

**WHAT HAPPENS ON SOCIAL MEDIA . . . COULD DERAIL  
YOUR LEGAL CAREER: TEACHING E-  
PROFESSIONALISM IN EXPERIENTIAL LEARNING**

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ABSTRACT

*Social media has fundamentally changed how people communicate and engage with one another in modern society. Because it is so embedded in our culture, it is no surprise that corporate America and other industries, including the legal industry, utilize social media to engage with the public, advertise and market their services and products, and share information. An attorney who fails to utilize social media will not only be invisible and less credible, they will also forfeit their position as the “go-to” lawyer and miss out on rising sectors as sources of new business. Therefore, future lawyers need to develop social media skills to be successful in the legal profession. That said, with any technology, there are certain risks to using it improperly, which can potentially derail a law student’s (or legal professional’s) career. In order to better prepare students for law practice, law schools should be teaching basic and fundamental social media skills, including how to engage in a professional manner on these platforms and the legal and ethical risks of using this technology.*

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## INTRODUCTION

Social media, for better or worse, is here to stay.<sup>1</sup> It has fundamentally changed the legal profession “bringing with it a range of benefits and challenges.”<sup>2</sup> As a result, law students and lawyers need to develop competency with this technology to be successful in the legal profession. Not only do they have to understand how to utilize social media effectively and professionally, but they should also appreciate the perils of improper use. In other words, students must become e-professionals and engage online while adhering to relevant professional codes of conduct.<sup>3</sup>

So, what is social media anyway? Social media has been defined as “forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share

1. Cameron Leach, *Social Media: Here to Stay*, CLEACHMUSIC (Apr. 5, 2018), <http://www.cleachmusic.com/blog/2018/4/5/social-media-here-to-stay>.

2. Kylie Burns & Lillian Corbin, *E-Professionalism: The Global Reach of the Lawyer’s Duty to Use Social Media Ethically*, J. PROF. LAW. 153, 171 (2016).

3. *Id.* at 155.

information, ideas, personal messages, and other content (such as videos).”<sup>4</sup> In other words, it is all about conversations.<sup>5</sup> The different types of social media include “[w]ebsites and applications dedicated to forums, microblogging, social networking, social bookmarking, social curation, and wikis.”<sup>6</sup> While “[m]any people believe that social media is limited to the large social platforms . . . [like] Facebook, Twitter, [and] LinkedIn,” it is really much larger than that.<sup>7</sup> It also includes video and photo-sharing sites such as YouTube, Snapchat, Flickr, and Instagram; blogs; and other social networking sites like Pinterest, Tumblr, Google+, and Reddit.<sup>8</sup>

What makes social media different from other forms of communication is its breadth and reach.<sup>9</sup> Unlike traditional internet communication, such as email, which tends to be more personal between sender and recipient, the ability to access social media from all over the world allows users to contribute and interact with others on an unprecedented level.<sup>10</sup> It has become such an integral part of modern society with nearly 73% of the public using more than one social media platform.<sup>11</sup>

Given its popularity with the public, it is only natural that attorneys would use social media. According to the American Bar Association’s (ABA) 2017 Legal Technology Survey Report, 81% of attorneys “report maintaining a presence on social networks for professional purposes.”<sup>12</sup> “With nearly 300 million users, LinkedIn provides lawyers with simple, cost-effective means to network with other professionals and to develop new business.”<sup>13</sup> Thus, as “more legal practitioners jump on the social media bandwagon,” logically,

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4. *Social Media*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/social%20media> (last visited Dec. 21, 2019).

5. RYAN GARCIA & THADDEUS HOFFMEISTER, *SOCIAL MEDIA LAW IN A NUTSHELL 2* (2017).

6. Margaret Rouse, *Social Media*, TECHTARGET WHATIS.COM, <https://whatis.techtarget.com/definition/social-media> (last updated Feb. 2019).

7. GARCIA & HOFFMEISTER, *supra* note 5, at 2.

8. Jamie, *65+ Social Networking Sites You Need to Know About*, MAKE A WEBSITE HUB.COM, <https://makeawebsitehub.com/social-media-sites/> (last updated June 5, 2019).

9. Audrey Willis, *6 Ways Social Media Changed the Way We Communicate*, CIRCA INTERACTIVE (Aug. 5, 2017), <https://circaedu.com/hemj/how-social-media-changed-the-way-we-communicate/> (discussing the transformative nature of social media platforms).

10. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1743 (2019) (Alito, J., concurring) (discussing the dangers of the internet and arguing that the internet offers sex offenders an “unprecedented degree of anonymity” and covertness); Michael C. Smith, *Social Media Update*, 62 THE ADVOC. (TEXAS) 197, 203–04 (2013) (detailing increasing use of the internet and social media over the past two decades).

11. Aaron Smith & Monica Anderson, *Social Media Use in 2018*, PEW RESEARCH CTR. (Mar. 1, 2018), <http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/>.

12. Allison Shields, *2017 Social Media and Blogging*, ABA TECHREPORT (Dec. 1, 2017), [https://www.americanbar.org/groups/law\\_practice/publications/techreport/2017/social\\_media\\_blogging.html](https://www.americanbar.org/groups/law_practice/publications/techreport/2017/social_media_blogging.html).

13. Vanessa S. Browne-Barbour, “*Why Can’t We Be ‘Friends’?*”: *Ethical Concerns in the Use of Social Media*, 57 S. TEX. L. REV. 551, 554–55 (2016) (footnote omitted).

aspiring [lawyers]—law students—would also want to establish a social media presence. Yet, “[m]any law students are hesitant to become involved in social media, in part because many law schools discourage it.” By discouraging law students to take a responsible and active role in social media circles, law schools may be encouraging their students to forego “a valuable opportunity to network and interact with potential future employers and colleagues.”<sup>14</sup>

Because social media skills are necessary for the practice of law, law schools should educate students on the legal and ethical risks of using this technology.

To accomplish the goal of educating students on social media, law schools should use experiential legal education courses, particularly externship seminars. Experiential pedagogy encourages learning by doing, self-reflection, and the development of professional identity.<sup>15</sup> Similarly, social media allows students to develop their “brand” and specialized knowledge in a particular area of law, and network and interact with potential future employers and colleagues.<sup>16</sup> But, like any technology, there are risks to using it.<sup>17</sup> When used improperly, social media use can potentially derail a law student’s (or legal professional’s) career.<sup>18</sup> Thus, engaging students in self-reflection on effective and professional social media use, as well as navigating the legal and ethical risks to using social media, will better prepare them for the realities of living and working in a technology-driven age.

Part I of this Article provides a brief history of the evolution of social media and examines the rise of its use in the legal profession.<sup>19</sup> Part II focuses on the importance of understanding social media and the potential legal and ethical risks of improper use.<sup>20</sup> Then, Parts III and IV provides an overview of law school reform and a snapshot into the status of if and how law schools are providing curricular education on social media and the law.<sup>21</sup> Finally, the Conclusion advocates for the creation of seminars that specifically address

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14. Patrick M. Ellis, *140 Characters or Less: An Experiment in Legal Research*, 42 INT’L J. LEGAL INFO. 303, 324 (2014) (footnotes omitted).

15. Kelly S. Terry, *Externships: A Signature Pedagogy for the Apprenticeship of Professional Identity and Purpose*, 59 J. LEGAL EDUC. 240, 264–65 (2009).

16. See Douglas Holt, *Branding in the Age of Social Media*, HARVARD BUS. REV. (Mar. 2016), <https://hbr.org/2016/03/branding-in-the-age-of-social-media> (discussing social media branding benefits in the context of employers and the notion of “crowdculture”).

17. See *infra* notes 114–15, 290–97 and accompanying text (providing examples of legal professionals who derailed their careers with social media blunders).

18. See *infra* notes 114–15, 290–97 and accompanying text.

19. See *infra* Part I.

20. See *infra* Part II.

21. See *infra* Part III–IV.

questions around social media within the externship context, where students are actively immersed in legal practice.<sup>22</sup>

## I. THE EVOLUTION OF SOCIAL MEDIA

Today, “there are . . . social networks with user bases larger than the population of most countries.”<sup>23</sup> It “is one of the fastest growing communication vehicles in the world.”<sup>24</sup> As social media is constantly evolving, it is important to look first at where it started and then how it evolved into a phenomenon that is an integral part of modern society.<sup>25</sup>

### *A. History of Social Media*

In the 1970s, the first form of social media was called the “bulletin board system,” or BBS.<sup>26</sup> BBSes acted as forums or blogs where “people could engage” in discussions or post pictures, much like today.<sup>27</sup> However, these systems lacked popularity since a computer was not a common commodity at the time.<sup>28</sup>

Social media shifted underground in the 1980s.<sup>29</sup> The majority of BBSes “were . . . connected to adult content, pirate software, hacking theories, anarchist movements and virus codes.”<sup>30</sup> However, in the 1990s, social media started to take on the form it has today when personal computers became more available to the masses.<sup>31</sup> Chat services like AOL and instant messenger started to gain popularity.<sup>32</sup> Music sites, such as Napster, made online music free.<sup>33</sup> From this stemmed social networking sites like Six Degrees, which allowed users to create “personal profiles, friends lists, and

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22. See *infra* notes 304–06 and accompanying text.

23. *The History and Evolution of Social Media*, WEBDESIGNER DEPOT (Oct. 7, 2009), <https://www.webdesignerdepot.com/2009/10/the-history-and-evolution-of-social-media/>.

24. Jan L. Jacobowitz & Danielle Singer, *The Social Media Frontier: Exploring a New Mandate for Competence in the Practice of Law*, 68 U. MIAMI L. REV. 445, 454 (2014).

25. See *infra* Parts I.A–B.

26. Ken Sundheim, *Where They Started, the Beginning of Facebook and Twitter: A Brief History of Social Media*, BUS. INSIDER (Aug. 5, 2011), <https://www.businessinsider.com/a-brief-history-of-social-media-2011-7>.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Keith Terrell, *The History of Social Media: Social Networking Evolution!*, HISTORY COOP. (June 16, 2015), <https://historycooperative.org/the-history-of-social-media/>.

32. Sundheim, *supra* note 26.

33. *Id.*

school affiliations.”<sup>34</sup> Following Six Degrees came MySpace and “[m]odern day [s]ocial [m]edia giant Facebook.”<sup>35</sup> The intent of these early social networking sites was “to establish online networks among like-minded peers and friends.”<sup>36</sup>

Over time, the number of users on social media has grown and its uses have expanded.<sup>37</sup> Previously, “users joined . . . [social media] sites . . . to share information and . . . user-generated content with [a] smaller network[] of friends” and family.<sup>38</sup> “Today, however, social media sites are becoming popular tools” for information sharing and marketing.<sup>39</sup> For instance, “when Facebook added video-sharing capacity to Instagram[,] . . . five million videos were uploaded in the first twenty-four hours.”<sup>40</sup> In fact, since Facebook opened up to the public in 2006, it “has grown to over a billion users.”<sup>41</sup> Use of social media has become so prevalent that according to a recent Nielsen survey, in 2018, “young adults (18–34)” spent “43% of their time . . . on digital platforms[,]” with nearly “a third of their time spent” on smartphone apps or browsing the web.<sup>42</sup>

While “social media sites share certain key characteristics, the purposes and architecture of these sites are nearly limitless.”<sup>43</sup> What makes social media different from other forms of communication then is its breadth and reach.<sup>44</sup> Social media encompasses a wide reach of communication that is “as diverse as human thought.”<sup>45</sup> In “contrast to the earl[ier] days of the Internet[,] . . . today’s websites are interactive” and allow users to connect

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34. Selene Presseller, *#Copyright Infringement via Social Media Live Streaming: Shortcomings of the Digital Millennium Copyright Act*, 7 ARIZ. ST. U. SPORTS & ENT. L.J. 357, 362 (2018) (footnote omitted).

