ARTICLES

The Dangers of Using Social Media in the Legal Profession: An Ethical Examination in Professional Responsibility

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INTRODUCTION

Imagine going through a divorce and a friend recommends the lawyer that she used for her own divorce. However, she cannot recall the attorney’s first name or the name of his firm but she is able to recall his last name and the city in which his firm has an office. Suppose you then decide to investigate the referral from your friend. You anxiously go online to search for this attorney with all the information you have. In today’s world, you will more than likely find the attorney that you are looking for with only the two pieces of data you entered. Twenty years ago, that would not be the case and you would be stuck looking for a divorce attorney via the tedious task of flipping through a mountain of yellow pages in the phonebook. In the modern scenario, it is a winning situation for both the prospective client and attorney. The client has easily located someone she feels she can trust and is able to learn more about the attorney and his or her area of practice via the attorney’s website or advertisement of services on social media. The attorney is also potentially gaining a new client, simply by word of mouth combined with the help of social media. Though not every situation involves such a positive outcome, it is fair to say that social media has created an ease in the ability to advertise and research that never existed before. But just as with all great things, some precaution must be taken in order to make advertising on social media work within the parameters set by the American Bar Association’s (ABA) Model Rules of Professional Conduct (MRPC).

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This paper will highlight the potential areas of risk that can accompany social media use in the law profession, with a focus on advertising issues and confidentiality. Part I outlines the history of attorneys advertising their services and explains the MRPC that will be examined throughout the paper. This part also details the types of social media on which attorneys rely and how attorneys may use social media to attract new customers and conduct their practice. Part II illustrates the dangers of advertising legal services on social media platforms. In addition, this part highlights current issues that have arisen by using hypothetical and real-world illustrations. Part III demonstrates that using social media to advertise or communicate with clients may not always be the appropriate avenue to take, as it can trigger the waiver of attorney-client privilege or permeate confidences protected by the attorney-client relationship. Part IV examines if new amendments to the MRPC are necessary to handle the emergence of social media usage in the law profession or if the current rules are worded in such a way that they are applicable to issues connected to using social media within the law profession. This part also offers suggestions as to how states may combat the problems associated with lawyers advertising and using social media platforms in their capacity as a lawyer. Finally, Part V examines the American Bar Association’s views on the necessity of a new social media rule.

I. LAWYER ADVERTISING MEETS SOCIAL MEDIA: THE MODERN WAY TO SOLICIT YOUR CLIENTS

Lawyers are allowed to advertise their services and specialties in order to create business.1 Without such advertisements, solo and smaller sized firms would have a difficult time surviving in such a competitive field.2 Additionally, advertising is necessary in order to communicate to prospective clients the wide variety of services from which they can select.3 Advertising for legal services can be found in many forms, including a mailer sent to your home, an advertisement on a billboard, or even an advertisement posted on a bus zooming by you during rush hour. It is important to note that the form of permitted advertising is state dependent and an attorney should check with his or her state rules to see how best to

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2. Davis C. Bae, The Illusion of Size (And Other Ways to Compete with the Big Competition), AMERICAN BAR ASSOCIATION (May 2009), http://apps.americanbar.org/lpm/lpt/articles/mgt05091.shtml.
proceed. The intent of advertisements should be clear: there should be the conveyance of the firm name, services offered, and how to contact the firm.

Advertising was not always a right afforded to the legal profession. The ban on advertising was overturned in 1977 when the Supreme Court reasoned that in order to “preserve the ‘free flow’ of commercial information, states cannot wholly ban lawyer advertising, but can regulate false, deceptive, or misleading advertisements.” States are unable to institute a total ban on legal advertisements because “lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection.” The First Amendment, of course, prohibits any law from impeding on the right to free speech. However, First Amendment protection of legal advertisements does not mean that every advertisement is permissible. One cannot claim to be the best attorney in the state or advertise that he or she has never lost a case. To laymen, these terms are concrete and indicative of the exact service that he or she will receive. Laymen expect that upon reading those words, if you are hired as their attorney, you will automatically win their case because you have claimed to literally be the best attorney in the state. Such advertising would lead to numerous cases of malpractice based on false advertising and misleading statements. Therefore, in order to prevent such a catastrophe within the profession, an attorney is able to turn to the American Bar Association’s MRPC that provide guidelines for acceptable and permissible behavior related to the law profession. Each state adopts and tailors the MRPC as it finds fit, though the primary principles remain consistent in each state’s adoption of the MRPC.

The rules that will be examined in this paper are MRPC 1.6, 7.1, 7.2, 7.3, and 7.4. Rule 1.6 addresses the confidentiality of information. This rule “governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer’s representation of the client.” Rule 7 and its subparts are referred to as the “advertising rules” and direct lawyers on the specifics involved with lawyer solicitation of clients and the types of advertising that are permitted.

Rule 7.1 is entitled “Communications Concerning A Lawyer’s Services.” This rule states, “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.” A communication is considered false or misleading if the communication

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7. U.S. Const. amend. I.
contains “a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”\textsuperscript{11} This rule governs all communications that pertain to a lawyer’s services and highlights that all communication must be truthful.

Rule 7.2 is simply called “Advertising”\textsuperscript{12} and illustrates the overarching rule pertaining to advertising. It is important to note that this rule provides a caveat in that “questions of effectiveness and taste in advertising are matters of speculation and subjective judgment.”\textsuperscript{13} This means that states are afforded a great deal of flexibility in determining what is considered an appropriate means of advertising. Important for this paper, the commentary of MRPC 7.2 does refer a reader to MRPC 7.3 when examining the means of advertising that can be considered to happen in “real-time.”

The next rule in the advertising section is MRPC 7.3, pertaining to the solicitation of clients.\textsuperscript{14} Rule 7.3 shows the limits of solicitation with a client and who may or may not be contacted by an attorney. Additionally, it shows what type of outside services the lawyer can employ to help obtain potential clients. The purpose for this rule is to “prohibit the type of advertising that has serious potential for abuse to the extent that the prohibition does not infringe on an attorney’s constitutionally protected commercial free speech.”\textsuperscript{15}

Lastly, MRPC 7.4 outlines the information that an attorney may disclose relating to his fields of practice and specialization.\textsuperscript{16} All of the aforementioned advertising rules are in place to allow potential clients to access truthful information that they may require without the hazard of being poached by hungry lawyers in search of business.

