With Metadata: Ten Key Steps*, 61 MERCER L. REV. 471 (2010); Louise L. Hill, *Emerging Technology And Client Confidentiality: How Changing Technology Brings Ethical Dilemmas*, 16 B.U. J. SCI. & TECH. L. 1, (2010); Elizabeth W. King, *The Ethics of Mining for Metadata Outside of Formal Discovery*, 113 PENN ST. L. REV. 801 (2009); Michael W. Loudenslager, *Why Shouldn’t Attorneys Be Allowed To View Metadata?: A Proposal For Allowing Attorneys To View Metadata As Long As Extraordinary Measures Are Not Taken To Do So And Opposing Counsel Is Contacted Upon Discovery Of Sensitive Information*, 15 J. TECH. L. & POL’Y 159 (2010); Andrew M. Perlman, *The Legal Ethics Of Metadata Mining*, 43 AKRON L. REV. 785 (2010); Hans P. Sinha, *The Ethics Of Metadata: A Critical Analysis And A Practical Solution*, 63 ME. L. REV. 175 (2010); Tomas J. Garcia & Shane T. Tela, *Current Development 2009-2010: Jurisdictional Discord in Applying Ethics Guidelines to Inadvertently Transmitted Metadata*, 23 GEO. J. LEGAL ETHICS 585; Campbell C. Steele, Note, *Attorneys Beware: Metadata’s Impact on Privilege, Work Product, and the Ethical Rules*, 35 U. MEM. L. REV. 911 (2005); Crystal Thorpe, Note, *Metadata: The Dangers Of Metadata Compel Issuing Ethical Duties To “Scrub” And Prohibit The “Mining” Of Metadata*, 84 N. DAK. L. REV. 257 (2008).

<sup>68</sup> ABA Formal Opinion 06-442.

<sup>69</sup> The ABA’s Legal Technology Resource Center chart is at [http://www.americanbar.org/groups/departments\\_offices/legal\\_technology\\_resources/resources/charts\\_fyis/metadatachart.html](http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadatachart.html)

effective way to show students both the substantive ethical issues presented by metadata, as well as how difficult it may be to achieve consensus on novel ethical questions. Thus, metadata issues provide an excellent opportunity for illustrating how bar regulators differ over the proper resolution of important ethical issues.

### 3. Maintaining Confidentiality In The Cloud.

As the technology for storage of digitized information continues to evolve, lawyers have had to adapt their practice to keep up with the technology. In recent years, the emergence of “cloud computing” has generated additional ethical concerns with respect to confidentiality and oversight of non-lawyer personnel.<sup>70</sup> In particular, when information relating to representation of law firm clients is not held physically within the control of the law firm, but is instead stored off-site, there is a risk that the security of that information could be compromised.<sup>71</sup>

Some ethics professors may consider the security of cloud computing to be too technical for the classroom, but this would be short-sighted. Most of our students already use some version of cloud computing in their daily lives, be it Facebook or Dropbox or iTunes Match or Google Drive. It may not even occur to them that there are substantial ethical issues associated with the use of cloud computing by lawyers. Moreover, many of today’s law students are likely to begin their legal careers as solo practitioners, and may need to rely on third party vendors to store and maintain client

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<sup>70</sup> See Catherine Sanders Reach, Rachel Packer, & Paul Bateman, *Ethical Challenges on the Horizon: Confidentiality, Competence and Cloud Computing*, ABA Section on Litigation Annual Conference, online article (April 2013).

<sup>71</sup> See, e.g., Stuart L. Pardau & Blake Edwards, *The Ethical Implications Of Cloud Computing For Lawyers*, 31 J. MARSHALL J. COMPUTER & INFO. L. 69 (2014); Andrew L. Askew, Note, *IEthics: How Cloud Computing Has Impacted the Rules of Professional Conduct*, 88 N. DAK. L. REV. 453 (2012); Kenneth L. Bostick, Comment, *Pie In The Sky: Cloud Computing Brings An End To The Professionalism Paradigm In The Practice Of Law*, 60 BUFFALO L. REV. 1375 (2012); Meghan C. Lewallen, Note, *Cloud Computing: A Lawyer's Ethical Duty To Act With Reasonable Care When Storing Client Confidences "In The Cloud"*, 60 CLEV. ST. L. REV. 1133 (2013); Eliu Mendez, Comment, *Dropping Dropbox in your Law Practice to Maintain your Duty of Confidentiality*, 36 CAMPBELL L. REV. 175 (2013); Timothy Peterson, Comment, *Cloudy With A Chance Of Waiver: How Cloud Computing Complicates The Attorney-Client Privilege*, 46 J. MARSHALL L. REV. 383 (2012); Shellie Stephens, Recent Development, *Going Google: Your Practice, The Cloud, And The ABA Commission On Ethics 20/20*, 2011 U. ILL. J.L. TECH. & POL'Y 237 (2011); Myles G. Taylor, Comment, *Seeing Clearly? Interpreting Model Rule 1.6(c) for Attorney Use of Cloud Computing Technology*, 45 MCGEORGE L. REV. 835 (2014).



information. A few minutes spent sensitizing them to possible ethical risks from off-site data storage is a necessity today, particularly when ongoing concerns about widespread governmental surveillance suggest greater compromises of confidentiality than were previously known.<sup>72</sup>

Cloud computing may not be uppermost on the minds of ethics teachers, but it is an issue of substantial concern in the legal profession, with at least nineteen ethics opinions, most of them since 2010.<sup>73</sup> Formal Opinion 2011-200 of the Pennsylvania Bar Association's Committee on Legal Ethics and Professional Responsibility provides an excellent overview of the ethical issues implicated in this area.<sup>74</sup> That opinion warned lawyers to "take great care to assure that any data stored offsite remains confidential and not accessible to anyone other than those persons authorized by their firms," noting that this obligation implicated the duty of competence. The Opinion also indicated that client consent might be necessary, "depending on the scope of representation and the sensitivity of the data involved, to inform the client of the nature of the attorney's use of "cloud computing" and the advantages as well as the risks endemic to online storage and transmission." The lawyer must be assured that "any service provider who handles client information needs to be able to limit authorized access to the data to only necessary personnel, ensure that the information is backed up, reasonably available to the attorney, and reasonably safe from unauthorized intrusion."

Formal Opinion 2011-200 can be a good teaching vehicle for highlighting the advantages and dangers of technology. It sets out a lengthy set of factors for lawyers to consider in exercising reasonable care over the preservation of confidential client information in the cloud, but also notes candidly that "the measures necessary to protect confidential information will vary based upon the technology and infrastructure of each office – and

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<sup>72</sup> See generally Sarah Jane Hughes, *Did the National Security Agency Destroy the Prospects for Confidentiality and Privilege When Lawyers Store Clients' Files in the Cloud—and What, if Anything, Can Lawyers and Law Firms Realistically Do in Response?* 41N. Ky. L. Rev. 405 (2014).

<sup>73</sup> The opinions are collected at [http://www.americanbar.org/groups/departments\\_offices/legal\\_technology\\_resources/resources/charts\\_fyis/cloud-ethics-chart.html](http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html). See, e.g., New Jersey Advisory Committee on Professional Ethics, Opinion 701, "Electronic Storage and Access of Client Files" (April, 2006); State Bar of Arizona, Opinion No. 09-04 (December, 2009): "Confidentiality; Maintaining Client Files; Electronic Storage; Internet" (Formal Opinion of the Committee on the Rules of Professional Conduct).

<sup>74</sup> Pennsylvania Bar Association, Committee on Legal Ethics and Professional Responsibility, Formal Opinion 2011-200, "Ethical Obligations for Attorneys Using Cloud Computing/Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property" (November, 2011).

this Committee acknowledges that the advances in technology make it difficult, if not impossible to provide specific standards that will apply to every attorney – there are common procedures and safeguards that attorneys should employ.”<sup>75</sup>

#### 4. Exercising Caution In Social Media With Respect to Confidential Information.

One of the reasons that we devote so much time to exploring confidentiality with our students is to inculcate professional norms and to suggest to them that they may need to alter their current behavior. Future lawyers must learn that they may no longer casually share stories about work with their friends or family members without considering possible ethical violations. Training students to take the default position that information about their clients is presumptively confidential is an important part of the acculturation process.