35. *Id.* at 363 (footnote omitted).

36. Raizel Liebler & Keidra Chaney, *Here We Are Now, Entertain Us: Defining the Line Between Personal and Professional Context on Social Media*, 35 PACE L. REV. 398, 402 (2014).

37. See Esteban Ortiz-Ospina, *The Rise of Social Media*, OUR WORLD IN DATA (Sept. 18, 2019), <https://ourworldindata.org/rise-of-social-media> (highlighting how much the use of social media has grown in recent history and how people now use social media to meet new people and learn about current events).

38. Michael E. Lackey, Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 152 (2012).

39. *Id.*

40. Jacobowitz & Singer, *supra* note 24, at 455 (footnote omitted).

41. GARCIA & HOFFMEISTER, *supra* note 5, at 1.

42. *Time Flies: U.S. Adults Now Spend Nearly Half a Day Interacting with Media*, NIELSEN (July 31, 2018), <https://www.nielsen.com/us/en/insights/article/2018/time-flies-us-adults-now-spend-nearly-half-a-day-interacting-with-media/>.

43. Lackey & Minta, *supra* note 38, at 151; see also danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 211 (2007) (“While SNSs have implemented a wide variety of technical features, their backbone consists of visible profiles that display an articulated list of Friends who are also users of the system.” (footnote omitted)).

44. See *infra* notes 45–48 and accompanying text.

45. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997)).

and communicate with each other and share user-generated content, such as documents and written postings, audio files, video, and music.<sup>46</sup> “Most social media services encourage” interaction and engagement with other users, “promot[ing] a two-way conversation in which web sites, resources, and people connect, create, and develop content collectively.”<sup>47</sup> Simply put, it is a “relatively unlimited, low-cost capacity for communication of all kinds.”<sup>48</sup>

Such interaction on social media can take a variety of forms.<sup>49</sup> Hashtags, for instance, allow users “to search for specific topics and keywords” when a word or phrase is preceded by a hashtag sign (#) as well as “provide a way for organizations to interact with individuals.”<sup>50</sup> “Commercials, advertisements, or general notices will now typically include a hashtag allowing individuals to interact around a brand or event no matter which platform they use.”<sup>51</sup> While hashtags grew from Twitter, now virtually all social platforms support them.<sup>52</sup> “The simplest form of social media content engagement involves a single click or action.”<sup>53</sup> Facebook allows users to react to a post by clicking the “like,” “love,” “haha,” “sad,” “angry,” and “wow” buttons.<sup>54</sup> By double-clicking on a photo, Instagram users can give it a heart.<sup>55</sup> Similarly, “Twitter users can click a heart button associated with a tweet.”<sup>56</sup> Overall, these platforms allow users to engage seamlessly with content.

In contrast, users can interact with one another and content in a more complicated manner through responses and tagging.<sup>57</sup> People can “respond to a particular piece of content,” and, depending on the social media platform, “[t]hat response can include text, photos, or other graphics but the entire response becomes part of the conversation attached to the content posted by

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46. Smith, *supra* note 10, at 203.

47. Bethany N. Whitfield, *Social Media @ Work: #PolicyNeeded*, 66 ARK. L. REV. 843, 844 (2013) (citing Ron Jones, *Social Media Marketing 101, Part 1*, SEARCH ENGINE WATCH (Feb. 16, 2009), <http://www.searchenginewatch.com/article/2064413/Social-Media-Marketing-101-Part-1>).

48. *Packingham*, 137 S. Ct. at 1736 (quoting *Reno*, 521 U.S. at 870).

49. See *infra* notes 50–56 and accompanying text.

50. GARCIA & HOFFMEISTER, *supra* note 5, at 5; see also Rebecca Kowalewicz, *How to Optimize Hashtags on Social Media*, FORBES (Dec. 26, 2018), <https://www.forbes.com/sites/forbesagencycouncil/2018/12/26/how-to-optimize-hashtags-on-social-media/#67aa699e7a17> (providing tips for organizations to use hashtags effectively).

51. GARCIA & HOFFMEISTER, *supra* note 5, at 6.

52. *Id.*

53. *Id.*

54. Elizabeth Stinson, *Facebook Reactions, The Totally Redesigned Like Button, is Here*, WIRED (Feb. 24, 2016), <https://www.wired.com/2016/02/facebook-reactions-totally-redesigned-like-button/>.

55. Ben Patterson, *9 Gotta-Know Instagram Tips for Newbies*, PCWORLD (Apr. 12, 2016), <https://www.pcmag.com/article/3049174/9-gotta-know-instagram-tips-for-newbies.html>

56. GARCIA & HOFFMEISTER, *supra* note 5, at 7.

57. See *infra* notes 58–61 and accompanying text.

the original user.”<sup>58</sup> By tagging someone, users can “intentionally include[] another user in the conversation or content.”<sup>59</sup> For example, a user could post an article and tag another user to indicate the article is also relevant to that other user.<sup>60</sup> “This may bring more attention to” that article “by explicitly including [the second user] and [her] connections in the conversation.”<sup>61</sup>

By understanding the functionality of social media, including the different ways to engage, law students and attorneys will better appreciate the legal and ethical risks of its use.<sup>62</sup>

### B. Social Media in the Legal Profession

Historically, the legal profession cautiously approached technology establishing new channels of communication.<sup>63</sup> “Despite resistance to change, the legal profession is adopting technology, including social media, at a ‘staggering rate’ as part of legal services delivery.”<sup>64</sup> This comes as no surprise given that nearly 73% of the public uses more than one social media platform.<sup>65</sup> “Lawyers must provide the online information that clients are seeking in order to establish meaningful connections with those clients.”<sup>66</sup> As such, they are employing a variety of social media sites, including Facebook, Twitter, LinkedIn, and YouTube, to communicate with other lawyers, clients, and the public.<sup>67</sup> According to the ABA’s 2017 Legal Technology Survey Report, 81% of attorneys reported “maintaining a presence on social networks for professional purposes.”<sup>68</sup> The platforms most commonly used were LinkedIn (72% of lawyers reporting a presence), followed by Facebook (34% participation), and finally Twitter (19% of attorneys reported maintaining a presence).<sup>69</sup> “Only 23% of respondents report[ed] that their firms *do not* maintain a presence on any social networks.”<sup>70</sup>

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58. GARCIA & HOFFMEISTER, *supra* note 5, at 7.

59. *Id.* at 8.

60. *See Id.* (explaining the process for tagging and how tagging works).

61. *Id.*

62. *See infra* Part I.B.

63. Jacobowitz & Singer, *supra* note 24, at 447–48.

64. Burns & Corbin, *supra* note 2, at 153 (footnote omitted) (quoting Brittany Stringfellow Otey, *Millennials, Technology, and Professional Responsibility: Training a New Generation in Technological Professionalism*, 37 J. LEGAL PROF. 199, 215 (2013)).

65. Smith & Anderson, *supra* note 11.

66. Jacobowitz & Singer, *supra* note 24, at 456 (footnote omitted).

67. *See infra* notes 68–70 and accompanying text.

68. Shields, *supra* note 12.

69. *Id.*

70. *Id.* (emphasis in original).



The report further revealed an increase in the percentage of law firms that reported that they have a blog from 26% during 2013 to 2016 to 31% in 2017.<sup>71</sup> Lawyers that personally maintain a legal topic blog increased “from 8% in 2016 to 12% in 2017.”<sup>72</sup> Of the lawyers that use social media “for professional purposes, 69% do so for professional development [or] networking,” 56% for client development, and 39% for education and awareness.<sup>73</sup> Less frequently, lawyers also used social media for case investigation and other uses.<sup>74</sup>

There are clearly numerous benefits to attorneys actively engaging on social media. “The internet and social media serve as accelerators of relationships and a lawyer’s word-of-mouth reputation.”<sup>75</sup> For instance, by maintaining an online journal or blog, lawyers may enhance their reputations and demonstrate expertise in their fields by disseminating information. In fact, lawyers “in firms of 2-9 or 50-99 lawyers each reported a greater than 50% success rate in client retention as a result of blogging.”<sup>76</sup> Use of social media further allows attorneys to “develop and maintain professional competence” through “reading and writing about recent developments in a particular area of the law.”<sup>77</sup> Social media has also arguably “levelled the playing field for lawyers.”<sup>78</sup> Lawyers now have unprecedented access to marketing, communication, preparation and trial investigation, and legal services by using professional networking skills.<sup>79</sup> Such “technological advancements in information gathering, storage, and dissemination have changed the practice of law, especially when compounded with the cultural changes within society toward an increased reliance on social networking.”<sup>80</sup> Attorneys must therefore utilize social media and other new technology to compete in the market effectively and efficiently, “develop relationships[,] and improve professional competence.”<sup>81</sup>

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71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* (quoting Kevin O’Keefe, *Lexblog, OKeefe, and Why Lawyers Blog Make TechFlash in Seattle*, LEXBLOG: REAL LAWYERS (Aug. 31, 2011) <https://kevin.lexblog.com/2011/08/31/lexblog-okeefe-and-why-lawyers-blog-make-techflash-in-seattle/>).

76. Shields, *supra* note 12.

77. Dane S. Ciolino, *Managing the Perils of Lawyer Social Networking 1* (2010) (unpublished manuscript), <http://daneciolino.com/wp-content/uploads/2013/07/2010-02-11-Ciolino-Article-re-Managing-the-Perils-of-Lawyer-Social-Networking.pdf>.

78. Burns & Corbin, *supra* note 2, at 160.

79. *Id.*

80. Katy (Yin Yee) Ho, *Defining the Contours of an Ethical Duty of Technological Competence*, 30 GEO. J. LEGAL ETHICS 853, 854–55 (2017) (footnote omitted).

81. Burns & Corbin, *supra* note 2, at 159–60 (footnote omitted) (quoting Ciolino, *supra* note 77, at 1).

In the coming years, if not already, lawyers who fail to embrace social media will be invisible and less credible. “They are . . . forfeiting their position as the ‘go to’ lawyer and missing out on emerging industries as sources of new business.”<sup>82</sup> In addition, “[t]hese lawyers are also absent from the conversation taking place among thought leaders, reporters, and business leaders” who are engaging in social media.<sup>83</sup> Thus, “writing-off the disruptive influence of social media will leave many, if not all social media holdout attorneys wondering where all of their business, and billable hours, went.”<sup>84</sup>

## II. ETHICAL IMPLICATIONS OF SOCIAL MEDIA

While social media provides many benefits to the legal profession, its use is not without risks, particularly concerning compliance with legal ethics rules.<sup>85</sup> Social media has affected “[t]he professional conduct of attorneys, prosecutors, [and] judges.”<sup>86</sup> Improper social media use can result in lawyers breaching various ethical rules, including confidentiality, competency, communication, and unauthorized practice of law.<sup>87</sup> “The ABA has provided guidance in legal ethics and professional responsibility by promulgating professional standards that serve as a model of regulatory authority governing the legal profession.”<sup>88</sup> Over time, the ABA has modified these regulations “to accommodate the expanding influence of technology on the practice of law.”<sup>89</sup> Specifically, as will be discussed below, the rule of competency has been extended to include technological competency.<sup>90</sup>

Despite these changes in the rules and widespread social media use by lawyers, a 2015 “ABA report found . . . major gaps in both the existence of and education about policies on professional use of social media” “by lawyers and law firms”:

[M]any firms still have not adopted firm-wide policies on the use of these tools. Less than half of the respondents—45%—said their

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82. Ellis, *supra* note 14, at 326.

83. *Id.*

84. *Id.* (footnote omitted)

85. See *infra* notes 86–87 and accompanying text.

86. Ken Strutin, *Social Media and the Vanishing Points of Ethical and Constitutional Boundaries*, 31 PACE L. REV. 228, 234 (2011) (footnotes omitted).