According to a 2012 poll, nearly 85% of U.S. law firms use social media for marketing purposes.\textsuperscript{17} Though social media continues to expand into new platforms, the most commonly examined include Facebook, Twitter, and LinkedIn, as well as professional blogs. It was found from the 2012 ABA Legal Technology Survey that 88% of responding firms have some information available on LinkedIn, 58% reported using Facebook for

\begin{footnotes}
\item[11.] Id.
\item[12.] Model Rules of Prof’l Conduct R. 7.2 (2010).
\item[13.] Model Rules of Prof’l Conduct R. 7.2 cmt. 3 (2010).
\item[14.] Model Rules of Prof’l Conduct R. 7.3 (2010).
\item[16.] Model Rules of Prof’l Conduct R. 7.4 (2010).
\item[17.] 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, 256 (2013).
\end{footnotes}
advertising purposes, and 13% have a firm account on Twitter.\(^\text{18}\) It is not unreasonable to assume that these numbers will only go up as younger generations of lawyers assume roles in law firms.

All of these social media forums revolve around the same common theme: distributing information. Information is shared about who works at the firm, how to contact the firm, what the firm specializes in, etc.\(^\text{19}\) Nevertheless, the “practice of law seems at odds with this information-sharing revolution.”\(^\text{20}\) After all, the law profession centers on the ability to maintain confidential attorney-client relationships and attorneys are “ethically obligated to guard and filter the information provided to them . . . [being] bound by duties of confidence and discretion[]” under the Model Rule of Professional Conduct 1.6.\(^\text{21}\) Attorneys are “expected to be thoughtful, reserved, and circumspect—anything but information-impulsive.”\(^\text{22}\) A great deal of precaution is thus required in order to ensure that the use of social media within the law profession does not violate this critical rule. This risk will be examined later, as it is first necessary to illustrate the advertising rules and their potential perks and downfalls.

Social media has grown from simple websites into complex and dynamic worlds of their own, complete with real time responses and updates.\(^\text{23}\) Websites offer attorneys and law firms a twenty-four hour marketing tool, explaining the “particular qualifications of a lawyer or a law firm, explaining the scope of legal services they provide and describing their clientele[] . . .”\(^\text{24}\) Additionally, newer forms of social media, such as Twitter, have also been embraced by the law world. A recent search reveals that “organizations like the American Bar Association and various law schools have Twitter accounts.”\(^\text{25}\) It is not only law organizations that have Twitter accounts, but also the largest law firms in the world have

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\item \(^\text{18}\) Id. (citing ABA, 2012 ABA Legal Technology Survey Report on Web and Communication Technology (Aug. 2012)).
\item \(^\text{21}\) Id.
\item \(^\text{22}\) Id.
\item \(^\text{25}\) Angela O’Brien, Comment, 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).
\end{itemize}
embraced the new age of social media. It is likely that in upcoming years, many more firms of varying sizes will also join this new social media revolution as the phenomena becomes more engrained in our daily lives.

This revolution in client communication is not the first that the law field has encountered. It used to be considered unprofessional for a lawyer to have a telephone in his or her office. The telephone was thought to take time away from the attorney processing higher-level issues and a distraction from work. Additionally, the same pushback was felt when computers became introduced into the workplace. Computers were to be used by the lawyer’s secretary or assistant, not by an attorney. The attorney was not to waste valuable time typing up his own emails or memos. However, as shown throughout history, the more our society becomes accustomed to something, the more comfortable and accepting it is of that behavior. The same struggle that was experienced with telephones and computers is now occurring with the usage of social media.

II. THE DANGER OF USING SOCIAL MEDIA IN ADVERTISING

Advertising online seems relatively harmless. It is inexpensive, can reach clients globally, and can be uploaded right from the comfort of your own home. However, advertisements for legal services are not this simple. There is a fine line between when advertising on the Internet, whether it be through email or when posted on a homepage, constitutes “direct mail” contact (which is constitutionally protected by the United States Supreme Court) and when this advertising resembles “in-person” and “live telephone” contact that is prohibited by MRPC 7.3. The State Bar of Michigan issued an informal ethics opinion which noted “posted information is in the nature of general material, non-targeted, and is seen or used when a user gains access to the venue upon which information is posted.” This opinion reasons that in instances involving posted material, it is the Internet user initially reaching out and it is thereby the user that exposes him or herself to the information. This is juxtaposed with the “in-person” solicitation that puts an individual on the spot and can be overwhelming as well as intrusive. The opinion found that “[s]ince the user initiates the contact with the posted information, MRPC 7.3 is not

28. Id.
29. Id.
30. Id.
31. Id.
triggered."\textsuperscript{34} It went on to note that sending form communications online is akin to "sending postcards through the US Mail . . . .\textsuperscript{35} The rational was that it "is not as private as sending a sealed letter, and there is an expectation, but no guarantee, that the communication has been received by the intended recipient."\textsuperscript{36} Thus, email advertisements are treated more similarly to directed mail solicitations as opposed to "real-time in-person or telephone solicitation."\textsuperscript{37} Additionally, email announcements imitate "direct mail in the receiver’s ability to enter a mailbox, identify the sender and subject matter prior to opening the transmission, and choose how to treat the communication."\textsuperscript{38} Therefore, the threshold allowance for online advertising is if a general audience can reach the information and the attorney does not, in a real-time platform, take the first step to directly communicate or advertise to a pre-identified individual.

Many lawyers engage in maintaining law related blogs.\textsuperscript{39} Blogs are an ideal medium "for scholarly discussion of legal issues, but lawyers should never use blogs to detail work experiences that may betray client confidences or impede justice."\textsuperscript{40} \textit{Hunter v. Virginia State Bar} illustrates the fine line that attorney-bloggers must navigate. In this case, there was a blog maintained by two attorneys, which was accessible via the law firm’s website.\textsuperscript{41} Much of the posted content reflected cases in which Hunter obtained favorable results for the firm’s clients. Hunter’s posts were claimed to be in violation of MRPC 7.1 and 7.2.\textsuperscript{42} Hunter argued that these posts were primarily political speech and not commercial.\textsuperscript{43} This was an important distinction for the court to make, as "[t]he distinction then is outcome-determinative in First Amendment jurisprudence because restrictions on commercial speech are subject to intermediate scrutiny, while content-based restrictions on political speech generally are subject to a higher standard of strict scrutiny."\textsuperscript{44} The Virginia Supreme Court ruled that these posts were predominately commercial speech, as Hunter admitted that his motivation for the blog was at least in part economic.\textsuperscript{45}

\textsuperscript{34} \textit{Id.}  
\textsuperscript{35} \textit{Id.}  
\textsuperscript{36} \textit{Id.}  
\textsuperscript{37} \textit{See Birdsell & Janow, supra} note 15, at 695.  
\textsuperscript{38} \textit{Id.}  
\textsuperscript{39} Joshua Landau & Kate Willcox, \textit{Within the Law: Dealing With Non-Confidential Sensitive Information in the Age of Online Legal Tabloids}, 23 Geo. J. Legal Ethics 667 (2010).  
\textsuperscript{40} \textit{See O’Brien, Comment, supra} note 25, at 537.  
\textsuperscript{43} \textit{Id.}  
\textsuperscript{44} \textit{Id.} at 20–21.  
\textsuperscript{45} \textit{Id.} at 21.
The posts were also determined to be advertisements, in that they described cases where he had won a favorable result for his client.\textsuperscript{46} The most important takeaway from this recent case is that though an attorney may want to highlight his winning record, any sort of post could be taken to be misleading to a potential client, and therefore, the posted material on a law-related website must be very closely monitored.