With the prevalence of social media in the twenty-first century, the issue of confidentiality has taken on an entire new character. Those who have come of age in the last decade or so are accustomed to sharing personal information about themselves through a variety of on-line vehicles. Stephen Gillers has cautioned: “Twenty-somethings have a much-reduced sense of personal privacy.”<sup>76</sup> For example, one in-house counsel reported “seeing a younger colleague happily recounting on Facebook the company’s excellent result in a recent negotiation. The senior lawyer was horrified. To the younger lawyer, it was the logical extension of what one always does with good news—share it with friends.”<sup>77</sup> In addition to client information, our students must be made aware that they should be cautious with sharing “[p]rivate law firm data, gossip, policy, or strategy,” which could cause “economic or reputational harm” to their employers.<sup>78</sup>

Because generational expectations may be radically different with respect to information privacy, law firms and in-house counsel are

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<sup>75</sup> Formal Opinion 2011-200.

<sup>76</sup> John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. TIMES, September 13, 2009.

<sup>77</sup> Lauren Stiller Rikleen, *Millennials and Technology in Today’s Workplace*, PD QUARTERLY at 4-5 (February 2014) (on-line); see Christina Parajon Skinner, *The Unprofessional Sides of Social Media and Social Networking: How Current Standards Fall Short*, 63 S.C. L. REV. 241, 252 (2011).

<sup>78</sup> Skinner, *supra*, at 256.

beginning to address the social media issue specifically when training new attorneys.<sup>79</sup> As one commentator has noted: “Boomers and Gen Xers need to be more explicit than seems inherently logical to them in developing and communicating the boundaries around what can and cannot be shared. And, even if the answer is a blanket prohibition, that needs to be clarified—and not in a way that calls into question the judgment of a younger colleague.”<sup>80</sup>

Unlike some of the areas already discussed, there is a widespread consensus that the rules of professional conduct reach disclosures of confidential information by attorneys, whether or not that disclosure occurs online.<sup>81</sup> As attorney Lucien Pera noted: “Notwithstanding that some lawyers (just like people) are willing to share the most amazingly intimate details of their lives on Facebook and other social media, nothing about its emergence has changed the rules, just like the telephone didn’t either.”<sup>82</sup> But social media provides a plethora of opportunities for disclosure of confidential information:

Blog posts, Facebook status messages, and tweets all allow for instant publication of information, including information about procedural developments, interparty negotiations, courtroom developments, and business-related travel. Many social media sites such as Facebook and LinkedIn also offer the ability to import contact information from existing e-mail accounts, but doing so may publicize details about clients, witnesses, consultants, and vendors. Photo-sharing sites can host photos that accidentally display confidential information such as evidence, trial materials, or personnel locations, while geo-mapping sites like Foursquare that publish users’ location information could permit lawyers to reveal information such as a current investigatory trip or meeting. Even a post that hides the identity of a client and recounts only public details of a trial still might reveal confidential information.<sup>83</sup>

The common assumption that merely omitting the name of the client

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<sup>79</sup> See Steven Seidenberg, “*Seduced: For Lawyers, The Appeal Of Social Media Is Obvious. It’s Also Dangerous.*,” 97 A.B.A.J. 48 (February, 2011).

<sup>80</sup> Rikleen, *supra*.

<sup>81</sup> See Margaret M. DiBianca, *Ethical Risks Arising From Lawyers’ Use Of (And Refusal To Use) Social Media*, 12 DEL. L. REV. 179 (2011); Michael E. Lackey Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149 (2012).

<sup>82</sup> Suzanne Craig Robertson, “*Friend’ or Foe? Social Media Is Calling. How Should Lawyers Answer?*” TENN. BAR J. at 17 (March 2011).

<sup>83</sup> John Browning, 40 N. KY. L. REV. 255, 265, *see* DiBianca, *supra*, at 190.

will preserve confidentiality in such postings also must be challenged. Philadelphia Bar Association Assistant Executive Director Paul J. Kazaras has cautioned: "Just because you don't use a client's name doesn't mean you are protecting confidentiality. Facts of a case can be well known, and if you are tweeting to either let your friends know what you are doing, or using some other social media to tout your successes, remember to guard the information you have about a client."<sup>84</sup>

Venting one's frustrations with work may be a popular activity in social media, but it can be a very high risk activity for an attorney.<sup>85</sup> Some examples may help to illustrate this point for law students. One particularly egregious breach of confidentiality occurred in Illinois, where an experienced assistant public defender, Kristine Peshek, began to discuss the clients she was representing on her personal blog. Although she later contended that she had "adequately concealed her clients' identities to avoid inappropriate disclosure," the information posted on her blog was easily traceable to specific clients. For example, she posted a client's jail identification number before sharply criticizing him:

This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because 'he's no snitch.' I managed to talk the prosecutor into treatment and deferred prosecution, since we both know the older brother from prior dealings involving drugs and guns. My client is in college. Just goes to show you that higher education does not imply that you have any sense.

In another post, she described a client by first name as having been "stoned" on cocaine in a court appearance. She even discussed perjury by one of her clients, as well as disparaged judges by name. Peshek lost her job and received a sixty-day suspension of her law license for these actions.<sup>86</sup>

Another notorious incident also involved a public defender, this time in Miami. While defending a client charged with murder, Anya Cintron Stern used her cellphone to take a photograph of fresh clothing his family had brought him for trial, including leopard print underwear. Stern then posted the photograph of her client's underwear to her Facebook page, mocking

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<sup>84</sup> Trish Lilley & Michelle Maier, *An Ethical Compass for Social Media Interaction*, THE LEGAL INTELLIGENCER (online) May 6, 2014.

<sup>85</sup> See Skinner, *supra*, at 258.

<sup>86</sup> In the Matter of Kristine Ann Peshek, Before The Hearing Board Of The Illinois Attorney Registration And Disciplinary Commission , No. 620177 (August 25, 2009), available at <https://www.iardc.org/09CH0089CM.html>; see Debra Cassens Weiss, *Blogging Assistant PD Accused of Revealing Secrets of Little-Disguised Clients*, ABAJ LAW NOW, Sept. 10, 2009; DiBianca, *supra*, at 189.

the family for believing that this was “proper attire for trial.” Although Stern’s Facebook page was set to “private,” someone reported the post to the judge, who granted a mistrial. Stern lost her job, and the Miami-Dade Public Defender Carlos Martinez noted: “When a lawyer broadcasts disparaging and humiliating words and pictures, it undermines the basic client relationship and it gives the appearance that he is not receiving a fair trial.”<sup>87</sup>

Yet another reported incident involved attorney Steven Belcher, who “was helping defend a wrongful death case when he decided to e-mail a picture of the deceased,” who was “pictured lying naked on an emergency room table.” He received a sixty-day suspension for his actions.<sup>88</sup>

Warning future lawyers about responding in social media to criticisms of their work from clients is also important today, as many websites that permit rating of attorneys may contain disparaging information posted by disgruntled clients.<sup>89</sup> Some lawyers have been disciplined in recent years for posting confidential client information in rebuttal to bad online reviews.<sup>90</sup> For example, one disciplined attorney had responded to a client’s critique on Avvo by posting: “I dislike it very much when my clients lose, but I cannot invent positive facts for clients when they are not there. . . . [H]is own actions in beating up a female co-worker are what caused the consequences he is now so upset about.”<sup>91</sup> Several recent bar opinions have indicated that broad rebuttals to client critiques do not fall within a “self-defense” exception to client confidentiality.<sup>92</sup>

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<sup>87</sup> See Martha Neil, *Lawyer Puts Photo of Client’s Leopard-Print Undies on Facebook; Murder Mistrial, Loss of Job Result*, A.B.A. JOURNAL LAW NEWS NOW (Sept. 13, 2012).

<sup>88</sup> See Debra Cassens Weiss, *Ethics Officials Seeing More Cases from Lawyers’ Online Foibles*, A.B.A. JOURNAL LAW NEWS NOW, May 11, 2010;

<sup>89</sup> See Jacob Gershman, *Lawyers Responding to Negative Online Reviews Tread Tricky Path*, LawBlog, Wall St. J. online, July 11, 2014, at <http://blogs.wsj.com/law/2014/07/11/lawyers-responding-to-negative-online-reviews-tread-tricky-path/>; In the Matter of Margrett A. Skinner, 295 Ga. 217 (Ga. 5/19/14).