87. See Jacobowitz & Singer, *supra* note 24, at 453–54 (describing the California State Bar’s 2010 advisory opinion on “an attorney’s obligation to be attentive to available security features” regarding client confidentiality and security when using technology).

88. *Id.* at 462 (footnote omitted).

89. *Id.* (emphasis omitted).

90. Burns & Corbin, *supra* note 2, at 156–57.

firms have policies on the use of online communities and social networks, and even fewer have policies covering blogging (32%) or Twitter use (25%). Perhaps even more disturbing, over 50% of respondents overall did not know whether their firms had these policies in place—and this number was even higher for lawyers in small firms. Of those in small firms (2 and 9 lawyers), 61% were unaware of the existence of any such policies. These numbers have also remained relatively consistent over the past several years. Firms need to institute these policies and do a better job of educating their attorneys about the need for and existence of these policies.<sup>91</sup>

There is a clear need to better educate legal professionals concerning ethical, responsible, and professional use of social media.<sup>92</sup> To that end, a variety of Continuing Legal Education (CLE) courses offered across the fifty-states focus specifically on social media.<sup>93</sup> Those courses include *The Ethics of Social Media: What Attorneys Need to Know*;<sup>94</sup> *Identifying and Avoiding Social Media Traps for Lawyers*;<sup>95</sup> *Social Media and the Bar Rules*;<sup>96</sup> *Ethical Issues in Social Media*;<sup>97</sup> *Practical and Ethical Use of Social Media in Litigation*;<sup>98</sup> *The Ethics of Social Media Research*;<sup>99</sup> and *Facebook in the Workplace: The Intersection of Social Media and Employment Law*.<sup>100</sup> Such courses provide foundational knowledge and encourage attorneys to engage in e-professional and ethical use of social media. In addition, the E-

91. *Id.* at 159 (alteration in original) (quoting Shields, *supra* note 12).

92. *See supra* Part I.B.

93. I conducted a search on Google using the following phrases: “social media CLE” and “social media continuing legal education.” My research found that each state offers a CLE on social media except for Kansas, Louisiana, and Idaho (pending).

94. *Ethics of Social Media: What Attorneys Need to Know*, NAT’L ACAD. OF CONTINUING LEGAL EDUC., <https://www.nacle.com/Alaska/AK-CLE/Courses/Ethics-of-Social-Media-What-Attorneys-Need-to-Know-1048> (last visited Dec. 21, 2018).

95. *Identifying and Avoiding Social Media Traps for Lawyers*, NAT’L ACAD. OF CONTINUING LEGAL EDUC., <https://www.nacle.com/CLE/Courses/Identifying-and-Avoiding-Social-Media-Traps-for-Lawyers-398> (last visited Dec. 21, 2019).

96. *CLE: Social Media & the Bar Rules*, FLIP CAT CONSULTING LLC, <http://www.flipcatconsulting.com/learn-grow/cle-social-media-the-bar-rules> (last visited Dec. 26, 2019).

97. *Ethical Issues in Social Media*, LEXVID, <https://www.lexvid.com/cle/ethics-cle-social-media> (last visited Dec. 26, 2019).

98. *Practical and Ethical Use of Social Media in Litigation*, ALI-CLE, <https://www.ali-cle.org/course/Practical-and-Ethical-Use-of-Social-Media-in-Litigation-VCZI0524> (last visited Dec. 26, 2019).

99. *The Ethics of Social Media Research*, MINN. CLE, <https://www.minncle.org/SeminarDetail.aspx?ID=1222921801> (last visited Dec. 26, 2019).

100. *Facebook in the Workplace: The Intersection of Social Media and Employment Law*, NAT’L ACAD. OF CONTINUING LEGAL EDUC., <https://www.nacle.com/California/CA-MCLE/Courses/Social-Media/Facebook-in-the-Workplace-The-Intersection-of-Social-Media-and-Employment-Law-343> (last visited Dec. 26, 2019).

Professionalism and Social Networking work group for the National Association for Law Placement, Inc. (NALP) “has [developed] six e-guides” that discuss “e-professionalism for law students and lawyer” with various different social networking sites and everyday electronic media sources.<sup>101</sup> The e-guides include *LinkedIn: Facebook for Lawyers*,<sup>102</sup> *Effective Email Strategies for Law Students and Lawyers*,<sup>103</sup> and *Managing Your Digital Dirt*.<sup>104</sup> These are positive steps in the legal profession. However, these steps do not negate all of the risks associated with using social media. Some of the ethical standards implicated by lawyers’ use of social media are discussed below.<sup>105</sup>

### A. Confidentiality Risks

A lawyer’s use of social media creates a risk that they will inadvertently disclose confidential client information, which Model Rule 1.6(a) prohibits.<sup>106</sup> This duty to maintain strict confidentiality is not altered simply because we are dealing with a new medium.<sup>107</sup> Using social media can result in the disclosure of confidential information in a variety of ways.<sup>108</sup> Tweeting, blogging, and posting Facebook status messages “allow for instant publication of information, including information about procedural developments, interparty negotiations, courtroom developments, and business-related travel.”<sup>109</sup> Some social media sites permit users “to import [their] contact information from existing e-mail accounts,” which could publicize details about vendors, witnesses, clients, and consultants.<sup>110</sup> Even photo-sharing sites, like Instagram, can pose a confidentiality risk if such

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101. *E-Guides on E-Professionalism*, NALP, <https://www.nalp.org/eguides> (last visited Dec. 26, 2019). “NALP is an association of over 2,500 legal career professionals who advise law students, lawyers, law offices, and law schools in North America and beyond.” *What is NALP?*, NALP, <https://www.nalp.org/whatisnalp> (last visited Dec. 26, 2019).

102. Marina Sarmiento Feehan, *LinkedIn: Facebook for Lawyers*, NALP, <https://www.nalp.org/eguides> (follow “LinkedIn: Facebook for Lawyers”) (last visited Dec. 21, 2019).

103. Susanne Aronowitz, *Effective Email Strategies for Law Students and Lawyers*, NALP, <https://www.nalp.org/eguides> (follow “Effective Email Strategies for Law Students and Lawyers”) (last visited Dec. 26, 2019).

104. Tracy Evans & Gwen Ferrel, *Managing Your Digital Dirt*, NALP, <https://www.nalp.org/eguides> (follow “Managing your Digital Dirt”) (last visited Dec. 26, 2019).

105. *See infra* Parts II.A–D.

106. MODEL RULES OF PROF’L CONDUCT r. 1.6(a) (AM. BAR. ASS’N 2018).

107. *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 480 (2018) (“Lawyers who blog or engage in other public commentary may not reveal information . . . that is protected by Rule 1.6(a), including information contained in a public record, unless disclosure is authorized under the Model Rules.”).

108. *See infra* notes 109–16 and accompanying text.

109. Lackey & Minta, *supra* note 38, at 155.

110. *Id.*

photos inadvertently display trial materials, locations of personnel, or evidence.<sup>111</sup>

Every day, people blog, tweet, and post “their every thought with little self-censorship and with few repercussions.”<sup>112</sup> However, in the legal industry, improper social media use “can result in” the disclosure of “confidential information, a waiver of the attorney-client privilege, or disciplinary action” before the state bar.<sup>113</sup> Indeed, one lawyer blogged and tweeted about a case she believed to be wrongly decided in an effort to raise awareness and influence the judge, resulting in her disbarment.<sup>114</sup> Relatedly, attorneys posting about sensitive and polarizing issues on their individual Facebook pages has resulted in employment termination.<sup>115</sup>

Given that posting on social media is easy and immediate, lawyers must proactively “safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure,” including using and increasing privacy settings on such sites.<sup>116</sup>

### B. Competency with Emerging Technologies

Lawyers also have a duty to “provide competent representation to a client” under Model Rule 1.1.<sup>117</sup> At the most basic level, this duty requires a lawyer to be knowledgeable concerning the substantive law she practices in. Beyond that, one of the comments to the rule states “[t]hat 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.”<sup>118</sup> Logically, this extends to social media. In fact, “38 [s]tates

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111. *Id.*

112. *Id.* at 156.

113. *Id.* (footnote omitted).

114. *In re McCool*, 172 So. 3d 1058, 1063–64, 1084 (La. 2015) (holding that the attorney violated the model rules by using social media to spread information about the pending litigation and the contact information of the judges and to encourage people to contact the judges, warranting disbarment).

115. See John G. Browning, *Taking the Heat for a Tweet: A Look at Lawyers, the First Amendment, and Social Media*, 81 TEX. B.J. 336, 336 (2018) (citing Maggie Astor, *Texas Attorney General's Aide Resigns After Mocking #MeToo Movement*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/us/andrew-leonie-texas-attorney-general.html> (providing an example of when a lawyer's “insensitive” tweet resulted in a “publicity nightmare” and termination); see also Debra Cassens Weiss, *CBS Fires Lawyer Over Facebook Posts Calling Vegas Shooting Victims Likely 'Republican Gun Toters'*, ABA JOURNAL (Oct. 2, 2017), [http://www.abajournal.com/news/article/cbs\\_fires\\_lawyer\\_over\\_facebook\\_comments\\_calling\\_vegas\\_victims\\_likely\\_republ](http://www.abajournal.com/news/article/cbs_fires_lawyer_over_facebook_comments_calling_vegas_victims_likely_republ) (writing about the firing of a senior counsel because of her Facebook comments stating that she had no sympathy for the victims of the Las Vegas mass shooting).

116. Lackey & Minta, *supra* note 38, at 157–58.

117. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR. ASS'N 2018).

118. Jacobowitz & Singer, *supra* note 24, at 466 (alteration in original) (quoting MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2013)).

[h]ave [a]dopted [rules for] the [ethical] [d]uty of [t]echnological [c]ompetence.<sup>119</sup> The ethical opinions in those various states focus on the proper manner in which lawyers should use social media in a case, rather than whether it should be used.<sup>120</sup>

At the very least, lawyers should be aware of social media as a potential source of information and competently be able to obtain such information in (or in anticipation of) litigation. Social media users generally publish vast amounts of information online,<sup>121</sup> making it a valuable source of information. Users have claimed such posts are subject to a reasonable expectation of privacy or are otherwise privileged, but courts have seemingly rejected that notion.<sup>122</sup> Courts have further found that a privilege does not exist even if the social media user restricts access to posted material to a limited group of friends or followers.<sup>123</sup> However, ethical considerations remain, particularly when a lawyer attempts to obtain restricted information posted on a social media site by methods other than those available under the formal discovery process.<sup>124</sup> In addition, this duty also necessitates that lawyers understand the functionality of social media and social networking sites and are able to advise clients about issues that may arise from their use, including what the

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119. See Robert Ambrogi, *Tech Competence*, LAWSITES, <https://www.lawsitesblog.com/tech-competence> (last visited Dec. 22, 2019) (compiling a list of each state that has formally adopted the ABA's revised comment 8 to Rule 1.1).

120. Jacobowitz & Singer, *supra* note 24, at 466 (footnote omitted).

121. See *supra* notes 39–42 and accompanying text.

122. See, e.g., *Moreno v. Hanford Sentinel*, 91 Cal. Rptr. 3d 858, 862 (Cal. Ct. App. 2009) (deciding that a posting on a publicly-accessible myspace.com profile affirmatively removed an expectation of privacy); see also Col. Bar Ass'n Ethics Comm., Formal Op. 127 (2015) ("A lawyer may always view the public portion of a person's social media profile and any public posts . . ."); Christopher A. Page, *Time to "Friend" Facebook? Using Social Media to Win Your Case*, 23 No. 52 WESTLAW J. INS. COVERAGE 9, at \*1, \*4 (2013) (footnote omitted) (explaining that "[c]ourts across the country that have looked at a 'privacy defense' for social media discovery have thus far found no basis for such a defense" but noting that "[t]here is a growing trend toward laws protecting social media privacy").