Blogs and other websites that allow readers to comment back to the author are another area where caution should be taken. If you have such an area where “readers can ‘talk’ to the authors and each other[,] [it] allows prospective clients to create a dialogue with attorneys.”\textsuperscript{47} This dialogue can be a cause for concern because “when posting to either a professional legal blog or a personal blog, which conspicuously notes that the author is an attorney[,] . . . the attorney-blogger inadvertently may develop an attorney-client relationship with a blog commenter.”\textsuperscript{48} Additionally, due to the possibility of real time responses in interactions such as these, there is a dangerous likelihood that a potential client may believe that the attorney he or she is conversing with has agreed to be his or her attorney.\textsuperscript{49} This could create the presumption of an attorney client relationship, as this relationship “‘may be implied ‘when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney’s professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.”\textsuperscript{50} Therefore, “whether an attorney-client relationship exists by implication is ultimately a factual determination based upon the circumstances presented by a particular case.”\textsuperscript{51} If an attorney-client relationship is found to exist, “many obligations attach—certainly the lawyer will be assuming, for example, the duties of competence, communication, confidentiality, and conflict-free advice.”\textsuperscript{52} If such relationship has been created inadvertently and a lawyer does not uphold his duties as an attorney, it could ultimately lead to a malpractice liability.\textsuperscript{53}

\textsuperscript{46} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Evan R. Shirley, Lawyers, Social Networking, and How to Avoid Falling Into Ethical Traps, 14 HAW. B.J. 123, 127 (2011).
\textsuperscript{51} Id.
\textsuperscript{52} Hope A. Comisky & William M. Taylor, Don’t Be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas—Discovery, Communications with Judges and Jurors, and Marketing, 20 TEMP. POL. & CIV. RTS. L. REV. 297, 319 (2011).
There are a few precautions an attorney can take when operating a blog or a website that allows for reader comments or questions. One suggestion is to “avoid answering fact-specific questions, instead tailoring a response to a broader legal issue.”54 Additionally, a “lawyer should make clear to a prospective client that the lawyer is not providing advice or any other service and that the lawyer is not agreeing or planning to provide any legal services for the prospective client.”55 After all, the purpose of allowing for these sorts of questions is not to distribute free individualized advice but rather to advertise. It is to show that you are a competent attorney in an area of law. By allowing your responses to appear on your website, it offers prospective clients a way to evaluate your work without having an in-person consultation. Warnings should also be stated on these sites to help ensure that those reading the websites understand that this is just general advice and is not to be construed as legal advice for anyone reading the blog. It is easy to see how advertising in real time social media can quickly escalate into other issues, such as the formation of attorney-client relationships, which will be discussed later in more detail.

The key difference in determining when activities such as these are acceptable under the MRPC is that “real time in interactive communication is treated as solicitation, but sequential communication is treated as advertising.”56 The communication is a matter of timing: if you are the first party to initiate contact in real-time between yourself and a prospective client, this is prohibited, but if you respond to a party in real-time or are only advertising services on a real-time platform, this is permitted behavior. For example, a lawyer could tweet “about a recent court ruling that might be of interest to people following him or her . . . .”57 This would be an acceptable form of social media usage by an attorney. On the other hand, if someone tweeted he or she had been involved in a motor vehicle accident and a lawyer reaches out to that individual with a tweet, “call me! #lawyer,” that would then constitute direct and prohibitive contact pursuant to MRPC 7.3, because the lawyer initiated contact in real-time.58 Therefore, if a client reaches out to you first, and you then responded in a real-time social medium, it is likely that you would not trigger a violation of MRPC 7.3. This violation would not occur due to the fact that the client took the initial step and you are not soliciting him or her at this point—you are only responding to the contact. The analogy was given that if something is in real time, it would be the equivalent of calling someone on

54. See Browning, supra note 17, at 270.
56. See Munneke with et al., supra note 27, at 19.
57. See Browning, supra note 17, at 274.
58. Id.
the phone and saying, “please hire me.”69 When applied to the current MRPC 7.3, this analogy aligns perfectly with Comment 1 of this Rule. Comment 1 explains the reasoning behind the prohibition of the in-person or real-time solicitation. The Comment says that these live or “in-person” forms of contact are dangerous as the solicited person is being subjected to “the private importuning of the trained advocate in a direct interpersonal encounter.”60 The “in-person” solicitation can be overwhelming to someone in the already stressful position of choosing legal counsel resulting in a compromising situation.61 The person may feel pressured to choose the person standing before them as his or her legal representation, even if he or she does not feel comfortable with that person as their representation.62 The law field does not want to pressure or mislead individuals into selecting lawyers and through careful edits of advertising material, steps are being taken to ensure this does not happen in virtual worlds.63

Another large issue that can appear with online advertising and the usage of social media is the “alter ego phenomenon.”64 The phenomenon details that the normal restraint shown in a real life setting has a dangerous possibility of disappearing when a lawyer has the ability to create an online version of him or herself.65 The idea is that “personal restraint and other immutable conditions are often abandoned in favor of a more perfect ‘screen personality.’”66

The most likely place for this “alter ego” to appear is via LinkedIn’s (or another similar website) specialty section or endorsement section.67 This endorsement section allows others to declare that you possess a certain skill or characteristic.68 These endorsements appear on your personal “profile,” visible to anyone that searches for you on the website. These terms of endorsement or skillset may run afoul of Rule 7’s advertising rules.69 A chief reporter for the ABA Commission on Ethics 20/20 says

59. Id.
60. MODEL RULES OF PROF’L CONDUCT R. 7.3 cmt. 1 (2010).
62. Id. at 457.
64. See Shirley, supra note 49, at 127.
65. Id.
66. Id.
67. Id.
69. See Shirley, supra note 49.
that acceptance of an endorsement of skills of which you do not possess would be misleading and violate MRPC 7.1. The Ethics Advisory Committee of the South Carolina Bar offered its insight on a hypothetical website that allowed for peer endorsement and client ratings. The Committee said that “a lawyer who adopts or endorses information on any similar website becomes responsible for conforming all information in the lawyer’s listing to the Rules of Professional Conduct.” Therefore, in South Carolina, you assume personal responsibility for the endorsements and are liable if it is found that these traits are misleading or false.