<sup>90</sup> Debra Cassens Weiss, *Lawyer Accused Of Revealing TMI In Response To Bad Avvo Review Is Reprimanded; Overdraft Also Cited*, A.B.A. JOURNAL LAW NEWS NOW, Jan 21, 2014

<sup>91</sup> *Id.*

<sup>92</sup> See Bar Association of San Francisco, Opinion 2014-1 (January 2014); Los Angeles County Bar Association Professional Responsibility And Ethics Committee, Opinion No. 525 (December 6, 2012). In July 2014, the Philadelphia Bar Association issued a similar opinion. See Josh J.T. Byrne, *Advisory Opinions*, LEGAL INTELLIGENCER,

Briefly reviewing these cautionary tales with students can raise their level of sensitivity to the norms of the profession. At a minimum, it may give professors an opportunity to reiterate that lawyers are far more limited in what they may say about their work lives, in social media or otherwise, than others in society.

#### *D. Litigation Issues.*

##### 1. Destruction of Evidence on Social Media.

Another area in which technological advances have generated ethical complexities is the duty to preserve evidence. When reviewing issues of obstruction of justice and spoliation, we need to be sure that our students appreciate the risks generated by social media. We must not only discuss what a lawyer must do about a client's fingerprints on a smoking gun, but also how a lawyer might counsel a client about how to handle incriminating photographs on Facebook.

May a lawyer counsel a client to "clean up" potentially damaging information in a social media account? On July 2, 2013, the New York County Lawyers' Association (NYCLA) issued Ethics Opinion 745, which stated that a competent lawyer should "review a client's social media pages, and advise the client that certain materials posted on a social media page may be used against the client for impeachment or similar purposes." The lawyer must be sure not to violate any substantive law governing obstruction of justice or spoliation of evidence, but Opinion 745 indicated that there otherwise "no ethical bar to "taking down" such material from social media publications, or prohibiting a client's attorney from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user's computer." Attorneys may also "guide the client" in subsequent postings in social media, including counseling the client on posting material favorable to the client's case, and warning the client about the possible consequences of posted materials."<sup>93</sup>

The Philadelphia Bar Association issued an ethics opinion in July 2014 that took a similar approach, reminding lawyers that they should "(1) have a basic knowledge of how social media websites work, and, (2) advise clients

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August 25, 2014.

<sup>93</sup> NYCLA Ethics Opinion 745, "Advising A Client Regarding Posts On Social Media Sites," July 2, 2013; See Jeffrey N. Rosenthal, *Ethics of Advising Clients to 'Clean Up' Facebook Page*, THE LEGAL INTELLIGENCER ONLINE (February 25, 2014).

about the issues that may arise as a result of their use of these websites.”<sup>94</sup> Opinion 2014-5 further noted that lawyers must be careful to preserve material that is taken down from such sites, in case they are subject to a lawful discovery demand.

As is often the case, a lawyer who is too aggressive in this process may run afoul of the ethics rules. One especially egregious case may serve as a cautionary tale for law students. Matthew B. Murray, an attorney in Charlottesville, Virginia, brought a wrongful death action on behalf of a client whose wife was killed in an automobile accident. At some point during the proceedings, the client had sent a message to opposing counsel directly through Facebook, which enabled them to view potentially probative photographs there. During discovery, defense lawyers filed a request for printed copies of material on the plaintiff’s Facebook page.

Rather than produce the requested information, the attorney had his paralegal instruct the client to “clean up” his Facebook page. The client deleted a number of photos, including one of him “holding a beer and wearing a T-shirt emblazoned with the message ‘I love hot moms,’ with love indicated by a heart.” The lawyer then replied to discovery by claiming that there was no active Facebook page, accusing the other lawyer of inappropriately hacking into private information. The subsequent discovery battle consumed substantial resources and the photographs ultimately were produced before trial. It was only after trial and the award of a verdict of more than \$8 million, however, that the lawyer’s role in attempting to obstruct justice became apparent, when he finally disclosed the incriminating emails. The Supreme Court of Virginia described his conduct as “patently unethical,” and Murray’s law license was suspended for five years.<sup>95</sup>

## 2. Professional Decorum Before The Tribunal.

In addition to teaching our students about the substantive content of the ethical rules governing litigation, we also focus on inculcating norms of professional behavior in dealing with opposing counsel, third parties, and the court. Careless use of social media by lawyers can generate

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<sup>94</sup> Philadelphia Bar Association Professional Guidance Committee, Opinion 2014-5 (July 2014).

<sup>95</sup> *Allied Concrete Co. v. Lester*, 285 Va. 295, 307 n. 7; 736 S.E.2d 699; 2013 Va. LEXIS 8 (Va. January 10, 2013). The agreed-upon five year suspension is *In the Matter of Matthew B. Murray*, VSB No. 11-070-088405 and 11-070-088422 (July 17, 2013). See *Charlottesville Attorney's Law License Suspended*, DAILY PROGRESS, July 30, 2013 (Charlottesville, VA).

unanticipated consequences. Law students must be alerted to the reality that once they enter the legal profession, long-standing habits of posting every detail of their lives online could come back to haunt them.

One example of unfortunate social media behavior was recounted by a judge who had received a request from a lawyer for a trial delay because of a “death in the family.” The judge granted the delay but also decided to check the lawyer’s Facebook page. She recalled: “There was a funeral, but there wasn’t a lot of grief expressed online . . . . All week long, as the week is going by, I can see that this lawyer is posting about partying. One night drinking wine, another night drinking mojitos, another day motorbiking.” The judge ultimately denied a second request for postponement and reported the attorney to a senior partner at her firm. She reported that the lawyer had “since removed her from her friends list.”<sup>96</sup>

Lawyers who vent about judges or opposing counsel in social media may also find themselves in hot water. The lawyer who unwisely called a local judge an “evil, unfair witch” on his blog was reprimanded and fined by the Florida bar.<sup>97</sup> In another case, an assistant state prosecutor posted a song parody to Facebook while awaiting a jury verdict in a trial, in which he referred to one of the participants as “weasle [sic] face,” and criticized opposing counsel for purported ethical lapses. Although the attorney believed that his posting was private, its content was disclosed to others and became the subject of an investigation. Chief Assistant State Attorney Tom Bakkedahl described the incident as “immature” and “harmless joking,” but noted that it also constituted a “training moment” for prosecutors to ensure that they maintain the public’s trust.<sup>98</sup> Similarly, two prosecutors in North Dakota were disciplined for Facebook postings that criticized jurors on their recent case as “12 idiots.”<sup>99</sup>

In a somewhat different vein, a Missouri court recently expressed concern about a chief prosecutor who tweeted openly about the facts and circumstances of an upcoming criminal trial, including a tweet that occurred days before jury selection, in which she stated that

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<sup>96</sup> See John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. TIMES (September 13, 2009); Molly McDonough, *Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches*, ABA JOURNAL ONLINE (Jul 31, 2009).

<sup>97</sup> See DiBianca, *supra*.

<sup>98</sup> Melissa E. Holsman, *Facebook Poem Gets Prosecutor In Hot Water, St. Lucie Deputy Under Investigation In Same Case*, TCPALM SUN SENTINEL (April 22, 2010).

<sup>99</sup> See Victor Li, *Two Prosecutors Disciplined For Criticizing Jurors On Facebook*, ABA JOURNAL ONLINE (Aug 22, 2014).



“DNA hit linked him to 1992 rape of 11 yr old girl. 20 yrs later, victim now same age as prosecutor.” She also tweeted while observing closing arguments: “I have respect for attys who defend child rapists. Our system of justice demands it, but I couldn’t do it. No way, no how.” The court of appeals did not overturn the conviction, but warned that “extraneous statements on Twitter or other forms of social media, particularly during the time frame of the trial, can taint the jury and result in reversal of the verdict. . . . We are especially troubled by the timing of [the prosecutor]’s Twitter posts, because broadcasting such statements immediately before and during trial greatly magnifies the risk that a jury will be tainted by undue extrajudicial influences.”<sup>100</sup>

Judicial clerks may also generate problems through unprofessional use of social media. In 2012, Sarah Peterson Herr, a law clerk for the Kansas Court of Appeals, attended a hearing on a controversial ethics complaint brought against State Attorney General Phill Kline. Herr live-tweeted through her personal Twitter account, referring to the Attorney General as a “douchebag,” mocking his arguments, and making observations about the judges. After she lost her job, she attempted to justify her crass comments as “me saying dumb things.”<sup>101</sup> On January 13, 2014, a hearing panel concluded that her tweets reflected bias and disrespect against a litigant and reflected badly on the courts, and recommended that she receive an informal admonition.<sup>102</sup>

Perhaps less damaging, but equally unprofessional, was an incident reported by one author. “[A] judicial clerk friend once posted a series of status updates about an ongoing jury trial,” she recalled. “One status opined that ‘there’s nothing like being hit on by jurors....’ A friend assured her that ‘its ok if their [sic] hot!!! and have a good job!!!’ Hopefully, said clerk did not follow this advice.”<sup>103</sup> At least one judge has also invited controversy by use of social media while actually sitting on the bench. A New York City trial judge “updated his Facebook “status” while sitting on the bench and once, sources said, he took a photo of his crowded courtroom and put it

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<sup>100</sup> Missouri v. Polk, 415 S.W.3d 692, 695-97 (Mo. Ct. App. Dec. 17, 2013). See “*Tweeting the Law: St. Louis Prosecutor Gets Praise and Criticism*,” ST. LOUIS POST-DISPATCH (December 2, 2012).