123. See e.g., *Nucci v. Target Corp.*, 162 So. 3d 146, 153–54 (Fla. Dist. Ct. App. 2015) (citing, *inter alia*, *Patterson v. Turner Constr. Co.*, 931 N.Y.S. 2d 311, 312 (N.Y. App. Div. 2011) (concluding that photographs posted on Facebook by the plaintiff in a personal injury lawsuit were neither privileged nor protected by a right of privacy, regardless of any privacy settings the user may have established)); *T.V. v. Union Twp. Bd. of Educ.*, No. UNN-L-4479-04 (N.J. Super. Ct. Law Div. June 8, 2007) (granting the plaintiff's motion for a protective order on the ground of her privacy rights after the defendant sought the plaintiff's MySpace and Facebook pages through discovery to show evidence of the plaintiff's mental state before and after the incident, but leaving the door open for later discovery if the school could make a particularized showing of relevance).

124. Douglas R. Richmond, *Discovery of Social Networking Sites in Litigation*, 33 ENERGY & MIN. L. FOUND. § 5.05 (2012) (explaining the conclusion of the New York City Bar Association's Committee on Professional and Judicial Ethics that neither a lawyer nor the lawyer's agent may use deception to obtain information from a person's social networking website); see Nancy L. Cohen, *Ethical Duties During Litigation*, 32 COLO. LAW. 53, 54 (2003) (illustrating a scenario in which lawyers can be subject to discipline using the Colorado Rules of Professional Conduct).

client must do to preserve information that may be relevant to legal disputes.<sup>125</sup>

### *C. Communication*

It is well-established tenet that “[l]awyers have a fundamental duty to communicate with their clients.”<sup>126</sup> “In 2012, the ABA Ethics 20/20 Commission amended Comment 4 to Model Rule 1.4, changing it from ‘[c]lient telephone calls should be promptly returned or acknowledged,’ to ‘[l]awyers should promptly respond to or acknowledge client communications.’”<sup>127</sup> As methods of client communications expand (email, texting, social media, etc.), “lawyers need to understand the communication possibilities and define the technology through which they will communicate with a client.”<sup>128</sup> One way to accomplish this is to set forth the mediums the attorney will use to communicate with the client in the engagement letter. At the outset of the relationship, it is important for the attorney to define the parameters of communication.<sup>129</sup>

Relatedly, due to “the various ways lawyers use social media to communicate with prospective clients, it is important for lawyers to understand the ethical risks that may arise when giving legal advice or opinions on social media, especially when it may create an unintended attorney-client relationship.”<sup>130</sup> For instance, “a Q&A session on Twitter or a social media blog post welcoming inquiries on legal matters . . . may create a prospective client-lawyer relationship under Rule 1.18 of the ABA Model Rules of Professional Responsibility.”<sup>131</sup> “[N]o clear line exists to determine what is legal information and what is legal advice.”<sup>132</sup> A few jurisdictions including “Arizona, New Mexico, the District of Columbia, and Florida have” looked at “the issue of lawyers providing advice online” and

125. W.V. Law. Disciplinary Bd., Legal Ethics Op. 2015-02 (2015).

126. Jacobowitz & Singer, *supra* note 24, at 468.

127. *Id.* (alteration in original) (footnote omitted) (quoting MODEL RULES OF PROF'L CONDUCT r. 1.4 cmt. 4 (2012) and MODEL RULES OF PROF'L CONDUCT r. 1.4 cmt. 4 (2013)) (citing Andrew Pearlman, *Ethics 20/20 Proposal to Amend Rule 1.4 (Communication)*, LEGAL ETHICS FORUM (Feb. 27, 2012), <http://www.legalethicsforum.com/blog/2012/02/ethics-2020-proposal-on-rule-14-communication.html>).

128. Jacobowitz & Singer, *supra* note 24, at 468.

129. *See supra* notes 126–28 and accompanying text.

130. Jessica Weltge & Myra McKenzie-Harris, *The Minefield of Social Media and Legal Ethics: How to Provide Competent Representation and Avoid the Pitfalls of Modern Technology*, 2017 ABA SEC. OF LAB. AND EMP. L. 20, [https://www.americanbar.org/content/dam/aba/events/labor\\_law/2017/03/ethics/papers/myra\\_paper.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/labor_law/2017/03/ethics/papers/myra_paper.authcheckdam.pdf).

131. *Id.* (footnote omitted).

132. *See id.* at 21 (footnote omitted) (citing ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 10-457) (explaining that “[a]lthough no exact line can be drawn between legal information and legal advice, both the context and content of the information offered are helpful in distinguishing between the two”).

specifically cautioned them “to draw the line between giving specific legal advice and general information” to social media users.<sup>133</sup> Ultimately, lawyers need to understand the importance of including a disclaimer that limits their obligations and exercise caution when contacted by other social media users.<sup>134</sup>

#### D. Unauthorized Practice of Law

Model Rule 5.5 prohibits lawyers from engaging in the unauthorized practice of law in a jurisdiction in which the lawyer is not licensed.<sup>135</sup> Nonetheless, “the actions [lawyers] take in social networking situations sometimes rise to the level of practicing law.”<sup>136</sup> Social networking allows attorneys to advise clients throughout the country and beyond. As noted above, “by answering a question” in response to a social media post, an attorney may inadvertently advise a potential client.<sup>137</sup> Adding an extra layer of complication, the attorney may be inadvertently engaged with a social media user in another jurisdiction.<sup>138</sup> “Not only could you have a new client (and not realize it), but you also could be practicing law in a jurisdiction where [you are] not licensed.”<sup>139</sup> Therefore, while using social media is important and necessary for a lawyer’s professional practice, doing so in a jurisdiction without an appropriate law license can result in an ethics violation.<sup>140</sup>

### III. STATUS OF CURRICULAR EDUCATION ON SOCIAL MEDIA AND THE LAW

Technology proficiency is not only a recognized competency for lawyers, but lawyers with such skills will be in great demand after graduation.<sup>141</sup> E-professionalism, which often refers to the “professional conduct on electronic media,” is now a part of legal professionalism.<sup>142</sup> An

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133. Jacobowitz & Singer, *supra* note 24, at 478.

134. *See id.* at 477–78 (explaining that the quick nature of the internet, specifically social media, could lead to unintentional duties to a prospective client, such that a lawyer should provide a disclaimer restricting their obligations in order to avoid an accidental consultation for legal services).

135. MODEL RULES OF PROF’L CONDUCT r 5.5 (AM. BAR ASS’N 2018).

136. Erika Stillabower & Stuart I. Teicher, *Tech Tock, Tech Tock: New Technologies and the Countdown to Your Ethical Demise*, AM. BANKR. INST. 95 (2017).

137. *Id.*

138. *Id.*

139. *Id.*

140. MODEL RULES OF PROF’L CONDUCT r 5.5 (AM. BAR ASS’N 2018).

141. Simon Canick, *Infusing Technology Skills into the Law School Curriculum*, 42 CAP. U. L. REV. 663, 667 (2014).

142. Burns & Corbin, *supra* note 2, at 155.



informal survey of five states<sup>143</sup>—Illinois, New York, Florida, California, and Colorado—reveal a robust offering of Continuing Legal Education programming on e-professionalism.<sup>144</sup> For example, Illinois offers the following courses: *Technology at Trial*,<sup>145</sup> *The Importance of Technology and How to Use It at Trial*,<sup>146</sup> *Digging for Details: Free Techniques to Gather Online Intelligence for Your Legal Cases*,<sup>147</sup> and *Legal Technology 101*.<sup>148</sup> In New York, lawyers have the opportunity to take courses such as *Legal Ethics in the Digital Age* and *The Use of Social Media and Its Legal Ethics*.<sup>149</sup> Florida provides similar options like *Technology—Managing the Matrix!* and *Annual Ethics Update: Back to Basics, The ABC's of Ethics*.<sup>150</sup> Turning to California, lawyers can take *Electronically Stored Information and Attorney Competence*,<sup>151</sup> *In My Opinion: A Review of the Latest*

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143. I selected five states where there is a high volume of admitted lawyers (Illinois, New York, Florida, California, and Colorado) and reviewed the Continuing Legal Education course offerings. See *New ABA Data Reveals Rise in Number of U.S. Lawyers, 15 Percent Increase Since 2008*, AM. BAR ASS'N (May 11, 2018) (“[T]he top five areas with the largest number of active attorneys in residence are New York (177,035), California (170,044), Texas (90,485), Florida (78,244) and Illinois (63,422).”). In doing so, I discovered there is robust programming on e-professionalism and integrating and using technology in legal practice in those states. I reference only a few of the courses that have been and will be offered.

144. Burns & Corbin, *supra* note 2, at 155.

145. *Technology at Trial*, ILL. STATE BAR ASS'N, <https://www.isba.org/cle/path?pathPage=%2Fisba%2Fcourses%2F10448> (last visited Dec. 26, 2019) (summarizing a CLE course designed to educate lawyers on how to competently use technology in a case).

146. *The Importance of Technology and How to Use It at Trial*, ILL. STATE BAR ASS'N, <https://www.isba.org/cle/path?pathPage=%2Fisba%2Fcourses%2F10471%2Fwebinars%2F4881> (last visited Dec. 26, 2019) (summarizing a CLE course introducing lawyers to the benefits and potential hazards of technology and how to incorporate technology at trial).

147. *Digging for Details: Free Techniques to Gather Online Intelligence for Your Legal Cases*, ILL. STATE BAR ASS'N, <https://www.isba.org/cle/path?pathPage=%2Fisba%2Fcourses%2F9756> (last visited Dec. 27, 2019) (summarizing a CLE course that teaches lawyers how to use social media to conduct investigations in a case).

148. *Legal Technology 101*, ILL. STATE BAR ASS'N, <https://www.isba.org/barnews/2019/05/clelegaltechnology101> (last visited Dec. 27, 2019) (summarizing a CLE course that teaches the basics of Microsoft Word, PDF, and associated ethics issues).

149. *Legal Ethics in The Digital Age—Spring 2019*, N.Y. STATE BAR ASS'N, <https://www.nysba.org/store/events/registration.aspx?event=0GB14> (last visited Dec. 27, 2019) (summarizing a CLE program that examines the ethical obligations of attorneys practicing law in the “digital age”); *The Use of Social Media and Its Legal Ethics*, N.Y. STATE BAR ASS'N, <http://www.nysba.org/store/events/registration.aspx?event=0FG93> (last visited Dec. 27, 2019) (summarizing a CLE course that examines “[p]reservation, collection, and production of social media” as a tool of litigators and “address[es] disciplinary complaints based on an attorney’s improper use of digital information.”).

150. *Technology—Managing the Matrix!*, FLA. STATE BAR ASS'N, <https://tfb.inreachce.com/Details/Information/f7ec0c78-abce-452a-86ef-d28b4b68e0c5> (last visited Dec. 27, 2019) (summarizing a CLE course highlighting Florida Bar Rule changes and cybersecurity risks and safeguards for legal practices); *Annual Ethics Update: Back to Basics, The ABC's of Ethics*, FLA. STATE BAR ASS'N, <https://tfb.inreachce.com/Details/Information/27996244-ffe4-4ce4-9646-4a540750c9a5> (last visited Dec. 27, 2019) (summarizing a CLE course that in part explores ethical advertising and social media).

151. *Electronically Stored Information and Attorney Competence*, CAL. LAWYERS ASS'N, <https://cla.inreachce.com/Details/Information/cc1842f5-ccc3-4f39-bada-beae5450e5b6>, (last visited Dec.

*Technology Rules to Protect Attorney & Client Confidentiality*,<sup>152</sup> *Internet Investigative Tools for Sole Practitioners and Small Firms*,<sup>153</sup> and *Social Media and Reputation Management for Small Law Firms*.<sup>154</sup> Finally, Colorado offers *Lawyer Ethics and Texting*,<sup>155</sup> *Ethics and Digital Communications*,<sup>156</sup> and *Social Media and Confidentiality*.<sup>157</sup> Some states have even gone as far as adopting a Continuing Legal Education requirement for technology.<sup>158</sup>

In addition, Illinois, New York, Florida, California, and Colorado all have a bar association section, committee, or task force dedicated to technology.<sup>159</sup> The benefit of these bodies includes providing resources on

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27, 2019) (summarizing a CLE program that helps attorneys become competent in the area of electronically stored information (ESI), including social media).