However, not everyone believes that attorneys should be held responsible under the MRPC for endorsements provided by third parties. Others believe that because these are not self-made statements by the attorney, they do not fall within the periphery of the Rule and therefore the lawyer cannot be held liable. This “alter ego” of an attorney may also be formed by client testimonials that are posted on an attorney’s website. Testimonials may be truthful for that particular client’s case, but can lead to unjustified expectations of the attorney’s work or ability for a different case. There has been no issuance of a statement or guidepost by the ABA on this subject matter so attorneys are left to balance the risk of going before a disciplinary panel or ensuring that their name and firm are searchable within social media.

Endorsements do not always come at the hands of others. In 2012, the South Carolina Supreme Court reprimanded a young lawyer for his misleading statements online and the misrepresentation of facts regarding his legal skillset and experience. The lawyer had only recently passed the bar and claimed to be competent in over 50 different practice areas, though he had little to no experience in any of these areas. It is easy to see how a prospective client, already in a panicked state due to needing legal counsel, would not realize that there would be no possible way for a newly admitted lawyer to already have sufficient knowledge in over fifty different practice areas. This false advertising sets both the client and attorney up for failure, as well as tarnishing the reputation of the legal community.

Lawyers using professional networking sites such as LinkedIn or Avvo also have another area to be wary of when creating a professional

72. Id.
74. See Shirley, supra note 49, at 128.
76. See Browning, supra note 17, at 271.
profile. Aside from third party endorsements, there is a section on each personal profile page that is entitled “skills and expertise.” Two individual states have felt the need to comment on this particular section of the profiles, as it could be misleading to those shopping for legal services.\textsuperscript{77} The New York State Bar Association was the first to address this issue, saying that to list one’s skills or areas of expertise on LinkedIn would be no different than an attorney listing his specialities on the firm’s website for which he worked.\textsuperscript{78} The New York State Bar Association Committee on Professional Ethics did draw the line at an attorney designating that he or she is an “expert” in a particular area of law.\textsuperscript{79} They felt that this could be a violation of MRPC 7.1 and 7.4, as it could lead a potential client to believe that the attorney is a specialist in the given area.\textsuperscript{80} The Florida Bar has examined this question twice—once in April 2013 and again in September 2013. In April, the Bar issued guidelines regarding social media for its attorneys and said “[r]egulations . . . include prohibitions against statements characterizing skills, experience, reputation or record unless they are objectively verifiable.”\textsuperscript{81} The Florida Bar’s September opinion was different than New York’s, in that it “concluded that lawyers who are not certified in a practice area ‘may not list areas of practice under the header ‘Skills & Expertise’ even if it was noted elsewhere on their LinkedIn profiles that they are neither certified nor an ‘expert.’”\textsuperscript{82} However, these opinions are overshadowed by \textit{Peel v. Attorney Registration and Disciplinary Commission of Illinois}, in which the United States Supreme Court held that “states may not constitutionally impose a blanket prohibition on a lawyer’s truthful communication that the lawyer is certified as a specialist by a bona fide organization.”\textsuperscript{83} The issue in \textit{Peel} revolved around whether there was First Amendment protection of an attorney’s letterhead that designated him as a civil trial specialist.\textsuperscript{84}

\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.}
\textsuperscript{82} See N.Y. St. Bar Assoc., Op. 972 (2013); supra note 78.
necessary because those designations could be potentially misleading under MRPC 7.4. The Court struck down the Commission’s ban and said “[t]he Commissioner’s authority is necessarily constrained by the First Amendment to the Federal Constitution, and specifically by the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking [sic] than is concealment of such information.” The Supreme Court held that the First Amendment allows for attorneys to advertise that they are certified specialists if there is a “qualified organization to stand behind that certification.” Additionally, “states can require an attorney who advertises ‘XYZ certification’ to demonstrate that such certification is available to all lawyers who meet objective and consistently applied standards relevant to practice in a particular area of law.” It was this ruling that led to the amendment of MRPC 7.4 in August 1992, allowing for attorneys to show certifications and specializations that are backed by a qualified organization.

The final area of social media advertising that will be discussed is coupon websites that advertise the purchase of legal services. Imagine being able to get a flat-rate reduced price for legal services! This very occurrence happens on the popular website, Groupon. These coupon websites allow for a business or individual to offer their services or products at a reduced rate. The catch is that the business or individual advertising must share half of the profits earned from advertising with the advertising company. Lawyers have recently “begun offering legal services through this site, alongside advertisements for restaurants, spas, and home improvement services.”

Currently, six states have issued opinions on the usage of Groupon for legal services. Indiana and Alabama have both disapproved such websites. Indiana takes issue with the “reasonable fee” language of MRPC 7.2, which states that a lawyer may pay a “reasonable cost” for advertising. Indiana’s disallowance for such sites (among other non-related reasons) is due to the fact that many of these coupon sites will ask attorneys for at least half of the fees collected for the services and this goes beyond what MRPC defines as “reasonable.” Alabama also does not

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85. Id. at 99.
86. Id. at 108.
87. Id. at 109.
88. Id.
89. See supra note 83.
91. See Browning, *supra* note 17, at 276.
94. Id.
allow its attorneys to use the website to advertise services to prospective clients. However, Alabama’s disallowance is based on the notion that “[u]nless the lawyer places restrictions on the type of services offered and on the number of deals available for purchase, the lawyer may find his caseload becomes unmanageable.”95 This can become problematic as “unmanageably high caseloads affect every area of representation, including preparation, thoroughness and communication with the client.”96 Additionally, according to Alabama’s adaptation of the MRPC, “if fees are stated in the advertisement, the lawyer or law firm advertising must perform the advertised services at the advertised fee, and the failure . . . to perform an advertised service at the advertised fee shall be prima facie evidence of misleading advertising . . . .”97 It is clear that not only can these advertisements result in issues with advertising, but they can also trigger other violations of the MRPC such as the ability to diligently represent each new client that may come along due to advertising in such a manner.98

However, North Carolina, South Carolina, Minnesota, and New York have all given their state attorneys the approval for using such sites, though not without some words of caution.99 These states have all indicated that there is no issue with fee sharing between the attorney and the coupon websites under MRPC 5.4.100 New York says, “[t]he offered discount must not be illusionary, but must represent an actual discount from an established fee for the named service.”101 There must be an actual discount shown because it would be deceptive “to apply the discount to a fee that he does not regularly charge.”102 To illustrate, if an attorney “quotes $500 as his customary fee for an uncontested divorce but in fact charges many of his clients only $400 for that service, to offer a discount from a $500 ‘customary fee’ would be misleading and improper.”103 The New York opinion also stated that the attorney must “clearly disclose[] that a lawyer-client relationship will not be created until after the lawyer has checked for

98. Id.
103. Id.
conflicts and determined whether the lawyer is competent to perform a service appropriate to the client.”\textsuperscript{104} Similarly, North Carolina also requires lawyers not to be misleading in their advertisements as well as “explain that the decision to hire a lawyer is an important one that should be considered carefully and made only after investigation into the lawyer’s credentials.”\textsuperscript{105} This extra step seems to serve as a warning to clients to think about whether a purchase for legal work on their beloved coupon site is the right fit for his or her current legal issues. Additionally, North Carolina requires that should an attorney be unable to serve the client or should the client change his or her mind, the attorney must refund the amount that was used to purchase the coupon.\textsuperscript{106} For the sake of public policy, this seems only fair. However, it does put the attorney in the precarious situation of setting aside great lengths of time in order to investigate a matter or set up initial consultations for clients, who may or may not need an attorney’s services.