<sup>101</sup> *Disciplinary Panel: Fired Research Attorney's Tweets 'Constitute A Violation'*, TOPEKA CAPITAL JOURNAL (December 20, 2013).

<sup>102</sup> In re Sarah Peterson Kerr, No. 2012 SC 94.

<sup>103</sup> Kate Crowley, *Why Can't We Be Friends? A Judicial Clerk's Guide to Social Networking*, 14 RICH. J. L. & PUB. INT. 641 (2010-2011).

on his Facebook page,” which allegedly led to his transfer.<sup>104</sup>

It may seem obvious to law faculty that this kind of commentary online is inappropriate for law clerks and attorneys. But as communication norms have changed dramatically in recent years, we do our students a disservice if we are not explicit about professional expectations.

### 3. *Duty of Diligence and Zealous Advocacy.*

Although some lawyers might try to insulate themselves from these risks by avoiding all social media, the societal shift toward this means of communication suggests that this short-sighted strategy could backfire. In some contexts, failure to avail oneself of information that is readily available on social media might generate a separate ethics violation for lack of diligence. As one commentator has noted: “If more than half of divorce attorneys say that Facebook is their best source for online evidence, then failure to utilize the site as part of informal discovery may constitute a failure to perform due diligence. A divorce attorney who ignores Facebook and other social-networking sites as a source of possible evidence could be compared to a prosecutor who fails to conduct a criminal background check on a defendant's key alibi witness. Both may be in violation of Rule 1.3.”<sup>105</sup>

#### *E. No Contact With Represented Parties.*

The traditional requirement that attorneys not make direct contact with represented parties has generated new questions with the advent of social media. A particular concern is the issue of “Facebook-friending” a represented party.<sup>106</sup> The “no-contact” rule can be difficult for students to grasp, and so reviewing how the rule operates in the context of Facebook and other forms of social media can reinforce the underlying objectives of

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<sup>104</sup> John Annese, *Staten Island Criminal Court Judge To Be Transferred To Manhattan After Facebook Postings, Sources Say*, STATEN ISLAND LIVE, October 15, 2009. See generally John G. Browning, *Why Can't We Be Friends? Judges' Use of Social Media*, 68 U. MIAMI L. REV. 487 (2014).

<sup>105</sup> DiBianca, *supra*, at 193.

<sup>106</sup> See, e.g., John G. Browning, *Keep Your “Friends” Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media*, 3 ST. MARY'S J. LEG. MALP & ETH. 204, 229-34 (2013); Jan L. Jacobowitz & Danielle Singer, *The Social Media Frontier: Exploring a New Mandate for Competence in the Practice of Law*, 68 U. MIAMI L. REV. 452, 475-75 (2014); Yvette Ostolaza & Ricardo Pellafone, *Applying Model Rule 4.2 to Web 2.0: The Problem of Social Networking Sites*, 11 J. HIGH TECH. L. 56, 90-91 (2010).

the rule for them.

Simply viewing on-line information about represented parties that is openly available to all does not constitute “contact” under the rules. In an analogous setting, a 2014 ABA Formal Opinion has indicated that viewing similar information about prospective jurors does not constitute an ex parte contact. Formal Opinion 466 draws the distinction between passive review of public information, which is permissible, and actively contacting a person to obtain access, which is not. “This would be akin to driving down the juror’s street, stopping the car, getting out, and asking the juror for permission to look inside the juror’s house because the lawyer cannot see enough when just driving past.”<sup>107</sup>

Ethical concerns arise when attorneys have sought greater access to Facebook pages of a represented party by sending a “friend” request, particularly when some form of deception is involved. For example, in 2012, the New Jersey Office of Attorney Ethics charged two attorneys with ethics violations when they allegedly instructed a paralegal to “friend” an opposing party to gain access to his Facebook page.<sup>108</sup>

A number of bar opinions may be worth highlighting for students during discussion of this rule. In 2010, the San Diego County Bar Committee on Legal Ethics addressed a situation in which an attorney sent “friend” requests to current high-ranking employees of a represented opposing party, hoping to obtain information that would be useful in a wrongful discharge action. In Opinion 2011-2, the Committee took the position that this constituted an ex parte communication by the attorney, even though the friend request is “nominally generated by Facebook and not the attorney,” because “the purpose of the attorney’s ex parte communication is at the heart of the offense.” It viewed this conduct as inherently deceptive, because the attorney seeks “to exploit a party’s unfamiliarity with the attorney’s identity and therefore his adversarial relationship with the recipient. That is exactly the kind of attorney deception of which courts disapprove.”<sup>109</sup> New York State Bar Association Ethics Opinion 843 (2010) took the same position, drawing a sharp

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<sup>107</sup> ABA Formal Opinion 466 (April 24, 2014).

<sup>108</sup> See Mary Pat Gallagher, *Hostile Use of 'Friend' Request Puts Lawyers in Ethics Trouble*, NEW JERSEY LAW JOURNAL (Aug. 30, 2012). As of 2014, the substantive issue apparently had not yet been resolved, due to litigation over jurisdiction. See Mary Pat Gallagher, *Facebook Case Tests Courts' Power To Review Ethics Tribunals' Actions*, N. J. LAW JOURNAL (July 2, 2013); Browning, *supra*, 3 ST. MARY’S J. LEG. MALP & ETH at 231-33.

<sup>109</sup> Opinion 2011-2, May 24, 2011

distinction between viewing public social media pages and making specific friend requests.<sup>110</sup>

In Opinion 2009-02, the Philadelphia Bar Association Professional Guidance Committee also indicated that using a third party to seek to “friend” a potential witness was deceptive, because it omitted a “highly material fact, namely, that the third party who asks to be allowed access to the witness’s pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness.” It rejected the contention that this was no different from “videotaping the public conduct of a plaintiff in a personal injury case to show that he or she is capable of performing physical acts he claims his injury prevents,” because that simply captures public conduct. Rather, this would be more like a videographer who had a “hidden camera and gained access to the inside of a house to make a video by presenting himself as a utility worker.”<sup>111</sup>

The most recent bar opinion on this issue came from New Hampshire in 2012. That opinion asserted that any friend requests to represented parties would violate rule 4.2, even if no deception was used. “As technology changes, it may be necessary to reexamine these conclusions and analyze new situations,” explained the Opinion. “However, the basic principles of honesty and fairness in dealing with others will remain the same. When lawyers are faced with new concerns regarding social media and communication with witnesses, they should return to these basic principles and recall the Supreme Court’s admonition that honesty is the most important guiding principle of the bar in New Hampshire.”<sup>112</sup>

One bar opinion has taken a different approach, at least with respect to unrepresented parties. In its Formal Opinion 2010-2, the Association of the Bar of the City of New York Committee on Professional Ethics permitted attorneys to send friend requests to unrepresented parties, without disclosing the reason for their requests, as long as there is no deception. “Despite the common sense admonition not to “open the door” to strangers,” noted the Opinion, “social networking users often do just that with a click of the mouse.”<sup>113</sup>

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<sup>110</sup> New York State Bar Association Ethics Opinion 843 (2010).

<sup>111</sup> Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02.

<sup>112</sup> Ethics Committee Advisory Opinion #2012-13/05, “Social Media Contact with Witnesses in the Course of Litigation.”

<sup>113</sup> The Association of the Bar of the City of New York Committee on

*F. Conflicts Of Interest.*

One of the most complex areas of coverage in our legal ethics courses is conflicts of interest. The area is of vital importance to attorneys, but highly fact-specific in practice, and so our classroom efforts are devoted to familiarizing our students with general principles, and sensitizing them to the constant presence of potential conflicts of interest.