152. *In My Opinion: A Review of the Latest Technology Rules to Protect Attorney & Client Confidentiality*, CAL. LAWYERS ASS'N, <https://cla.inreachce.com/Details/Information/42aa699c-f398-47c5-9c7a-b2b711e462d6> (last visited Dec. 21, 2019) (summarizing a CLE program that “review[s] recent State Bar Committee on Professional Responsibility and Conduct (COPRAC) opinions regarding an attorney’s use of technology, and help to ensure that [attorneys] are meeting the standards of competence”).

153. *Internet Investigative Tools for Sole Practitioners and Small Firms*, CAL. LAWYERS ASS'N, <https://cla.inreachce.com/Details/Information/792bfc27-fb96-436c-bd61-402b5b600545> (last visited Dec. 23, 2019) (summarizing a CLE program that “explore[s] the uses of the internet, including sources of discovering evidence in social media and background searches on litigants, potential clients, bench officers, clients, opposing counsel and expert witnesses” and the “ethical issues involved in communicating with represented parties when using the internet”).

154. *Social Media and Reputation Management for Small Law Firms*, CAL. LAWYERS ASS'N, <https://cla.inreachce.com/Details/Information/816d291b-0571-4edb-a560-dbc2c3e8e9df> (last visited Dec. 23, 2019) (summarizing a CLE program that teaches attorneys “the advantages and risks of law firms using social media and how to best protect their reputation[s] online”).

155. *Lawyer Ethics and Texting*, COLO. BAR ASS'N, <https://cle.cobar.org/Seminars/Event-Info/sessionalted/TS022219W> (last visited Dec. 27, 2019) (summarizing a CLE program that discusses “confidentiality issues involving unsecured transmission of texts involving sensitive case issues” and “[t]ension among the duties of competence, prudence and to communicate with clients”).

156. *Ethics and Digital Communications*, COLO. BAR ASS'N, <https://cle.cobar.org/HomeStudies/Product-Info/producted/TS121918J> (last visited Dec. 27, 2019) (summarizing a CLE program that explores “the maze of ethical issues that occur when attorneys use technology in their lives and practice”).

157. *Social Media and Confidentiality*, COLO. BAR ASS'N, <https://cle.cobar.org/HomeStudies/Product-Info/producted/ET091218J> (last visited Dec. 27, 2019) (summarizing a CLE program that discusses a lawyer’s ethical obligations as they relate to social media).

158. *See Burns & Corbin, supra* note 2, at 168 (quoting ABA COMM’N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 42 (2016)) (noting that “the Florida Bar Board of Governors ‘has approved a mandatory technology-based continuing legal education requirement’”); *see also* Bob Ambrogio, *North Carolina Becomes Second State to Mandate Technology Training for Lawyers*, LAWSITES (Dec. 5, 2018), <https://www.lawsitesblog.com/2018/12/north-carolina-becomes-second-state-mandate-technology-training-lawyers.html> (reporting that, beginning in 2019, North Carolina will require all lawyers to complete one hour per year of CLE devoted to technology training); Jason Tashea, *North Carolina Bar to Propose Mandatory Technology CLE Credit*, ABA JOURNAL (May 21, 2018), [http://www.abajournal.com/news/article/north\\_carolina\\_bar\\_to\\_propose\\_mandatory\\_technology\\_cle\\_credit](http://www.abajournal.com/news/article/north_carolina_bar_to_propose_mandatory_technology_cle_credit) (“[T]he Pennsylvania Bar . . . recommended that the state supreme court adopt a one-hour, every two-years technology CLE requirement.”).

159. *See Colorado Communications & Technology*, COLO. BAR ASS'N, <https://www.cobar.org/>

implementing technology in law practices; identifying subjects concerning technology that will impact “the delivery of legal services;” offering technology tools and education on the same to lawyers; and educating lawyers on an array of issues resulting from technology, including social media.<sup>160</sup> Thus, lawyers must be competent in technology, yet there is little focus and attention on e-professionalism in law schools.<sup>161</sup> There is no requirement for technological competency or e-professionalism in law school curriculums.<sup>162</sup> Generally, e-professionalism in schools is only an “‘add on’ to the existing ethics curriculum.”<sup>163</sup>

In order “to succeed in today’s technology-driven practice,” legal educators and law schools must intentionally consider how to engage students in technology and help them become e-professionals.<sup>164</sup> Currently, “over fifty law schools offer a concentration in technology.”<sup>165</sup> Some law schools also actively promote the use of social media by their students for professional purposes.<sup>166</sup> An informal survey of the top 150 law schools<sup>167</sup> reveals that 15 of those schools teach courses covering aspects of social

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For-Members/CBA-Sections (last visited Dec. 26, 2019) (describing the Colorado Bar Association’s sections on Communications and Technology, which address problems linked to emerging technologies); *Committee on Technology*, THE FLA. BAR, <https://www.floridabar.org/about/cmtes/cmtes-cm/cmtes-cm468/> (last visited Dec. 26, 2019) (listing the individuals on the Florida Bar’s Committee on Technology); *State Bar Board of Trustees Appoints Legal Tech Task Force to Increase Access to Justice Through Innovation*, THE STATE BAR OF CAL., (Oct. 19, 2018), <http://www.calbar.ca.gov/About-Us/News-Events/News-Releases/state-bar-board-of-trustees-appoints-legal-tech-task-force-to-increase-access-to-justice-through-innovation> (describing the State Bar of California’s Legal Tech Task Force addressing technology and the law); *Committee On Technology and the Legal Profession*, N.Y. STATE BAR ASS’N, <http://www.nysba.org/techcommittee/> (last visited Dec. 26, 2019) (describing the mission of the New York State Bar Association’s Committee on Technology and the Legal Profession); *Standing Committee on Legal Technology*, ILL. STATE BAR ASS’N, <https://www.isba.org/sections/legaltechnology> (last visited Dec. 26, 2019) (describing the mission of the Illinois Bar Association’s Standing Committee on Legal Technology).

160. *See supra* note 144 (listing several states with a bar association section, committee, or task force focused on technology).

161. Burns & Corbin, *supra* note 2, at 168.

162. *Id.*

163. *Id.* at 170; *see also Technology, Ethics, Professionalism and Legal Education (Program)*, FORDHAM UNIV. SCH. OF LAW, [https://www.fordham.edu/info/25019/ethics\\_and\\_legal\\_education/8046/technology\\_ethics\\_professionalism\\_and\\_legal\\_education\\_program/1](https://www.fordham.edu/info/25019/ethics_and_legal_education/8046/technology_ethics_professionalism_and_legal_education_program/1) (last visited Dec. 26, 2019) (describing how Fordham University School of Law is an exception and has offered a specific program on e-professionalism, which educates attorneys on how technology can be used to integrate attorney professional conduct issues into legal education and how social media scenarios are relevant to ethics in the legal field, prompting professionalism).

164. Robert C. Blitt & Reece Brassler, *Experiencing Experiential Education: A Faculty-Student Perspective on the University of Tennessee College of Law’s Adventure in Access to Justice Author*, 50 J. MARSHALL L. REV. 11, 20 (2016).

165. *Id.* at 19. (footnote omitted).

166. *See infra* notes 167–83 and accompanying text.

167. I conducted an informal search by using Google and searching “law school social media course.” Once I had a list of law schools that offered such courses, I visited the individual law school websites to learn more about the social media courses being offered.

media law and 12 specifically have social media-focused classes.<sup>168</sup> The law schools offering dedicated social media courses focus on a variety of topics, such as: (1) challenges of social media in the workplace,<sup>169</sup> (2) legal issues associated with social media,<sup>170</sup> (3) regulation of new technologies,<sup>171</sup> and (4) defamation, privacy, and First Amendment principles as they relate to social media.<sup>172</sup> SMU Dedman School of Law, for example, offers *Social Media Law*, providing “a comprehensive look at how social media is affecting the legal system.”<sup>173</sup> At Columbia Law School, students can take *Law and Regulation of Social Media*, a seminar focused on the legal issues generated by social media use.<sup>174</sup> The *Law in a New Media World* seminar at Georgetown Law examines “defamation, privacy,” and First Amendment principles that have evolved to address electronic media, including social media.<sup>175</sup>

In addition to coursework, law faculty that actively use social media and require their students to blog provide guidance and opportunity for students to engage in social media in a professional capacity. Professor Jennifer Murphy Romig at Emory Law School not only requires her students to blog in her *Advanced Legal Writing: Blogging and Social Media* class, but also maintains her own blog, *Listen Like a Lawyer*.<sup>176</sup> Professor Romig explores effective listening practices for lawyers, law students, and other legal

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168. See Appendix A (listing law school courses on social media).

169. *Law and Regulation of Social Media*, COLUMBIA LAW SCH., <https://www.law.columbia.edu/courses/sections/22732> (last visited Dec. 26, 2019); *Courses: Privacy in the Workplace*, WAKE FOREST UNIV. SCH. OF LAW, <http://academics.law.wfu.edu/courses/?id=720?id=720> (last visited Dec. 26, 2019).

170. *Dedman Law: Course Descriptions*, S. METHODIST UNIV., <https://catalog.smu.edu/content.php?catoid=25&navoid=1714&p2463=3> (last visited Dec. 26, 2019); *Intellectual Property Courses*, IU ROBERT H. MCKINNEY SCH. OF LAW, <https://mckinneylaw.iu.edu/ip/courses.html> (last visited Dec. 26, 2019); *Social Media Law (Graif)*, PENN LAW, <https://goat.law.upenn.edu/cf/coursefinder/course-details/?course=social-media-law&sec=LAW%20903001&term=2018A&page=2> (last visited Dec. 26, 2019).

171. *Law and Regulation of Social Media*, *supra* note 169; *Regulation of New Technologies - FinTech & Social Media (Fall 2018)*, BERKELEY LAW, <https://www.law.berkeley.edu/php-programs/courses/coursePage.php?clD=22562&termCode=D&termYear=2018> (last visited Dec. 26, 2019).

172. *Law in a New Media World*, GEORGETOWN LAW CURRICULUM GUIDE, <https://curriculum.law.georgetown.edu/course-search/> (last visited Dec. 26, 2019) (search “Law in a New Media World” in search box; then click on “Law in a New Media World” in the search results); *Law & Social Media*, UNIV. OF TEX. AT AUSTIN SCH. OF LAW, <https://law.utexas.edu/courses/catalog/class-details/20172/28795/> (last visited Dec. 26, 2019); *News Media Law in the Digital Age*, UCLA LAW, <https://curriculum.law.ucla.edu/guide/Course/1441> (last visited Dec. 26, 2019).

173. *Dedman Law: Course Descriptions*, *supra* note 170 (then follow hyperlink “Social Media Law”).

174. *Law and Regulation of Social Media*, *supra* note 169.

175. *Law in a New Media World*, *supra* note 172.