South Carolina issues the same warnings as New York and North Carolina, but interestingly, is the only opinion that addresses the issue of soliciting prospective clients. The opinion notes that these coupon websites would not violate “the requirements of Rule 7.3 . . . because the lawyer will not be communicating directly with the users of the website and because the lawyer does not know whether the prospective clients who may use the website will be in need of legal services in a particular matter.”\textsuperscript{107} Therefore, the four states that do allow for the advertisements of legal services on coupon websites all stipulate that the attorney must be truthful in advertising so as to not mislead, warn of the lack of attorney-client privilege until the lawyer has checked for conflict, and verify competency on the legal matter.

III. SOCIAL MEDIA MAY NOT ALWAYS BE THE RIGHT FORUM: PROTECTING ATTORNEY-CLIENT PRIVILEGE

The other large area that deserves attention is the attorney’s duty of confidentiality when using social media. The establishment of this privilege appears easily formed, especially to non-lawyers, who are typically unaware of when this privilege begins and ends. It is therefore up to the attorney to ensure that the privilege is formed only in authentic relationships and that no online advertising or solicitation creates this


\textsuperscript{106} \textit{Id.}

presumption in the minds of prospective clients.\textsuperscript{108} Furthermore, the lawyer must also let the client know of any possible risks regarding breaches of confidentiality if those risks are present.\textsuperscript{109} Thus, it is important to understand how the advertising rules apply to the ever-growing use of technology in today’s business because “as technology continues to develop, what once was said in private may easily be a public conversation with disciplinary repercussions.”\textsuperscript{110}

The ABA states that the possibility of this inadvertent attorney-client relationship occurs only when “the lawyer gives the prospective client a ‘reasonable expectation’ that he or she is willing to enter into a relationship.”\textsuperscript{111} There is no bright line rule as to what may trigger a reasonable expectation of an attorney-client privilege. It may be that a prospective client visits the attorney’s website and completes an online questionnaire that asks general questions about the potential client’s case.\textsuperscript{112} This prospective client may then believe that the attorney is reviewing his or her submitted information and not look for alternate counsel.\textsuperscript{113} The statute of limitations could very easily be missed should this individual not confirm that the attorney has or has not taken on his or her case.

Another instance where this may occur is with a blog that distributes general advice but also includes an area to post a legal question for the lawyer-author to answer. If an individual posts a question and the attorney responds, the individual may rely on this information without verifying if the legal advice was correct.\textsuperscript{114} This is a situation in which the individual may or may not believe an attorney-client relationship was formed but also highlights the danger with legal blogs, as individuals may believe that everything posted is valid law, regardless of if he or she is in the same state or without taking into consideration the facts and circumstances. It is well established that lawyers are able to provide legal information to the public but it is “transformed into legal advice if the lawyer applies analysis of the law to the particular facts of an individual’s situation.”\textsuperscript{115} As mentioned before, it is very important on any legal website to “avoid addressing

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\item\textsuperscript{109} See Munneke with et al., supra note 27, at 14.
\item\textsuperscript{110} Ellen Eidelbach Pithuk, \textit{Ethical Issues for Lawyers Involving the Internet}, 60 \textit{Advoc.: Litig. Sec. St. B. Tex.} 21 (2012).
\item\textsuperscript{111} Browning, supra note 17, at 270.
\item\textsuperscript{112} See Comisky & Taylor, supra note 52, at 319.
\item\textsuperscript{113} Id.
\item\textsuperscript{114} Id.
\item\textsuperscript{115} Thomas Roe Frazer II, Symposium, \textit{Social Media: From Discovery to Marketing—A Primer for Lawyers}, 36 \textit{Am. J. Trial Advoc.} 539, 564 (2013).
\end{itemize}
highly specific facts and wherever possible expressly state that the answer should not be construed as legal advice.\textsuperscript{116}

Though these are only a sampling of hypotheticals, a real life situation involving social media and the attorney-client privilege took place in 2005. It is “one of the few decisions that has analyzed the formation of the attorney-client relationship through Internet communications.”\textsuperscript{117} In \textit{Barton v. United States}, the law firm representing the plaintiffs in a class action suit posted a questionnaire on its website to contact prospective clients.\textsuperscript{118} Though at the time of submission this information seemed to be under the attorney-client privilege, the lower court ruled that there was no formation of such privilege.\textsuperscript{119} The lower court said that the right to the privilege was waived when each plaintiff checked a “yes” box on the disclaimer form, acknowledging that the questionnaire did not constitute a request for legal advice and that the plaintiff was not forming an attorney-client relationship by submitting this information.\textsuperscript{120} On appeal, the Ninth Circuit reversed this decision and found that the information received was confidential information pertaining to a perspective client. The court went on to say that the checking of the “yes” box did not equate to waiver of confidentiality nor the attorney-client privilege.\textsuperscript{121} The court concluded, “the changes in law and technology that allow lawyers to solicit clients on the internet [sic] and receive communications from thousands of potential clients cheaply and quickly do not change the applicable principles.”\textsuperscript{122}