Worth highlighting for our students is the potential for creating conflicts of interest through on-line interactions. Lawyers must be cautious about communications with persons through social media who might be adverse to a current client. They may need to consider whether postings might create issue conflicts with positions being taken by their law firm on behalf of clients. Particular care should be taken in communicating with prospective clients, where acquisition of confidential information might present a later conflict of interest with respect to future representation of adverse parties.<sup>114</sup>

Moreover, courts have begun to wrestle with the related question of how “friend” relationships on social media may generate substantive concerns requiring disqualification of jurors or judges.<sup>115</sup> ABA Formal Opinion 462, issued in 2013, takes the position that friend relationships are not presumptively problematic, but cautions judges about the risks of social media use.<sup>116</sup> Florida Ethics Opinion 2009-20 takes the position that judges may not “friend” lawyers who appear before them, because “listing lawyers who may appear before the judge as “friends” on a judge's social networking page reasonably conveys to others the impression that these lawyer “friends” are in a special position to influence the judge.”<sup>117</sup> New

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Professional Ethics, Formal Opinion 2010-2, “Obtaining Evidence from Social Networking Websites.”

<sup>114</sup> See Abigail S. Crouse & Michael C. Flom, *Social Media for Lawyers*, BENCH AND BAR OF MINNESOTA (Nov. 10, 2010).

<sup>115</sup> See John G. Browning, *Why Can't We Be Friends? Judges' Use of Social Media*, 68 U. MIAMI L. REV. 487 (2014); Nicola A. Boothe-Perry, *The "Friend"ly Lawyer: Professionalism And Ethical Considerations Of The Use Of Social Networking During Litigation*, 24 U. FLA. J.L. & PUB. POL'Y 127 fn. 118; Samuel Vincent Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281 (2011).

<sup>116</sup> ABA Formal Opinion 462, “Judge's Use of Electronic Social Networking Media” (February 21, 2013).

<sup>117</sup> Florida Opinion 2009-20 (Nov. 17, 2009), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jecopinions/2009/2009-20.html>

York took the opposite approach in a 2009 bar opinion, stating that “the judge also should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge’s court through a social network. In some ways, this is no different from adding the person’s contact information into the judge’s Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e., other users can normally see the judge’s friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond.”<sup>118</sup>

### *G. Marketing.*

In order to remain in business, lawyers in private practice must ensure that they have a steady stream of clients by marketing their services. This self-evident proposition sometimes is absent from courses on legal ethics. Indeed, although advertising, solicitation, and related activities have long been the subject of intensive regulation by the bar, some ethics textbooks unfortunately provide little coverage of this area. Particularly today, when our students will enter a world in which their ability to survive as professionals will depend on their ability to compete in a declining market, we must ensure that they do so with full awareness of the ethical pitfalls presented by various marketing practices.

As in the area of confidentiality, the number of ethical issues raised by legal marketing is vast.<sup>119</sup> This is due in part to the broad net cast by Model Rule 7.1, which provides: “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”<sup>120</sup> Thus, whether communications occur in person, in writing, in traditional print

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<sup>118</sup> New York State Bar Opinion 08-176 (January 29, 2009).

<sup>119</sup> The ABA maintains a detailed catalog of the many variations among states in their advertising and solicitation rules, updated frequently. *See* Differences between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct (May 1, 2014), available at [http://www.americanbar.org/groups/professional\\_responsibility/resources/professionalism/professionalism\\_ethics\\_in\\_lawyer\\_advertising.html](http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising.html)

<sup>120</sup> Model Rule 7.1.

media, or in cyberspace, they may be subject to the general provisions of Model Rule 7.1 as well as the more specific regulations governing advertising and solicitation. Of course, constitutional issues relating to the regulation of commercial speech overlay the entire area, and merit classroom attention as well.<sup>121</sup>

Technology has had a substantial effect on lawyer marketing ever since the first brave attorneys created so-called “home pages” on the Internet. Although full coverage of the myriad issues presented is beyond the scope of this overview, I will highlight a few that may be of particular interest, especially in the area of social media.<sup>122</sup>

### 1. Website Regulation.

Website regulation has become far more sophisticated, and often far more intrusive, than it was in the early days of lawyer home pages. Students need to know that the content of their website must comply with all ethical rules, including specific rules relating to advertising and solicitation. A good summary of these concerns appears in ABA Formal Opinion 10-457, “Lawyer Websites,” which acknowledges that websites “offer lawyers a twenty-four hour marketing tool by calling attention to the particular qualifications of a lawyer or a law firm, explaining the scope of the legal services they provide and describing their clientele, and adding an electronic link to contact an individual lawyer.”<sup>123</sup> Websites must be accurate and up-to date. They must not disclose confidential information about current or former clients without consent. Care must be taken to avoid inadvertent creation of attorney-client relationships with visitors to the website and concerns about prospective clients must also be addressed. Disclaimers may insulate lawyers from some of these problems, but not all of them. “Limitations, conditions, or disclaimers of lawyer obligations will

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<sup>121</sup> See, e.g., Jan L. Jacobowitz and Gayland O. Hethcoat II, *Endless Pursuit: Capturing Technology At The Intersection Of The First Amendment And Attorney Advertising*, 17 J. Tech. L. & Pol’y 63 (2012).

<sup>122</sup> As an example, one increasingly significant area of concern for practitioners is the emergence of legal technology startups that market services to consumers and then connect them to lawyers through “branded networks.” Collaboration with these companies can be beneficial to lawyers but it may raise ethical concerns about structuring payments and complying with marketing rules. My thanks to Stephanie Kimbro for calling this issue to my attention. See Stephanie Kimbro, *The Consumer Law Revolution: The Lawyer’s Guide To The Online Legal Marketplace* (2014).

<sup>123</sup> ABA Formal Opinion 10-457, “Lawyer Websites.”

be effective only if reasonably understandable, properly placed, and not misleading. This requires a clear warning in a readable format whose meaning can be understood by a reasonable person.”<sup>124</sup>

I have found it useful to display some legal websites in class, in order to get students thinking about what regulatory scheme they would favor for this kind of advertising. There are countless possibilities for classroom use. Always popular are websites with problematic domain names, such as “potlawyer.com,”<sup>125</sup> “Top Gun DUI.com”<sup>126</sup> or “LA’s Dopest Attorney.com.”<sup>127</sup> The controversy over branding of law firms by using animal mascots like bulldogs can also be readily presented in class.<sup>128</sup> Many lawyer websites use embedded images, sound effects, or videos that could run afoul of strict state advertising restrictions.<sup>129</sup> Taking a closer look at these sites in class affords an excellent opportunity to press the question about whether “dignity” is a sufficient basis for regulating or banning certain types of lawyer advertising.<sup>130</sup>

## 2. Marketing Through Social Media.

As many lawyers now attempt to use social media to market themselves and their professional services, questions begin to arise about whether this kind of activity will be treated like traditional attorney advertising. John Browning argues persuasively that that “the ethical missteps by lawyers via social media . . . would be just as ethically dubious if they occurred in a more traditional forum.”<sup>131</sup> The Supreme Court of South Carolina, for example, issued a reprimand to an attorney who had

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<sup>124</sup> *Id.* at 6.

<sup>125</sup> [www.potlawyer.com](http://www.potlawyer.com). (“Ease your mind.”)

<sup>126</sup> <http://www.topgundui.com/> (“Friends don’t let friends plead guilty.”)

<sup>127</sup> <http://lasdopestattorney.com/>

<sup>128</sup> <http://www.wcsr.com/?id=86&objId=481>; <http://alexanderandcatalano.com/>;

see

<sup>129</sup> <http://www.papeandchandler.com/#>!

<sup>130</sup> *See, e.g.*, <http://www.lifeshortgetadivorce.com/>

<sup>131</sup> John G. Browning, *Facebook, Twitter, and LinkedIn - Oh My! The ABA Ethics 20/20 Commission and Evolving Ethical Issues in the Use of Social Media*, 40 N. KY. L. REV. 255 (2013).



posted false and misleading information about his educational background and experience at LinkedIn and other similar websites, behavior that would be impermissible regardless of context.<sup>132</sup> Nevertheless, the ease with which communications may be generated and disseminated through social media, as well as the more casual vernacular that they employ, can enhance the likelihood of ethical breaches.