176. Jennifer Romig, LISTEN LIKE A LAWYER, <https://listenlikealawyer.com/> (last visited Dec. 26, 2019).

professionals.<sup>177</sup> Likewise, in *Entertainment Law and New Technologies*, Professor Tonya M. Evans at the University of New Hampshire School of Law expects her students to “maintain a Twitter account specifically for [the] class to microblog about” relevant issues.<sup>178</sup> Professor Thaddeus Hoffmeister of University of Dayton School of Law teaches courses focused on technology, including social media; edits two blogs, *Juries*<sup>179</sup> and *Social Media Law*;<sup>180</sup> and authored the book *Social Media in a Nutshell*.<sup>181</sup> These pioneers are providing a framework for developing social media skills and competencies.<sup>182</sup> By doing so, law schools can better train students on the “intricacies of technology in the practice of law,” allowing them to succeed in the practice as well as increasing their “marketability to potential employers.”<sup>183</sup>

#### IV. LAW SCHOOL REFORM AND INTEGRATION OF SOCIAL MEDIA EDUCATION WITHIN EXPERIENTIAL LEARNING

Experiential education is not new.<sup>184</sup> Experiential learning can be traced back as far as “384 B.C.E. when Aristotle wrote, ‘[f]or the things we have to learn before we can do them, we learn by doing them.’”<sup>185</sup> However, integrating experiential learning into a traditional law school education is a more recent development. What follows is a brief history of law school reform concerning experiential learning and a discussion of how integrating social media within experiential learning is necessary to better prepare law school graduates for the practice.<sup>186</sup>

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177. Zosha Millman, *Emory Law School Gets Students Blogging Early with Innovative New Class*, LEXBLOG: REAL LAWYERS (Feb. 12, 2015), <https://kevin.lexblog.com/2015/02/12/emory-law-blogging-class/>; Jennifer Romig, *supra* note 176.

178. Tonya M. Evans, *Classes*, <https://proftevens.wordpress.com/classes/> (last visited Dec. 26, 2019).

179. *Directory: Thaddeus Hoffmeister*, UNIV. OF DAYTON, [https://udayton.edu/directory/law/hoffmeister\\_thaddeus.php](https://udayton.edu/directory/law/hoffmeister_thaddeus.php) (last visited Dec. 26, 2019); *JURIES*, <https://juries.typepad.com/> (last visited Dec. 26, 2019).

180. Thaddeus Hoffmeister, *About*, LAW & SOCIAL MEDIA, <https://lawandsocialmedia.wordpress.com/author/> (last visited Dec. 26, 2019).

181. HOFFMEISTER & GARCIA, *supra* note 5, at 1.

182. *See supra* notes 176–81 and accompanying text.

183. Blitt & Brassler, *supra* note 164, at 20 (footnotes omitted).

184. *Id.* at 14 (alteration in original) (footnote omitted).

185. *Id.*

186. *See infra* Part IV.A

*A. Brief History of Law School Reform*

Examinations “of legal education . . . over the last 30 years have created momentum for curricular reform.”<sup>187</sup> In 1992, the ABA Task Force on Law Schools and the Profession released the MacCrate Report, which identified a gap between skills lawyers need and the doctrinal focus of most law schools.<sup>188</sup> In particular, the MacCrate report recognized ten fundamental skills necessary for good lawyering: (1) “[p]roblem [s]olving,” (2) “[l]egal [a]nalysis,” (3) “[l]egal [r]esearch,” (4) “[f]actual [i]nvestigation,” (5) “[c]ommunication,” (6) “[c]ounseling,” (7) “[n]egotiation,” (8) “[l]itigation and [a]lternative [d]ispute-[r]esolution” [p]rocedures,” (9) “[o]rganization and [m]anagement of [l]egal [w]ork,” and (10) “[r]ecognizing and [r]esolving [e]thical [d]ilemmas.”<sup>189</sup> This report identified skills necessary to be a competent lawyer but did not specify how law schools should guarantee “the means by which the law schools should ensure how they are implemented.”<sup>190</sup>

In 2007, the Carnegie Foundation for the Advancement of Teaching released its report entitled *Educating Lawyers: Preparation for the Profession of Law*.<sup>191</sup> Building on the themes addressed initially in the MacCrate Report,<sup>192</sup> the Carnegie Report identified “two weaknesses of traditional legal education”: professionalism and inadequate attention to teaching legal skills.<sup>193</sup> Specifically, the report emphasized “[o]ne limitation is . . . [that] legal education typically pays relatively little attention to direct training in professional practice . . . . The second limitation is law schools’ failure to complement the focus on skill in legal analysis with effective support for developing the ethical and social dimensions of the profession.”<sup>194</sup> The report further stated becoming a lawyer requires law schools to “bridge the gap between analytical knowledge and practical application.”<sup>195</sup> To do so, the Carnegie Report maintains “that apprenticeship

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187. Earl Martin & Gerald Hess, *Developing a Skills and Professionalism Curriculum—Process and Product*, 41 U. TOL. L. REV. 327, 328 (2010).

188. See generally ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 4–8 (1992) (identifying the gap between the focus of law schools and the practicing bar.).

189. Lisa K. Halushka, *The Prosecution Externship from the Classroom to the Courtroom*, 11 T.M. COOLEY J. PRAC. & CLINICAL L. 323, 337 (2009).

190. *Id.*

191. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 1 (2007) [hereinafter CARNEGIE REPORT].

192. Halushka, *supra* note 189.

193. Martin & Hess, *supra* note 187, at 331 (citing CARNEGIE REPORT, *supra* note 191, at 188).

194. *Id.* (alterations in original) (footnote omitted).

195. Halushka, *supra* note 189, at 339 (citing CARNEGIE REPORT, *supra* note 191, at 97).

is really the ‘heart of all education,’”<sup>196</sup> and it “endorses increased experiential and clinical legal education.”<sup>197</sup>

Thereafter, the Clinical Legal Education Association (CLEA) in 2013:

petitioned the ABA to “adopt an accreditation standard that requires every J.D. student to complete the equivalent of at least 15 semester credit hours after the first year of law school in practice-based, experiential courses, such as law clinics, field placements, or skills simulation courses, with at least one course in a law clinic or externship.”<sup>198</sup>

Responding to these calls for reform, law schools began to transform and implement experiential education into their curriculum.<sup>199</sup>

The ABA, however, rejected CLEA’s proposal, instead requiring law schools “to ensure its graduates . . . complete at least ‘one or more experiential course(s) totaling at least six credit hours.’”<sup>200</sup> Thus, to satisfy ABA’s accreditation standards, law schools must offer experiential courses.<sup>201</sup> That said, the ABA does not actually define “experiential.”<sup>202</sup> ABA Standard 303 provides guidance in stating “[a]n experiential course must be a simulation course, a law clinic, or a field placement.”<sup>203</sup> “[T]he primary focus” of these courses must:

1. integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302;
2. develop the concepts underlying the professional skills being taught;

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196. *Id.*

197. Karen Tokarz et al., *Legal Education at a Crossroads: Innovation, Integration, and Pluralism Required!*, 43 WASH. U.J.L. & POL’Y 11, 18 (2013) (quoting CARNEGIE REPORT, *supra* note 191, at 120).

198. Blitt & Brassler, *supra* note 164, at 16 (quoting *Clinical Legal Education Association Comment of Draft Standard 303(a)(3) & Proposal for Amendment to Existing Standard 302(a)(4) to Require 15 Credits in Experiential Courses*, CLINICAL LEGAL EDUC. ASS’N (July 1, 2013), <https://www.cleaweb.org/Resources/Documents/2013-01-07%20CLEA%2015%20credits.pdf>).

199. Blitt & Brassler, *supra* note 164, at 16.

200. *Id.* (quoting Standard 303(a)(3) of AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2015–2016).

201. Blitt & Brassler, *supra* note 164, at 16.

202. *Id.* at 17.

203. *Id.* (alteration in original) (quoting of AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2015–2016).

3. provide multiple opportunities for performance; and
4. provide opportunities for self-evaluation.<sup>204</sup>

Students engage “in supervised real world practice” allowing them to experience how legal theory “learned in the classroom translates into being an effective lawyer . . . [r]egardless of whether the experiential learning occurs in a simulation course, a clinic, or an externship.”<sup>205</sup> Students learn the skills through “repetition, faculty guidance, and the opportunity to practice the skills in a variety of complex situations.”<sup>206</sup> From this standpoint, social media aligns well with experiential education; students learn by doing.

As an increasing number of “legal practitioners jump on the social media bandwagon, it should naturally follow that . . . aspiring [lawyers]—law students—would also want to establish a social media presence.”<sup>207</sup> While most law students enter “law school with a heightened awareness of—and ability to interact with—tech based social media platforms,”<sup>208</sup> that does “not necessarily . . . translate into the types of technological interactions future attorneys will encounter within their practices of law.”<sup>209</sup> Students need to develop an understanding of technology like social media and harness it to be competent in the legal profession.<sup>210</sup> Social networking sites, like LinkedIn and Twitter, allow students to connect and build relationships with legal professionals across the country and world, which in turn can lead to professional opportunities and development of one’s professional identity. That said, “[m]any law students are hesitant to become involved in social media, in part because many law schools discourage it.”<sup>211</sup> Thus, “[b]y discouraging law students to take a responsible and active role in social media circles, law schools may be encouraging their students to forego ‘a valuable opportunity to network and interact with potential future employers and colleagues.’”<sup>212</sup>

While some law school career development offices offer programming on and resources about using social media,<sup>213</sup> law faculty are better suited to

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204. Blitt & Brassler, *supra* note 164, at 17–18 (footnote omitted).

205. Emily Traylor Vande Lune, *Settling for Six: Should the American Bar Association Have Done More to Promote Experiential Learning in Law Schools?*, 39 J. LEGAL PROF. 305, 309 (2015).

206. *Id.*

207. Ellis, *supra* note 14, at 324 (emphasis omitted) (citation omitted).

208. Blitt & Brassler, *supra* note 164, at 20.

209. *Id.*

210. *Id.*

211. Ellis, *supra* note 14, at 324 (alteration in original) (footnote omitted).

212. *Id.* (footnote omitted).

213. See *Market Yourself*, UNIV. OF S.F. SCH. OF LAW, <https://www.usfca.edu/law/career/market-yourself> (last visited Dec. 26, 2019) (providing social media workshops and resource links to teach students how to create and use social media); see also *Social Media*, UNIV. COLO. LAW SCH.,



educate and train students on this topic.<sup>214</sup> Law faculty should teach basic and fundamental social media skills, including how to engage in a professional manner on these platforms, and should educate students on the legal and ethical risks of using this technology. Thus, offering social media courses within experiential legal education can accomplish these goals.

### *B. Evolution of Externship Seminars*

In 1969, “[t]he term ‘externship’ emerged . . . when surveys of law school clinical programs referred to ‘farm-out’ clinics as externships.”<sup>215</sup> Over time, “the term ‘externship’ [became] synonymous with ‘field placement.’”<sup>216</sup> In an externship, students work off-campus (in the field) in a legal office, at a government agency, in-house, at a non-profit organization, or in a courthouse.<sup>217</sup> As of 2012, 190 of the 200 ABA approved law schools offer externships that allow students to earn academic credit towards their J.D. degree.<sup>218</sup> “Law school externship programs embody the belief that structured, examined involvement in practice is an essential part of the training of skilled, ethical lawyers.”<sup>219</sup> To ensure these programs bridge the gap “between the practice of law and the classroom,” the ABA has promulgated certain standards governing externships.<sup>220</sup>

The 1973 ABA Standard 306, as amended in 1977, did not refer to or indicate that a seminar must complement the externship.<sup>221</sup> In fact, external placements (externships) “were increasingly disengaged from the overall curriculum.”<sup>222</sup> In response, the ABA found a “lack of substantial supervision given by a law school faculty to law students working with practicing lawyers throughout a state.”<sup>223</sup> In 2014-2015, Standard 306(c) provided:

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<https://www.colorado.edu/law/social-media> (last visited Dec. 26, 2019) (encouraging law alumni and students to network with one another using social media).

214. See Ellis, *supra* note 14, at 325 (finding that “the problem starts in the career services offices, where student advisors are they themselves not active social media users”).

215. Sudeb Basu & J.P. “Sandy” Ogilvy, *Externship Demographics Across Two Decades with Lessons for Future Surveys*, 19 CLINICAL L. REV. 1, 3 (2012) (footnote omitted).

216. *Id.*

217. See *id.* at 3–4 (identifying externship types).

218. *Id.* at 5.