Additionally, if there is already an attorney-client privilege in place, the attorney must be careful about his or her use of social media with the client in order to not violate such privilege or confidentiality. In \textit{Scott v. Beth Israel Med. Ctr. Inc.}, the attorney and his client were exchanging electronic messages related to the case, which was an action against the client’s current employer.\textsuperscript{123} The court ruled that there was no attorney-client privilege allowed for these messages and their content, as the employer owned the computer on which the messages were sent.\textsuperscript{124} It reiterated that “[a]s with any other confidential communication, the holder of the privilege and his or her attorney must protect the privileged communication; otherwise, it will be waived.”\textsuperscript{125} This serves as a warning

\begin{itemize}
  \item[116.] Browning, \textit{supra} note 17, at 270.
  \item[117.] Comisky \& Taylor, \textit{supra} note 52, at 320 (citing \textit{Barton v. U.S. Dist. Court Cent. Dist. Cal.}, 410 F.3d 1104, 1108–12 (9th Cir. 2005)).
  \item[118.] \textit{Barton v. United States}, 410 F.3d 1104, 1105 (9th Cir. 2005).
  \item[119.] \textit{Id.} at 1108.
  \item[120.] \textit{Id.} at 1107.
  \item[121.] \textit{Id.} at 1111.
  \item[124.] \textit{Id.}
  \item[125.] \textit{Id.} at 440.
\end{itemize}
to lawyers tempted to use social media forums to contact clients.\textsuperscript{126} If a lawyer avoids using social networking sites to communicate with clients, it “prevents confidential information from being viewed by others especially if privacy settings are not in place because anything that is posted on a blog or social networking site is available to the public.”\textsuperscript{127} Legal ethicist John Steel summarizes by noting “[t]here’s a tension between the duty of confidentiality and the Facebook norm of enormously reduced, if not nonexistent, personal boundaries.”\textsuperscript{128} Attorneys should not avoid or be prevented from using social media, “[h]owever, attorneys should never use social networking sites to communicate with their clients about ongoing or past matters related to their case.”\textsuperscript{129}

The ABA Commission on Ethics 20/20 has also said that social media usage requires a change to MRPC 1.6, which deals with confidential information.\textsuperscript{130} In August 2012, the ABA House of Delegates approved the Commission’s proposal to add paragraph (c) to MRPC 1.6.\textsuperscript{131} The amended MRPC 1.6 (c) now says, “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.”\textsuperscript{132} This amendment changed the past rule in which there was no ethical obligation to protect client information that is collected, recorded, or stored in a digital manner that may be accessed by an outsider.\textsuperscript{133} The Commission acknowledged that the duty to take reasonable steps to protect client confidentiality was stated in areas of several other rules. However, it felt that “in light of the pervasive use of technology to store and transmit confidential client information, this existing obligation should be stated explicitly in the black letter of Model Rule 1.6.”\textsuperscript{134} The addition of paragraph (c) to MRPC 1.6 is indicative of the impact social media and technology have made on the legal profession. The usage of social media and technology had added new ethical obligations that are recognized to be important enough to warrant inclusion in the black letter law.

This new amendment to MRPC 1.6 can be applied when information is unintentionally disclosed or when it is accessed without authority (i.e.

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\item[126.] See O’Brien, Comment, supra note 25, at 535.
\item[128.] Id. at 535 (citing Leslie, supra note 127).
\item[129.] O’Brien, Comment, supra note 25, at 535.
\item[131.] Id.
\item[132.] Browning, supra note 17, at 262–63 (citing MODEL RULES OF PROF’L CONDUCT R. 1.6(c) (as amended Aug. 2012)).
\item[133.] See ABA COMM’N ON ETHICS 20/20, supra note 130, at 4.
\item[134.] Id. at 2.
\end{enumerate}
third party hacking into a lawyer’s email account or law firm network).\textsuperscript{135} However, this paper focuses on the amendment’s applicability to disclosures that occur when employees or agents of the lawyer or the lawyer himself, releases the information on a social media platform without express authority or consent of the client.\textsuperscript{136} This amendment was necessary, as the previous Model Rule 1.6 did “not indicate what ethical obligations lawyers have to prevent such a revelation.”\textsuperscript{137} As illustrated by the following examples, the ethical obligation referred to in MRPC 1.6 has been ignored by many attorneys. In 2012, a public defender posted a photo to her private Facebook account that shed a negative light on her client.\textsuperscript{138} The posting of the photo resulted in the judge granting a mistrial. The lawyer was subsequently fired and the Public Defender’s Office issued a statement that “‘when a lawyer broadcasts disparaging and humiliating words and pictures, it undermines the basic client relationship . . . .’”.\textsuperscript{139} Additionally, another public defender was fired from her position and received a 60-day suspension of her law license due to postings on her blog.\textsuperscript{140} In the aforementioned case of Hunter v. Virginia State Bar, the lawyer was also charged with violating confidentiality because, without client consent, he posted about cases he had won on his blog.\textsuperscript{141} The Virginia Supreme Court did not agree and it had been found that the information that Hunter posted about was information that was already available to the public, and therefore no violation of confidentiality had occurred.\textsuperscript{142} The court noted that “a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom.”\textsuperscript{143} The court ultimately concluded that based upon the evidence of this case, “to the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections.”\textsuperscript{144} Thus, no confidence was broken. As shown from the above examples, behavior and postings on social media that is accepted outside the confines of the law profession is not behavior that is condoned or allowed within the MRPC.

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\textsuperscript{135} Id. at 4.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{139} Id.
\textsuperscript{140} See Browning, supra note 17, at 266 (citing In re Peshek, No. 6201779 (Ill. Att. Registration & Disciplinary Comm’n, Aug. 25, 2009)).
\textsuperscript{141} Hunter v. Va. State Bar, 744 S.E.2d 611, 613 (Va. 2013).
\textsuperscript{142} Id. at 620.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\end{footnotesize}
IV. THE ONGOING DEBATE: ARE NEW MODEL RULES OF PROFESSIONAL
CONDUCT NECESSARY TO ACCOMMODATE THE USAGE OF SOCIAL
MEDIA IN THE LAW PROFESSION?

After one learns of the potential pitfalls that can happen to a lawyer using social media in his or her practice of law, the focus then centers on what can be done to change this area or to make improvements. Many have asked whether the current MRPC are written efficiently enough to be applied to social media or whether there should be a new set of Rules written specifically for the purpose of managing issues related to social media. Some have argued that “without a model rule to spur action, many state bars have similarly been slow to provide clarification on social media and social networking issues, and merely tell their attorneys that the ‘regular rules still apply.’” The present trend has been to use the current Rules, indicated by the multiple opportunities to implement new amendments regarding social media, proposing new amendments to the current Rules, and teaching responsibility of social media usage alongside existing Rules.

Some states, even upon implementation of new editions of the MRPC, have yet to make amendments addressing social media related problems. New York is a recent example, as its newest edition of the New York Rules of Professional Conduct went into effect on April 1, 2009. Social media was well developed by 2009 and there was enough exposure to potential issues to allow for new amendments or rules to be developed to address the pitfalls of social media.

It has been argued that a new rule in the MRPC, specific to social media, would provide more guidance rather than leaving this information up to each individual state supreme court to decide. The creation of a new Model Rule “and the local rules it inspires will not only set uniform

expectations but also will clarify these expectations both now and over time as social media and social networks evolve.”¹⁴⁹ This uniformity would help streamline approaches to social media and create solidarity in the profession.