Kentucky attorney Christian Mascagni ran afoul of bar regulators in 2010 when he “posted on his Facebook page, to his more than 2,000 friends, that he wanted “the Breeder's Cup and weekend parties to call if you get into trouble or need out of jail before Monday.” And he said these kinds of postings have paid off. “I have picked up a lot of business on Facebook,” Mascagni said, noting that the social-networking site allows him to directly reach out to his target market, club-hoppers in their 20s and 30s who are difficult to reach through traditional advertising.”<sup>133</sup> In apparent response to this activity, the Kentucky Bar Association proposed a regulation in November 2010 that would require social media communications by attorneys to be submitted to the Bar's Advertising Commission and subject to a \$ 75 filing fee.<sup>134</sup> Although this proposal proved to be controversial, Kentucky rules now appear to require that attorneys submit all postings on social media sites for review.<sup>135</sup>

### 3. Marketing By Blogging

Blogging by attorneys has been described as “the most useful tool in one's online arsenal to advertise an area of expertise in the law and to solicit prospective clients.”<sup>136</sup> As it becomes a more popular activity, however, some bloggers have been charged with violating various ethical restrictions.

In February 2013, the Supreme Court of Virginia issued an important opinion about lawyer blogging in *Hunter v. Virginia State Bar*.<sup>137</sup> The attorney argued that his blog, “This Week in Richmond Criminal Defense,” was fully protected by the First Amendment as political speech,

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<sup>132</sup> Id.

<sup>133</sup> Jason Riley, LOUISVILLE, KY. COURIER-JOURNAL, November 15, 2010.

<sup>134</sup> Browning, *supra*.

<sup>135</sup> See “Frequently Asked Questions Attorneys' Advertising Commission,”

<sup>136</sup> Richard Raysman & Peter Brown, *Attorney Advertising In the Digital Age*, NY LAW JOURNAL at 5 (January 14, 2014).

<sup>137</sup> 744 S.E. 2d 611 (2013), cert denied 2013

and thus not subject to the ethical rules governing advertising by lawyers. Although he argued that he wrote his blog to advance political views about criminal law, Hunter conceded that one of his reasons for blogging was to market his services.

Despite the fact that Hunter was represented by noted First Amendment scholar Rodney Smolla, he was unsuccessful in his constitutional challenge to the disciplinary action brought against him. “Here, Hunter's blog posts, while containing some political commentary, are commercial speech,” stated the court. “Hunter has admitted that his motivation for the blog is at least in part economic. The posts are an advertisement in that they predominately describe cases where he has received a favorable result for his client. He unquestionably references a specific product, i.e., his lawyering skills as twenty-two of his twenty-five case related posts describe cases that he has successfully handled. Indeed, in nineteen of these posts, he specifically named his law firm in addition to naming himself as counsel.” The Court further opined that “Hunter chose to comingle sporadic political statements within his self-promoting blog posts in an attempt to camouflage the true commercial nature of his blog.”

It is noteworthy that the court accepted Hunter’s argument that he could freely post whatever had happened in public court proceedings, regardless of the broad confidentiality prohibitions of Rule 1.6. “To the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom.”<sup>138</sup> Two dissenting justices asserted that Hunter’s entire blog was protected speech and thus not subject to the regulations.

The distinction between personal speech and communication that may be regulated as advertising is murky. In a 2013 opinion, the New York State Bar Association Commission on Professional Ethics determined that a blog by an attorney that “will not address legal topics but will include posts about work-life balance” would not be covered by Rule 7.1. “Since the inquirer’s blog will not discuss legal matters and it appears that the inquirer does not intend to solicit clients for a law practice, the blog will not be

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<sup>138</sup> Commentators have found this position to be inconsistent with traditional understandings of client confidentiality. See Jan L. Jacobowitz and Kelly Rains Jesson, *Fidelity Diluted: Client Confidentiality Gives Way to the First Amendment & Social Media in Virginia State Bar, ex rel. Third District Committee v. Horace Frazier Hunter*, 36 CAMPBELL L. REV. 75 (2013) (“The Hunter opinion dilutes the fidelity that is intrinsic in the attorney-client relationship and challenges the public trust. Members of the public are better served by the assurance that whatever occurs in their individual legal cases will not become the subject of a blog or otherwise be posted on the Internet by their attorney with whom they entered into a fiduciary relationship.”).

considered an advertisement even though its name indicates that the author is an attorney.”<sup>139</sup>

It is likely that more regulatory activity will be focused on lawyer blogs in the future. Indeed, in December 2014, the California Bar’s Standing Committee on Professional Responsibility and Conduct issued a draft Formal Opinion on the applicability of advertising rules to attorney blogging.<sup>140</sup> Thus, our students should be alerted to the possible ethical restrictions that might be brought to bear on such activities.

#### 4. Marketing By Offering Discounted Fees Via Groupon.

There is a substantial split among the ethics opinions that have been issued in recent years on the question of whether attorneys may utilize websites such as Groupon to offer a coupon “deal of the day” or other enticement to potential clients.<sup>141</sup>

On October 21, 2013, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 465, “Lawyers’ Use of Deal-of-the-Day Marketing Programs.” The Opinion recognized: “Offering services through deal-of-the-day or group-coupon marketing programs presents a new way for lawyers to market their services and to provide consumers with legal assistance.” Rather than prescribing a blanket rule, however, the opinion identified a number of possible problems stemming from such practices. The advertising must not be false or misleading, so unsophisticated consumers would have to be advised about the potential scope of services and any procedures for refund. The proposal would have to be drafted carefully to clarify that the purchaser of a coupon deal or prepaid deal was not a client or prospective client at the point of purchase. The lawyer must ensure that the proposed services be within his or her area of competency, and that the common risk of overselling deals

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<sup>139</sup> New York State Bar Association Comm. on Professional Ethics, Op. 967 (N.Y. 2013).

<sup>140</sup> See Formal Opinion Interim No. 12-0006, State Bar Of California Standing Committee On Professional Responsibility And Conduct, available at <http://www.calbar.ca.gov/AboutUs/PublicComment/201417.aspx>.

<sup>141</sup> See Michael J. Conroy, Note, *Clash of Titans: Groupon v. The Model Rules of Professional Conduct*, 99 IOWA L. REV. 1329 (2014); Aaron J. Russ, Note, *Is Groupon For Lawyers Fraught With Ethical Danger? Why The Legal Community Should Embrace Innovative Internet-Marketing For Lawyers*, 13 U. ILL. J.L. TECH. & POL’Y 393 (2013); Krista Umanos, Comment and Casenote, *Ethics, Groupon’s Deal-of-the-Day, and the ‘McLawyer,’* 81 U. CIN. L. REV. 1169 (2013).

not overwhelm the lawyer's ability to perform the requested professional services. The overall fee must be reasonable.<sup>142</sup>

## 5. Endorsements In Social Media.

Students should be reminded that various forms of endorsement that are common in social media, such as "liking" on Facebook, or endorsements of skills on LinkedIn, could generate ethical concerns. First, a lawyer may not offer a thing of value in return for recommendation of a lawyer's services. John Browning notes: "For example, a firm that offers a give-away like a T-shirt, ballcap, etc., to individuals who visit its Facebook page and "like" them on Facebook could be accused of giving something of value in exchange for a recommendation in violation of Rule 7.2."<sup>143</sup> Many states forbid endorsements, testimonials, or statements of quality in lawyer advertising. A lawyer who solicits such material would be responsible for all such comments.<sup>144</sup>

### H. *Multijurisdictional Practice and Virtual Law Offices.*

The question of multijurisdictional practice (MJP) has been the focus of regulatory attention for many years. In addition to a general discussion of how MJP rules have evolved in recent years, an analysis of the implications of a new form of practice – the "virtual law office" – can provide a vehicle for thinking about more sweeping changes in regulating legal practice.

The bombshell that caused a major rethinking about MJP came in 1998, with the California Supreme Court's opinion in *Birbrower, Montalbano, Condon & Frank v. Superior Court of Santa Clara County*.<sup>145</sup> *Birbrower* held that New York lawyers who had come to California to conduct some aspects of a representation of a California subsidiary of their New York client had engaged in the unauthorized practice of law. Decided during the early years of Internet use by attorneys, *Birbrower* contained a paragraph that generated much consternation within the legal profession:

Our definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. Physical presence

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<sup>142</sup> ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 465, "Lawyers' Use of Deal-of-the-Day Marketing Programs," October 21, 2013.

<sup>143</sup> Browning, *supra*

<sup>144</sup> See DiBianca, *supra*, South Carolina Advisory Opinion.

<sup>145</sup> 949 P.2d 1 (Cal. 1998).

here is one factor we may consider in deciding whether the unlicensed lawyer has violated section 6125, but it is by no means exclusive. For example, one may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute **by telephone, fax, computer, or other modern technological means**. Conversely, although we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person automatically practices law "in California" whenever that person practices California law anywhere, or "virtually" enters the state by telephone, fax, e-mail, or satellite. . . . We must decide each case on its individual facts.<sup>146</sup>

*Birbrower* generated substantial debate over the crossing of state lines by attorneys.