219. Rebecca B. Rosenfeld, *The Examined Externship Is Worth Doing: Critical Self-Reflection and Externship Pedagogy*, 21 CLINICAL L. REV. 127, 127 (2014).

220. *Id.* at 129 n. 7.

221. AM. BAR ASS’N, APPROVAL OF LAW SCHOOLS: AMERICAN BAR ASSOCIATION STANDARDS AND RULES OF PROCEDURE, AS AMENDED—1977, at 9–10 (1977) [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/1977\\_standards.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1977_standards.pdf).

222. Elizabeth G. Ford, *Toward A Clinical Pedagogy of Externship*, 22 CLINICAL L. REV. 113, 117 (2015).

223. Peter A. Joy, *Evolution of ABA Standards Relating to Externships: Steps in the Right Direction?*, 10 CLINICAL L. REV. 681, 702 (2004) (footnote omitted).

A law school may award credit for distance education and may count that credit toward the 45,000 minutes of instruction required by Standard 304(b) if:

(1) there is ample interaction with the instructor and other students both inside and outside the formal structure of the course throughout its duration; and

(2) there is ample monitoring of student effort and accomplishment as the course progresses.<sup>224</sup>

By 1980, the ABA focused increasingly on examining externship programs for compliance with curricular requirements.<sup>225</sup> The ABA tightened externship requirements, “requir[ing] that all field placement programs include seven programmatic elements.”<sup>226</sup> The first is a “clear statement of its goals and methods, and a demonstrated relationship between those goals and methods and the program in operation.”<sup>227</sup> It also adopted “Interpretation 2 of Standard 306,” which discussed “specific criteria for externship[s]” to require a classroom component along with the placement.<sup>228</sup> Between 1993 and 2004, the ABA amended its standards, stating, “[a] contemporaneous classroom or tutorial component taught by a faculty member is preferred. If the field placement program awards academic credit of more than six credits per semester, the classroom or tutorial component taught by a faculty member is required.”<sup>229</sup>

The ABA Standards governing a classroom component regarding externships has shifted slightly from 2004.<sup>230</sup> Presently, experiential course guidelines are under Standard 304.<sup>231</sup> Under that standard, experiential learning is described as something that must be experiential in nature and

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224. AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2014–2015, [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2014\\_2015\\_aba\\_standards\\_and\\_rules\\_of\\_procedure\\_for\\_approval\\_of\\_law\\_schools\\_bookmarked.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_bookmarked.pdf). Standard 306(c) changed after this. Compare AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2014–2015, *supra*, with AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2015–2016.

225. Ford, *supra* note 222, at 117.

226. *Id.* at 118.

227. *Id.* (footnote omitted).

228. Joy, *supra* note 223, at 696.

229. *Id.* at 703; see also ABA STANDARDS AND RULES OF PROCEDURE 305(g)(4), 9–10 (AM. BAR ASS’N 1977), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/1977\\_standards.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1977_standards.pdf). (citation omitted)

230. See *infra* notes 231–33 and accompanying text.

231. AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2018–2019, [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2018-2019ABASStandardsforApprovalofLawSchools/2018-2019-aba-standards-chapter3.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABASStandardsforApprovalofLawSchools/2018-2019-aba-standards-chapter3.pdf).

lists five requirements for such courses, including a required classroom component.<sup>232</sup> Specifically, Standard 304(a)(5) provides:

Experiential courses satisfying Standard 303(a) are simulation courses, law clinics, and field placements that must be primarily experiential in nature and must: . . . provide a classroom instructional component; or, for a field placement, a classroom instructional component, regularly scheduled tutorials, or other means of ongoing, contemporaneous, faculty-guided reflection.<sup>233</sup>

Thus, while it is not required that “externship programs require a class along with [their] fieldwork,” the “vast majority” do.<sup>234</sup> In fact, a 2007-2009 study, which examined 665 externship courses, found that 490 of those had a classroom component.<sup>235</sup> Clearly, law schools believe a classroom component is important.<sup>236</sup> There is dissent, however, concerning the design and structure of these classes.<sup>237</sup>

According to the 2007-2009 survey, the classroom format for externship courses were devoted to the following topics: 56% to substantive and procedural law, 55% to legal process, 81% to professional roles and responsibility, 77% to reflection on placements, 69% to lawyering skills, 46% to legal institutions, 49% to career choices, and 11% to other activities.<sup>238</sup> The survey also examined the different teaching techniques employed in these courses, finding that 94% use lecture and discussion, 67% use student presentations, 55% use guest speakers, 37% use student facilitation, and 17% use other methods.<sup>239</sup>

Simply put, externship faculty have developed different approaches to the classroom component.<sup>240</sup> At some law schools, externship seminars are general, with a focus on reflective learning. Some examples include American University Washington College of Law,<sup>241</sup> Boston College Law

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232. *Id.*

233. *Id.*

234. Rosenfeld, *supra* note 219, at 129.

235. Basu & Ogilvy, *supra* note 215, at 21.

236. *Id.*

237. *Id.* at 21–22.

238. *Id.* at 24, Table 8.

239. *Id.* at 25, Table 10.

240. *Id.* at 23.

241. *FAQs About Teaching Externship Seminars*, AM. UNIV. WASH. COLL. OF LAW, <https://www.wcl.american.edu/academics/experientialedu/externships/for-faculty/faq-about-teaching-externship-seminars/> (last visited Dec. 26, 2019).

School,<sup>242</sup> and Michigan State University College of Law.<sup>243</sup> In contrast, some externship programs at Boston University School of Law,<sup>244</sup> Howard University School of Law,<sup>245</sup> and Seattle University School of Law<sup>246</sup> are tailored to a specific type of externship placement (i.e. criminal, civil, in-house, judicial, government, etc.).<sup>246</sup> Still, other law schools like the University of Denver Sturm College of Law<sup>247</sup> and Georgetown Law,<sup>248</sup> offer externship seminars focused on different competencies and specific placement settings (i.e. social media skills, corporate, professionalism, work-life balance, prosecution, child advocacy, etc.).

Despite these conflicting approaches, there is consensus that “externship courses should begin with clear learning goals; those goals should drive the student’s work at the placement and the structure of the classroom component; and there should be meaningful formative and summative assessment.”<sup>249</sup> Since “externship seminar[s] [are] fertile ground providing opportunities for reflection that the field experience alone does not,”<sup>250</sup> faculty need to intentionally and “thoughtfully create academic components that amplify the lessons of fieldwork.”<sup>251</sup> Externship faculty must design seminars that focus on development of practical lawyering skills and professional identity through field learning and reflection supported and guided by the faculty. These seminars should be “as educationally rich as possible,”<sup>252</sup> and they should provide students with a crucial opportunity to examine “progress toward his or her professional identity as a future lawyer.”<sup>253</sup>

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242. *Externships*, BOS. COLL. LAW SCH., <https://www.bc.edu/content/bc-web/schools/law/academics-faculty/experiential-learning/externships.html> (last visited Dec. 26, 2019).

243. *MSU Law Externship Program*, MICH. STATE UNIV. COLL. OF LAW, <https://www.law.msu.edu/careers/externships-seminars.html> (last visited Dec. 26, 2019).

244. *Externship Program for BU Law Students*, BOS. UNIV. SCH. OF LAW, <https://www.bu.edu/law/current-students/jd-student-resources/experiential-learning/externships/> (last visited Dec. 26, 2019).

245. *Externship Programs*, HOWARD UNIV. SCH. OF LAW, <http://law.howard.edu/content/externship-programs> (last visited Oct. 8, 2019).

246. *Program Overview*, SEATTLE UNIV. SCH. OF LAW, <https://law.seattleu.edu/academics/programs/externship-program/program-overview> (last visited Dec. 26, 2019).

247. *Externships*, UNIV. OF DENVER STURM COLL. OF LAW, <https://www.law.du.edu/legal-externship-program/information-students/specialty-programs> (last visited Dec. 26, 2019).

248. *For J.D. Students*, GEORGETOWN LAW, <https://www.law.georgetown.edu/experiential-learning/externships/for-j-d-students/> (last visited Dec. 26, 2019).

249. Ford, *supra* note 222, at 121 (footnote omitted).

250. Rosenfeld, *supra* note 219, at 137.

251. *Id.* at 131.

252. *Id.* at 128.

253. Timothy W. Floyd & Kendall L. Kerew, *Marking the Path from Law Student to Lawyer: Using Field Placement Courses to Facilitate the Deliberate Exploration of Professional Identity and Purpose*, 68 MERCER L. REV. 767, 769–70 (2017) (footnote omitted).

It is clear that “[b]ecoming an effective, ethical, and fulfilled lawyer . . . is a [developmental process] that does not happen overnight.”<sup>254</sup> It takes time. It is also “personal to each student.”<sup>255</sup> Through externship seminars, faculty can dive deep into philosophical questions, like: What does it mean to be a lawyer? The seminars also encourage students to reflect on and answer other questions, such as: “What do I really believe in?”<sup>256</sup> “Who am I as a member of this profession? . . . What am I like? . . . What do I want to be like in my professional role?”<sup>257</sup> This exploration of “professional identity matters because it” allows students to “develop an internal compass for navigating” the “roles and responsibilities” lawyers have imposed by the Model Rules of Professional Conduct.<sup>258</sup> At the end of the day, “[s]tudents want to know what is expected of them as [legal] professionals.”<sup>259</sup> Therefore, an externship seminar that incorporates social media skills and use fits nicely with the goals of experiential education teaching students to “think[] like a professional.”<sup>260</sup>

### *C. Incorporating Professional Social Media Use into Externship Seminars*

The gap between law school and the practice of law are bridged by externships.<sup>261</sup> Such “programs embody the belief that structured, examined involvement in practice is an essential part of the training of skilled, ethical lawyers.”<sup>262</sup> Simply put, experiential learning places “students into practice situations that can be used to teach . . . crucial aspects of lawyering in context.”<sup>263</sup> Through externship companion seminars, students develop lawyering skills and “cultivate [their] professional . . . identit[ies].”<sup>264</sup> To that end, externship seminars should encourage students to develop responsible and professional social media skills. Such seminars allow for a deep dive into social media law in practice. This encompasses exploring how legal professionals are using social media for marketing and client development, branding, and networking. Most importantly, seminars should educate

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254. *Id.* at 768.

255. David I.C. Thomson, “Teaching” Formation of Professional Identity, 27 REGENT U.L. REV. 303, 317 (2015).

256. *Id.*

257. Terry, *supra* note 15, at 243 (alterations omitted).

258. *Id.* at 244.

259. Thomson, *supra* note 255, at 316 (footnote omitted).

260. Terry, *supra* note 15, at 253 (footnote omitted).

261. Lori A. Buiteweg, *Bridging the Gap: Externships Make Better Lawyers*, 95 MICH. B.J. 10, 11 (2016).

262. Rosenfeld, *supra* note 219, at 127.

263. Floyd & Kerew, *supra* note 253, at 770.

264. *See generally id.* (providing comprehensive information on two different externship courses aimed at growing one’s own professional identity).

students on the ethical pitfalls of using social media. There is a broad range of ethics-related issues concerning social media use, including: civility, breaching client confidentiality, using social media to inappropriately gather evidence in litigation, or using social media to gather information about jurors.<sup>265</sup>

Externship seminars encourage law students to adopt a reflective, thoughtful, and deliberative approach to social media use.<sup>266</sup> Students learn to think like professionals and to form their own professional identities considering questions, such as: How do I develop a professional identity on social media? What does it mean to be a professional in a technological age? What are the professional and ethical standards that govern my behavior as a future lawyer engaged in social media? The nature of social media use poses risks that warrant these questions.<sup>267</sup> Professional risks involved in social media use are important to law students.<sup>268</sup> Thus, externship seminars better prepare law students for the realities of living and working in a technology-driven age.