Others argue that new social media rules are not necessary. They point to the existing rules, explaining that they cover any issue that may arise with social media. For example, Model Rule 1.1 deals with competence. Many believe that it is not “reasonable for an attorney today to be ignorant of the standard features and capabilities of word processing and other software used by that attorney . . .”¹⁵⁰ Interestingly, Canada addressed this issue in 2004, stating that “[l]awyers must be able to recognize when the use of a technology may be necessary to perform a legal service on the client’s behalf, and must use the technology responsibly and ethically.”¹⁵¹ Therefore, some believe that the other Model Rules cover issues related to technology and social media sufficiently enough to not warrant any new rules or amendments.

However, some states have taken steps to address issues related to social media usage even without the implementation of a new Model Rule. Michigan has proposed requiring that any advertisement display the name of an active Michigan attorney as responsible for the advertisement.¹⁵² The proposal would apply to both traditional and social media forms of advertising. Along with the name, any posting on social media should contain an explanation of where the attorney is and is not licensed to practice, the locations in which an attorney maintains law offices, a statement that the attorney does not seek to represent clients in a certain state (if applicable), a statement that the attorney does not seek to represent anyone based only upon visiting the attorney’s website, a statement that the attorney will not represent anyone discovered through the use of a website if such site does not comply with the advertising and other local rules of the state in which the potential client is located, and finally, each of the aforementioned disclaimers should be written in an intelligent manner and displayed in a prominent position within the social media platform.¹⁵³

¹⁴⁹. Id.
¹⁵⁰. Tom Mighell, Symposium, Avoiding a Grievance in 140 Characters or Less: Ethical Issues in Social Media and Online Activities, 52 ADVOC. LITIG. SEC. ST. B. TEX. 8, 8 (2010) (citing Me. Ethics Opinion No. 196 (Oct. 2008)).
reasoning for such extensive disclaimers and warnings is to prevent some of the previously illustrated confusion related to the use of social media. Nonetheless, there are certain instances in social media in which warnings are just not practical. For example, what is an attorney to do when there is a platform inflicted restriction on number of words (e.g. Twitter)? This 140-character limitation is non-negotiable and “can make it impossible to include the required disclaimer requirements.”

In cases such as this, some legal scholars have advocated that lawyers should just avoid it along with any other new technology with which they feel uncomfortable. This does not seem a practical option, both ethically and professionally. As explained, the attorney has an ethical duty to keep up with any change that is relevant to his or her practice of law, including unfamiliar technology. On a professional level, if an attorney does not feel the need to embrace new technology and social media, that attorney risks losing business and surviving in the ever-changing law world.

In November 2010, the Kentucky Bar Association proposed a regulation that would “bar attorneys from attempting to solicit clients via social networking platforms like Facebook and MySpace unless the social media communications are submitted to the Bar’s Advertising Commission and subject to the payment of a $75 filing fee.” This is an example of some of the more extreme steps that states are taking to combat social media issues. It could be speculated that the addition of the filing fee is added to create a deterrence from making vast and quick changes to an already approved advertisement. The combination of fees and waiting for a response of approval from the Bar Association would mean that


the ability to constantly edit and add to postings on social media sites means that a recommendation or endorsement may have several iterations; the attorney responsible for the site would have to review each iteration to ensure compliance with the rules on endorsements, fields of expertise and material representations.\textsuperscript{157}

The delay of approval may make an attorney think twice before posting otherwise questionable material. A rule similar to the proposed Kentucky rule already exists in Texas, requiring that any email solicitation contain the word “advertisement” in the subject portion of the email and again at the beginning of the text of the email.\textsuperscript{158} Additionally, “[b]oth e-mail solicitations and websites must be reviewed by the State Bar of Texas Advertising Review Department . . . .”\textsuperscript{159}

However, such requirements may be in violation of the First Amendment and commercial speech protection. Recently, a law firm in Louisiana challenged its Bar’s requirement to submit all Internet advertisements to a review committee, claiming the requirement violated the First Amendment.\textsuperscript{160} The district court found that the Louisiana State Bar Association’s request to have every Internet advertisement submitted for approval was unconstitutional as the regulation of ads in no way “directly and materially advance[d] the State’s interests . . . .”\textsuperscript{161} If the regulation did advance the state’s interests, then it may be able to be regulated. The winning law firm commented on the importance of the ruling mentioning that “[t]he court not only noted that states must have a reason to regulate Internet speech, but it also recognized that the Internet media is different from broadcast media, and is entitled to unique protection.”\textsuperscript{162} Though this is only the first published case on this topic, commentators have already begun voicing their disapproval of state bars requiring submission of advertisements before they are posted. One blogger notes, “[i]n the First Amendment context, the rule is that one may speak and risk damages—but not here. Blog postings can be newsworthy, and delay can be deadly; waiting for pre-publication review may mean there is no point in posting the blog entry at all.”\textsuperscript{163} The blogger continues

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\item\textsuperscript{157} Comisky & Taylor, supra note 52, at 316 (citing Steven Seidenberg, Seduced: For Lawyers, the Appeal of Social Media is Obvious. It’s Also Dangerous, A.B.A. J., Feb. 2011, at 53).
\item\textsuperscript{158} See Pitluk, supra note 110, at 22.
\item\textsuperscript{159} Id.
\item\textsuperscript{160} Public Citizen, Inc. v. La. Attorney Disciplinary Bd., 642 F. Supp. 2d 539, 544 (E.D. La. 2009).
\item\textsuperscript{161} Id. at 559.
\item\textsuperscript{162} Louisiana’s Regulation of Internet Speech by Attorneys Declared Unconstitutional, PRWEB (Aug. 4, 2009), http://www.prweb.com/releases/louisiana/lawyer-advertising/prweb2714354.htm.
\item\textsuperscript{163} Julie Hilden, A Louisiana Law Firm Challenges, On First Amendment Grounds, State Bar Advertising Rules that May Affect Attorney Blogs: The Issues the Suit Raises, and
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by noting that “this isn’t just a speech-slowing measure, it’s a speech-killing measure.” Only time will tell if other attorneys and organizations challenge such requirements under the First Amendment.

The issues relating to the usage of social media can be fought at another level: law school. Unsurprisingly, the newest entrants and graduates of law school are geared toward technology. These students must be “undergirded with practical and thoughtful training in technological professionalism in order to preserve the duties of confidentiality, competence, and to avoid malpractice.” The entire necessity of teaching technological professionalism in law school can be summed up by realizing that educators “must [now] teach a generation of students who use technology without a second thought to pause and think twice about the technology they employ.” The new generations require law schools’ professional responsibility courses to adopt a new dynamic approach.

Students often view the professional responsibility class as a means to an end: it gets them closer to taking the bar. The class has a reputation for being dull and exhaustive. However, it does not have to be that way. The class can be used as an interactive learning tool to illustrate how to use social media in a more responsible way. A handful of schools have already begun to illustrate to their students the damage that social media can do to their legal careers. The West Virginia University College of Law “encourage[s] students to use [social media] as a professional tool” and “seek[s] to model how social networking can contribute to a professional public presence by using it to communicate with the world.”