The ABA's amendment of Model Rule 5.5 to provide more realistic safe harbors for attorneys practicing law across state lines has been adopted by at least forty-five jurisdictions.<sup>147</sup> Stephen Gillers has cogently argued:

We should not have needed *Birbrower* to spur us to revise our rules on cross-border practice. . . . We should have revised those misguided rules earlier, as we partly did thereafter, to sensibly reconcile the competing interests, which is the purpose of regulation in the first place. We should do the same today for other rules to take account of expanding technology and the cross-border needs of clients, while preserving the good things that regulation offers.<sup>148</sup>

The rethinking of these restrictions, coupled with emerging technology and changing expectations about workplace life, is generating a different type of law practice through "virtual law offices." We must anticipate that our law students may gravitate toward this form of practice as it becomes more popular in the future, and so it is important to alert them to regulatory concerns currently advanced by the bar.

Stephanie Kimbro, former on-line practitioner and one of the best-known advocates of VLO's, has provided a thorough overview of the issues surrounding the growth of this form of legal practice.<sup>149</sup> She defines a

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<sup>146</sup> *Id.* at 5-6 (emphasis added).

<sup>147</sup> Stephen Gillers, *A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L.J. 953, 961 and n.30 (2012).

<sup>148</sup> Gillers, *supra*, 63 HASTINGS L.J. at 962.

<sup>149</sup> Stephanie L. Kimbro, *Regulatory Barriers To The Growth Of*

“virtual law practice” broadly as “a professional law practice where both the client and the attorney communicate through a secure online client portal, accessible anywhere the parties may access the Internet.” She notes that most virtual law offices offer online unbundled legal services, even though their physical locations may be “a home office, a meeting room at the public library, or a branch office of a larger firm.”<sup>150</sup>

Virtual law offices pose a number of issues about the applicability of traditional ethics rules to a new form of practice, ranging from requirements of bona fide physical addresses for practicing lawyers to risks of unauthorized practice of law across state lines.<sup>151</sup> Most recently, in June 2014, the Association of the Bar of the City of New York Committee on Professional Ethics issued Formal Opinion 2014-2, which endorsed the use of the address of a “VLO,” by an attorney who wished to work at home.<sup>152</sup> The Opinion identified many possible advantages to clients from this form of practice, explaining that some prospective clients “may conclude that a lawyer who uses a VLO can provide greater value due to lower overhead and other efficiencies. In addition, clients who are technologically savvy and who themselves may use similar facilities for their own businesses may be more comfortable with a lawyer who understands how those business models work.” The concern that “a client might not be able contact a lawyer simply because the lawyer does not have a traditional brick-and-mortar law office is less compelling than in the past. . . . Imposing an inflexible requirement on lawyers to maintain a traditional brick-and-mortar office does not necessarily provide enhanced protection to clients or the public.” Although noting a number of ethical concerns that should be addressed by practitioners using this model, the Opinion argued for “flexibility,” noting: “By using an Internet connection, a laptop computer, a mobile phone, and other devices, a lawyer can communicate easily with colleagues, clients, and adversaries from any location, at any time. Our interpretation of the Rules should recognize these technological

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*Multijurisdictional Virtual Law Firms And Potential First Steps To Their Removal*, 13 N.C. J.L. & TECH. ON. 165 (2012). Kimbro’s comprehensive blog on issues relating to virtual law practice is at <http://virtuallawpractice.org/>.

<sup>150</sup> Stephanie L. Kimbro, *Practicing Law Without An Office Address: How The Bona Fide Office Requirement Affects Virtual Law Practice*, 36 DAYTON L. REV. 1, 4-5 (2010).

<sup>152</sup> Formal Opinion 2014-02 defines “VLO” as “a physical location that offers business services and facilities, such as private or semi-private work spaces, conference rooms, telephones, printers, photocopy machines, and mail drop services to lawyers.”

developments.”<sup>153</sup>

Other jurisdictions have also provided general support for the VLO model, with recent bar opinions in California,<sup>154</sup> Illinois,<sup>155</sup> North Carolina,<sup>156</sup> Pennsylvania,<sup>157</sup> and Virginia.<sup>158</sup> Similarly, New Jersey has recently abandoned the requirement of a “bona fide office,” now requiring: “An attorney need not maintain a fixed physical location for the practice of law, but must structure his or her practice in such a manner as to assure, as set forth in RPC 1.4, prompt and reliable communication with and accessibility by clients, other counsel, and judicial and administrative tribunals before which the attorney may practice, provided that an attorney must designate one or more fixed physical locations where client files and the attorney's business and financial records may be inspected on short notice by duly authorized regulatory authorities, where mail or hand-deliveries may be made and promptly received, and where process may be served on the attorney for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto.”<sup>159</sup>

Among the ethical issues that have been identified as risks for VLOs are the following, many of which we have already reviewed. The lawyer must carefully supervise third parties such as cloud computing services, as well as non-lawyer personnel who may be in locations remote from the lawyer's physical office. If the lawyer chooses to meet in person with clients in shared meeting spaces, the lawyer must ensure protection of client confidentiality. The lawyer must be sure to maintain regular communication with clients and ensure that they understand the nature of

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<sup>153</sup> <http://www.nycbar.org/ethics/ethics-opinions-local/2014opinions/2023-formal-opinion-2014-02>

<sup>154</sup> California State Bar Standing Committee on Professional Responsibility and Conduct Formal Opinion 2012-184.

<sup>155</sup> Illinois State Bar Opinion 12-09, "Unauthorized Practice of Law; Multijurisdictional Practice; Law Firms."

<sup>156</sup> North Carolina State Bar Formal Ethics Opinion 2005-10 "Virtual Law Practice and Unbundled Legal Services" (approved January 2006).

<sup>157</sup> Pennsylvania Bar Opinion 20-2010.

<sup>158</sup> Legal Ethics Opinion 1872, “Virtual Law Office And Use Of Executive Office Suites” (March 29, 2013)

<sup>159</sup> Rule 1:21-1(a). See Joan C. Rogers, *New Jersey Ditches Bona Fide Office Rule, Permits Virtual Practice if Conditions Are Met*, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (Wednesday, January 30, 2013).

the representation. Attorneys who do not meet their clients in person may also need to take steps to confirm client identity, as well as to assess the possibility that a client may have diminished capacity.<sup>160</sup>

It can be useful to show students how an on-line law practice might operate. An excellent example of a successful virtual law practitioner is Richard Granat, who practices Maryland family law online from his home in Florida.<sup>161</sup> Granat was a pioneer in advocating the use of software that facilitates unbundled legal services to clients online, and was recognized as one of the American Bar Association's "Legal Rebels" in 2009.<sup>162</sup> Students were intrigued by Granat's practice, and examining his website in class generated substantial class discussion about the risks and rewards of providing legal services through this model.

### *I. Unauthorized Practice of Law and Lay Legal Document Providers.*

As the semester draws to a close, our students need to understand the competitive forces that are likely to affect them as they enter law practice in the twenty-first century. Among the most significant is the well-documented growth of online legal document preparers like LegalZoom and Rocket Lawyer. As increasing numbers of potential clients gravitate to nonlawyer websites for preparation of routine legal documents, significant

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<sup>160</sup> See, e.g., Vanessa S. Browne-Barbour, *A Fork in the Road: The Intersection of Virtual Law Practice and Social Media*, 52 WASHBURN L.J. 267 (2013); Jeffrey I. Silverberg, *Hanging Out Your Virtual Shingle: A Look at How South Carolina's Ethics Rules Concerning Attorney Communications, Advertising, and Solicitation Apply to Virtual Worlds*, 62 S.C. L. REV. 715, 716 (2011); Stephanie L. Kimbro, *The Law Office of the Near Future Practical and Ethical Considerations for Virtual Practice*, N.Y. ST. B. J. at 28, 29 (Sept. 2011); JoAnn Hathaway & Diane Ebersole, *Law Practice Solutions: Best Practice Tips for the Virtual Law Office*, 89 MI B. J. 58 (2010); Kevin Crews, *The Door to a Virtual Law Practice Is Always Open: And the Proper Use of Technology Can Keep It That Way*, FLORIDA BAR J. (June 2014); Michael Downey, *Ethics and the Virtual Law Office*, ST. LOUIS LAWYER (February 2013); Daniel J. Siegel, *Watch Where You Set Your Virtual Foot – Advice on Dealing with Varying State Rules*, 37 LAW PRACTICE MAGAZINE No. 5 (Sept Oct 2011).

<sup>161</sup> <http://www.mdfamilylawyer.com/>; see Gillers, *supra*, at 975-76.

<sup>162</sup> See *Richard Granat: Internet Obsessive*, "Legal Rebels" ABA J. (Aug. 24, 2009) [http://www.abajournal.com/legalrebels/article/internet\\_obsessive](http://www.abajournal.com/legalrebels/article/internet_obsessive); Richard S. Granat, *Online Legal Services and Virtual Lawyering: What Is it, Why Is it Important and What Do You Do Now?* DIRECT LAW 4 (Aug. 1, 2011), <http://www.directlaw.com/virtual-lawyering-for-competitive-advantage.pdf>. See generally Richard S. Granat & Stephanie Kimbro, *The Teaching of Law Practice Management and Technology in Law Schools: A New Paradigm*, 88 Chi.-Kent L. Rev. 757 (2013).



questions about the regulatory landscape for “scriveners in cyberspace” remain unanswered and there is a division of opinion over whether they are engaged in the unauthorized practice of law.<sup>163</sup>

The question of whether lay preparation of legal forms on behalf of customers constitutes the unauthorized practice of law is not a novel one. The organized bar has fretted about such activity for many decades, at least since the emergence of “typing services” in the Seventies.<sup>164</sup> In later years, the arrival of software programs like Quicken Family Lawyer prompted regulatory activity.<sup>165</sup> Today, LegalZoom and its counterparts are the focus of attention, as their growing share of the market in production of routine legal documents continues to frighten many practicing attorneys.

There is substantial debate over the regulatory issues surrounding online document preparers. Consensus has yet to emerge over whether their actions constitute the unauthorized practice of law.<sup>166</sup> There is debate over whether these services ought to be welcomed as a vehicle for serving those

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<sup>163</sup> See Catherine J. Lanctot, *Scriveners In Cyberspace: Online Document Preparation And The Unauthorized Practice Of Law*, 30 HOFSTRA L. REV. 811 (2002). For an overview of past regulatory battles involving LegalZoom, see Catherine J. Lanctot, *Does LegalZoom Have First Amendment Rights? Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & CIV. RTS L. REV. 255, 257-61 (2011). An update on LegalZoom appears at Robert Ambrogi, *Latest Legal Victory Has LegalZoom Poised For Growth*, A.B.A.J. (August 2014); see also Robert Ambrogi, “LegalZoom Suffers Setback In North Carolina,” LawSites (blog) (May 19, 2014), available at <http://www.lawsitesblog.com/2014/05/legalzoom-suffers-setback-north-carolina.html>. In the spring of 2014, the South Carolina Supreme Court approved a settlement of a claim against LegalZoom which stated that LegalZoom’s activities as alleged in the complaint did not constitute unauthorized practice of law under South Carolina law. *Medlock v. LegalZoom*, Case No. 2012-208067, Report on Findings of Fact and Recommendations to Approve The Settlement Agreement (October 8, 2013), approved by Supreme Court, March 11, 2014.

<sup>164</sup> Lanctot, *supra*, 30 Hofstra L. Rev. at 829-36.

<sup>165</sup> *Id.* at 836-40.

<sup>166</sup> See, e.g., Legal Document Preparation by Online Services, Advisory Opinion UPL 2008-03 (Bd. on the Unauthorized Practice of Law of the S. Ct. of Ohio Dec. 12, 2008), available at [http://www.sconet.state.oh.us/Boards/UPL/advisory\\_opinions/UPLAdvOp\\_08\\_03.pdf](http://www.sconet.state.oh.us/Boards/UPL/advisory_opinions/UPLAdvOp_08_03.pdf); We The People and LegalZoom Document Preparation Services, Informal Opinion 2008-01 at 3, Conn. Bar Assoc. Comm. on the Unauthorized Practice of Law (2008); Legal Document Preparation by Online and In-Person Services, Formal Opinion 2010-01 (Penn. Bar Assoc. Unauthorized Practice of Law Comm. Mar. 10, 2010), available at <http://www.pabar.org/public/committees/unautpra/Opinions/2010-01LglDocumentPreparation.pdf>.

who feel that they cannot afford the services of a licensed attorney, or whether instead they should be regulated or banned in the name of consumer protection.<sup>167</sup> Constitutional questions also are raised by “the collision of two equally muddled doctrines - unauthorized practice on the one hand, and the First Amendment on the other.”<sup>168</sup>

To sharpen this inquiry in class, I contrasted LegalZoom’s website with that of Maryland Family Lawyer, overseen by attorney Richard Granat. The similarities and differences between the two sites generated a thoughtful discussion about the future role of the legal profession, if any, in providing routine legal documents to clients of modest means.<sup>169</sup>

### CONCLUSION: SPENDING OUR LIVES IN THE FUTURE

Law school graduates in 1993 had no way of knowing how radically the emergence of the Internet would soon affect their professional lives. The same is true today. We do not know what the future holds for the law practice of tomorrow. Nevertheless, at the end of a modern twenty-first century course in legal ethics, law students must be prepared to practice law in that future environment that we may only dimly anticipate today. After

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<sup>167</sup> See, e.g., Deborah L. Rhode & Lucy Buford Ricca, *Protecting The Profession Or The Public? Rethinking Unauthorized-Practice Enforcement*, 82 *FORDHAM L. REV.* 2587 (2014); Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 *PEPP. L. REV.* 365, 416-18 (2013); Lisa H. Nicholson, *Access To Justice Requires Access To Attorneys: Restrictions On The Practice Of Law Serve A Societal Purpose*, 82 *Fordham L. Rev.* 2761 (2014); Mathew Rotenberg, Note, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 *MINN. L. REV.* 709 (2012); Gerard J. Clark, *Internet Wars: The Bar Against the Websites*, 13 *J. HIGH TECH. L.* 247 (2013); Cassandra Burke Robertson, *Globalization, New Technologies, And What It Means To Be A Lawyer In These Uncertain Times: Regulating Electronic Legal Support Across State And National Boundaries*, 47 *AKRON L. REV.* 37, 43-44 (2014); Isaac Figueras, Comment, *The LegalZoom Identity Crisis: Legal Form Provider or Lawyer in Sheep's Clothing?* 63 *CASE W. RES. L. REV.* 1419 (2013); Sarah Knapp, Current Developments 2012-2013: *Can LegalZoom Be The Answer To The Justice Gap?* 26 *GEO. J. LEG. ETH.* 821 (2013).

<sup>168</sup> Catherine J. Lanctot, *Does LegalZoom Have First Amendment Rights? Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 *TEMP. POL. & CIV. RTS L. REV.* 255, 256 (2011); see, e.g., Renee Newman Knake, *Legal Information, The Consumer Law Market, And The First Amendment*, 82 *FORDHAM L. REV.* 2843 (2014); Marc Lauritsen, *Liberty, Justice, And Legal Automata*, 88 *CHI.-KENT L. REV.* 945 (2013); see generally Josh Blackman, *What Happens If Data Is Speech?* 16 *U. PA. J. CONST. L.* 25 (2014).

<sup>169</sup> See generally Benjamin H. Barton, *The Lawyer's Monopoly - What Goes And What Stays*, 82 *FORDHAM L. REV.* 3067 (2014).

all, in 1993, a drivers' ed teacher would not have foreseen that drivers of the future would be using a form of telephone to type messages to their friends while driving 60 miles an hour. Nevertheless, a good teacher would have trained future drivers to be cautious and to keep their eyes on the road at all times, inculcating the values that would equip them for safe use of whatever tempting distractions the future might bring.

If we commit ourselves to ensuring that our law students are fully conversant with current ethical issues relating to technology in the legal profession, we will provide them with essential tools for their future as practicing lawyers. Not only does this approach warn them about the many pitfalls that await them today, but it also instills in them some of the most important habits of competent lawyers –innovative thinking and prudent judgment. Competent lawyers of tomorrow will always be looking for creative ways to accomplish their clients' lawful objectives, especially in the use of emerging technologies. At the same time, lawyers who will be successful in riding the next waves of technological disruption will be the ones who maintain a skeptical and cautious approach to each shiny new object that is dangled before them.

Future events such as these will affect us in the future, my friends. Although those of us who teach and write in the area of legal ethics may not yet appreciate it, we are on the front lines of the battle over the future of the legal profession. If we embrace the challenge of imbuing our approach to the study of legal ethics with a focus on technological innovation, in both our teaching and our scholarship, we can be important voices at this time of transformation. There is nothing to fear, and everything to be gained, by assuming our rightful role today.