Harvard Law School allows its students to create blogs using Harvard’s prestigious domain name. Upon viewing the set-up page for the blog, the user sees that the page lists terms of use and warns the blogger about who may view the page as well as what constitutes appropriate content. Though this page does not claim to be used as a way to teach professional responsibility, it can be used as a future model for other law schools.

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164. Id.
166. Id.
167. Id. at 237 (citing Aliza B. Kaplan & Kathleen Darvil, Think [and Practice] Like a Lawyer: Legal Research for the New Millennials, 8 LEGAL COMM. & RHETORIC: JALWD 153, 154–55 (2011)).
170. Id.
schools. Schools could allow for their students to use their domain names to set up law-related blogs. This would allow a monitoring of the information that is posted and could allow a professor to illustrate what material is deemed to be acceptable and what posted material could get an attorney in trouble on a blog.

It is important for professors, instead of having an overall ban on technology in the classroom, to explain the proper time and place for technology. Requiring professors to expound upon the etiquette of using technology in the law profession may seem like a remedial task to place upon the instructor, but it is important to recognize that the upcoming generations of attorneys do not recall a time prior to technology and social media being involved with everything they do. It has been said that clinical teaching provides the best way to teach new generations about the use of social media in the law profession, as clinical teaching has practical application and in-context learning. Professor Mark Neal Aaronson said “[C]linical legal education seeks not just to impart legal skills, but to encourage students to be responsible and thoughtful practitioners.” Possible ideas to implement in the clinic settings include having students review the clinic’s Technology User Agreement. This would allow students to “identify possible loopholes (inadvertent or not), or violations one might make unwittingly[...].” This methodology of teaching in the professional responsibility class with real-world application in a clinic may be one of the strongest ways of reinforcing the dangers and precautions that should be taken when a lawyer uses social media in his or her law practice.

V. THE AMERICAN BAR ASSOCIATION’S VIEW ON NEW SOCIAL MEDIA RULES

Many references have been made to the ABA Commission on Ethics 20/20 and its role in the development of the legal profession’s usage of social media. The Commission was formed to examine the role of technology (including social media) to see how it applies to the current set of Model Rules. The Commission stated that its “Rule and Comment-based proposals necessarily offer more general guidance and do not offer advice regarding the use of any particular type of technology.” Relating to the idea of competency, the Commission added verbiage to Comment 6

171. See Otey, supra note 165, at 226.
172. Id. at 229 (citing ROY STUCKEY ET AL., BEST PRACTICE FOR LEGAL EDUCATION: A VISION AND A ROADMAP 168–69 (2007)).
174. See Otey, supra note 165, at 241.
175. Id.
176. ABA COMM’N ON ETHICS 20/20, supra note 130.
of MRPC 1.1, which now indicates that “competency mean[s] more than just keeping up with statutory developments or common law changes in one’s particular field, but also having sufficient familiarity with and proficiency in technology that may affect both the substantive area of practice itself and how the lawyer delivers these services.”

The Commission also proposed to amend Rule 1.18, which outlines duties to prospective clients. The Commission would like to change the word “discusses” with “consults.” The way the current Rule reads implies that there is a “two-way verbal exchange (e.g., an in-person meeting or telephone conversation) and does not capture the idea that Internet-based communications can, in some situations, give rise to a prospective client relationship.” This new change is thought to help attorneys to “identify the precautions that they should take to prevent the inadvertent creation of a prospective client-lawyer relationship in a digital age and help the public understand the consequences of communicating electronically with a lawyer.”

Though it may be a long time before the ABA ever introduces rules or specific guidelines as to how to handle social media, it is clear from its embrace of Twitter and the recent ABA Commission on Ethics 20/20 that it believes social media is here to stay and it has jumped on the bandwagon. The ABA Commission on Ethics 20/20 has submitted its three years’ worth of research and new amendments are being made to the current rules. As it stands now, it does not appear that the ABA is making any vast movement toward implementing a new set of rules nor does it appear necessary. After all, it is “the offending content, rather than the medium, that matters.” The rules are vague and flexible for the very reason that it allows for the profession to adapt to new ways to conduct business without the need to constantly add or edit rules with introduction of every new medium or platform. The rules have been amended in ways that reflect the “realities of 21st century law practice.”

There is no need to add a new rule specifically targeting social media, as technology changes too rapidly for a specific rule to be implemented and “the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available.” Therefore, the ABA should not adopt a new rule specifically addressing social media, but should continue to adjust and amend current rules to allow for maximum flexibility and coverage of possible issues.

177. Browning, supra note 17, at 259.
179. Id.
180. Browning, supra note 17, at 271.
181. ABA COMM’N ON ETHICS 20/20, supra note 130.
182. Id.
CONCLUSION

The world today is fast paced and instant gratification is sought in every situation, including the quest for legal representation. Therefore, in order to remain in the sights of prospective clients, many attorneys invade a multitude of social media platforms to ensure that their name and firm is available round-the-clock. This eagerness to be found and to advertise should be approached with hesitation and caution. After all, it is very easy to find yourself before your local court explaining why you did not mean to violate your state’s professional responsibility code.

The MRPC seek to provide guidance and clarity to attorneys as they embark upon their advertising mission. Rules 7.1-7.4 provide guidance as how best to advertise as well as the legally allowable methods of contacting prospective clients. Rule 1.6 provides the boundaries that an attorney must adhere to in order not to create an unintentional attorney-client relationship or on the flip side, violate a pre-existing attorney-client relationship through the incompetent handling of technology and social media. Every area of social media should be approached with these rules in mind.

The MRPC have been recently amended by the ABA, though some argue that an entirely new set of rules should be adopted. While this debate rages on, there are other avenues to explore to ensure lawyers are getting the protection and education they need about social media. Law schools, both in class and through clinical experience, can emphasize the dangers of social media as well as provide a practical situation in an effort to guide students through the best ways to market themselves or their firm without violating the rules. Additionally, some state Bar Associations have proposed requiring all attorneys to submit their advertising material for review before posting can occur, to add a name of an attorney associated with the advertisement, or to pay a filing fee for each new advertisement. This would slow down the posting process and allow for reflection on the material and another set of eyes to scan for possible violations. The ABA does not appear to be issuing a new rule anytime soon and there is not a real necessity to do so. The current rules are flexible enough to be applied to the current use of social media. At the end of the day, however, it is important to remember that these rules are created for the protection of the prospective client and to ensure the decorum of the law community remains. Approach social media with caution and care, remembering to contact your local bar association with any doubts, questions, or concerns to avoid possible penalties and violations.