#### *D. Social Media Seminar*

Rather than steering law students away from social media, legal educators must teach law students how to use social media professionally and responsibly. Universities can accomplish this by offering a social media-focused externship course or by incorporating social media into an existing externship seminar. I do both at the University of Denver Sturm College of Law. I have found that integrating social media into my externship seminars is useful and valuable to my students.<sup>269</sup> I primarily teach externship seminars for students in private sector placements. However, I have taught the social media seminar to students across sectors (i.e. judicial, public, and private placements). The material is applicable and relevant to all students despite the nature of their placement.

In the summer of 2017, I designed a one-credit externship seminar called *Social Media and the Law Practice*. Students enrolled in this seminar receive a letter grade at the end of the semester. By the end of the course, I hope students master five learning outcomes: (1) a developed understanding of the

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265. See *supra* Part II.

266. See Terry, *supra* note 15, at 243 (explaining that seminars provide students an opportunity to reflect on “moral, ethical, and professional” issues facing lawyers, which now extend to social media use).

267. See *supra* notes 114–15, 290–97 (detailing specific instances of negative repercussions after law students and lawyers irresponsibly used social media).

268. Christina Parajon Skinner, *The Unprofessional Sides of Social Media and Social Networking: How Current Standards Fall Short*, 63 S.C.L. REV. 241, 282 (2011).

269. Course evaluations are on file at the Sturm College of Law of University of Denver. Course syllabi and assignment descriptions are on file with the author.

evolution of social media and why such use matters in the legal profession; (2) an increased awareness of ethical implications involving the use of social media by law students and lawyers; (3) establish what constitutes professional social media use by law students; (4) gain tools to become “e-professional” students and future lawyers; and (5) newfound confidence in using social media.

The course is organized by topics including: (1) the evolution of social media; (2) the benefits of using social media as both a law student and a future lawyer (including using social media to network and create your own brand); (3) using social media effectively and ethically in investigation and discovery; and (4) ethical and professional implications of social media use. Throughout the semester, students are encouraged to use social media as a professional tool, as well as reflect on best practices for such usage. To achieve the course objectives, students engage in a variety of in-class activities and reflective assignments. For instance, at the beginning of the semester, students identify learning objectives for their externship experience, which consider specific areas they would like to improve in, their supervisor’s expectations, the specific placement, and the action plan they will implement. Students must meet with their supervisor concerning their learning goals for the semester. The supervisor must electronically confirm their goals in our experiential management software after the meeting.

At the outset of the semester, students also complete a Skills Self-Evaluation. Students rate their development in a variety of skills. The Evaluation allows students to identify their strengths, weaknesses, and areas of improvement for skills that practicing attorneys have identified as important. This also helps students determine which specific classes or externship course work they would like to take in their remaining time at law school.

In addition to these assignments, students also engage in a variety of other exercises. For example, students audit each social media site they use to ensure such usage complies with professional and ethical standards. I provide parameters to assist the students in evaluating their social media use. These parameters include: (1) put together a list of every social media site you currently engage in; (2) review your profile picture for each social media site (choose this photo wisely to ensure you would not be embarrassed to have a prospective employer view it); (3) set your security settings to the most restrictive level possible; (4) examine your Friends and Contacts lists (I recommend limiting certain social media sites such as Facebook and Instagram to close, personal friends, and using LinkedIn for professional contacts); (5) consider your online presence and check for consistency and quality across all of the social media sites you use (What do your posts, status updates, tweets, and responses to friends’ and contacts’ posts say about

you?); (6) evaluate whether you are using social media in such a way as to advance your professional and personal goals (Are there other social media sites you should be using? How can you engage with your current social media platforms better?); and (7) create new accounts on social media platforms that will assist you in advancing your goals.

Relatedly, students also examine the social media platforms attorneys use at their externship placements. As part of this assignment, students speak with their supervising attorney (or any other lawyer at their placement) about the attorney's social media use. Specifically, students meet with a lawyer to discuss how: (1) the attorney is using social media, (2) how the placement engages in social media, and (3) the ethical and professional standards the attorney looks to guide such use. The students present their findings to the class. This exercise enlightens many students who fail to consider how social media has melded their professional and personal lives into one. Additionally, supervisor attorneys also raise other points the students had not considered.

In another exercise, the class develops a list of best practices when engaging with social media. Some of the best practices students have routinely included are: (1) be intentional in posting content on social media; (2) know your audience; (3) follow conversations and legal professionals that interest you; (4) increase privacy settings; (5) consider the individuals and organizations you follow and friend, as well as those you allow to follow and friend you; (6) build your reputation now; (7) treat any individual that engages with you on social media with civility and respect; (8) educate yourself on social media implications; (9) continue to build on your social media connections offline; and (10) be consistent in your branding and voice. Such reflective exercises allow students to see how social media applies to professionalism and the practice of law. Each student reviews existing social media policies at their placement as part of developing the best practices. This engagement helps students to connect externship coursework and real-world applications. For example, the importance of educating future attorneys on social media use through externship seminars directly connects to active policies implemented to protect attorneys from improper social media use. Given the evolving nature of social media, professors should constantly improve and revisit courses and lesson plans. The following teaching plan for two classes aids in developing similar social media seminars.

#### *E. Teaching Plan for Using Social Media in Investigation and Discovery*

In the semester-long social media seminar, one class is dedicated to exploring how attorneys can use social media effectively and ethically for



investigation and discovery. The discussion opens with the premise that lawyers can use social media for investigative purposes, but the parameters need to be defined. Prior to class, each student meets with their supervising attorney to discuss how their attorney and placement uses social media for investigative purposes. If students are at a judicial placement, the conversation instead focuses on any issues the judge has encountered when attorneys use social media for investigative purposes in a case. Students come to class prepared to discuss their meeting and Colorado Formal Ethics Opinion 127, *Use of Social Media for Investigative Purposes*.<sup>270</sup> The “opinion addresses ethical issues that arise when lawyers . . . use social media [(including restricted portions of it)] to obtain information [concerning] witnesses, jurors, opposing parties, opposing counsel, and judges.”<sup>271</sup> Considering that opinion, students engage in class discussion concerning the following:

- Can lawyers use social media for investigative purposes? What are the parameters?
- Should lawyers be proactively using social media for investigative parameters?
- How are attorneys at your placement using social media for investigative purposes?
- What Rules of Professional Conduct govern an attorney’s investigation of social media?
- What, if any, issues have your placements encountered because attorneys used social media in investigations?
- Do users have an expectation of privacy for social media activity? Should there be an expectation of privacy?

This tends to be a lively discussion, especially with regard to the issue of privacy. Students overwhelmingly tend to disagree with case law on this topic,<sup>272</sup> arguing that there is an expectation of privacy when social media users take certain steps. The steps students generally identify include: (1) increasing privacy settings, (2) only posting content on their personal pages, and (3) managing content that the students are “tagged” in by other users.

Following that discussion, we turn to the discoverability of social media in civil litigation matters. First, students examine how a party seeks social media information through the discovery process. We review examples of

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270. Col. Bar Ass’n Ethics Comm., Formal Op. 127 (2015).

271. *Id.*

272. Page, *supra* note 122; see *supra* notes 122–23 and accompanying text (listing cases discussing privacy and social media).

potential social media discovery requests. Some examples I have used in the past include:

- Please provide any pictures of Plaintiff taken during the relevant time period and posted on Plaintiff's profile.
- Please provide all social networking communications between Plaintiff and any current or former employees of Defendant that pertain to her employment at Defendant or this lawsuit.
- Identify and describe any social media services Plaintiff has used since 2016 including the URL (web address) for each specific services, as well as Plaintiff's username/ID on the service. This includes, but is not limited to, Facebook, Twitter, LinkedIn, Instagram, Pinterest, Snapchat, or similar social media services.
- Please produce any and all profiles, postings or messages . . . from social media sites from September 2016 through the present, that reveal, refer, or relate to any emotion, feeling, or mental state of Plaintiff.
- Please list all steps which have been taken to identify and preserve any electronically-stored information (such as documents stored on any type of computer, text and instant messages, magnetic storage, solid state device, remote and cloud storage—including all social media and other information stored on the internet or accessible from websites, etc.) in connection with the incident or the injuries resulting from the incident.
- Please produce any and all archived posts, information, tweets, photographs, and/or any other material authored or posted by Plaintiff on any social media or websites used or frequented by Plaintiff, from the five years preceding the subject incident to the present.

Each student acts as the plaintiff's attorney and states how he or she would respond to each of the requests. I challenge them to consider any objections while also stating the reasoning. Some common objections students point to involve relevancy, over breadth and burden, and privacy.

This exercise then leads into a discussion concerning the four approaches courts take in resolving discovery disputes related to social media information. Those approaches are:

- Factual Predicate Approach: A party seeking discovery must demonstrate a “factual predicate” to access any private social media information;<sup>273</sup>
- “[W]ide-[O]pen or [B]lanket [A]pproach”: Parties are required to exchange social media passwords during the discovery phase;<sup>274</sup>
- “[R]easonable [P]articularity [A]pproach”: Parties must demonstrate that social media discovery request is relevant;<sup>275</sup> and
- “[D]irect [J]udicial [A]pproach”: Adopting “a hands-on role,” the judge directly “reviews the social media content” and determines whether disclosure to the opposing party is necessary.<sup>276</sup>

We review and discuss cases that apply these approaches. We then revisit the discovery request examples. I designate two students each to act as counsel for Plaintiff and Defendant. The selected students then advocate for which approach they think the court should apply to each discovery request. The remaining students act as judges, determining whether such requests are permissible.

In this class, we also explore whether the Rules of Professional Conduct require attorneys to counsel their clients about their social media use and whether attorneys can advise clients to “clean up” their social media pages. For guidance, we look to the jurisdictions that have addressed ethical issues regarding counseling clients on social media use: New York,<sup>277</sup> Pennsylvania,<sup>278</sup> North Carolina,<sup>279</sup> and Florida for guidance.<sup>280</sup> Finally, the

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273. *See Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650, 654 (N.Y. App. Div. 2010) (determining that photos on the public portion of the plaintiff’s Facebook and Myspace accounts served as the factual predicate to obtain full access to the plaintiff’s social media information).

274. GARCIA & HOFFMEISTER, *supra* note 5, at 331.

275. *Id.* at 332–34; *see also* Louisiana Pac. Corp. v. Money Mkt. 1 Institutional Inv. Dealer, 285 F.R.D. 481, 486 (N.D. Cal. 2012) (“A party noticing a deposition pursuant to Rule 30(b)(6) must describe with reasonable particularity the matters on which the examination is requested.” (citing FED. R. CIV. P. 30(b)(6))).

276. GARCIA & HOFFMEISTER, *supra* note 5, at 334.

277. “New York attorneys may advise clients as to (1) what they should/should not post on social media, (2) what existing postings they may or may not remove, and (3) the particular implications of social media posts, subject to the same rules, concerns, and principles that apply to giving a client legal advice in other areas.” N.Y. Cty. Lawyers Ass’n, Ethics Op. 745, at 1 (2013).

278. Penn. Bar Ass’n., Formal Op. 2014-300, at 1–2 (2014) (“This [o]pinion . . . provides a broad overview of the ethical concerns raised by social media . . . [The Committee] conclude[d] that . . . [a]ttorneys may advise clients about the content of their social networking websites, including the removal or addition of information.”).

279. “[A] lawyer must advise a civil litigation client about the legal ramifications of the client’s postings on social media as necessary to represent the client competently. The lawyer may advise the client to remove postings on social media if the removal is done in compliance with the rules and law on preservation and spoliation of evidence.” N.C. State Bar, Formal Op. 2014-5 (2014) (emphasis omitted).

280. “A personal injury lawyer may advise a client pre-litigation to change privacy settings on the client’s social media pages so that they are not publicly accessible. Provided that there is no violation of

last part of class is dedicated to class discussion where we apply the Rules of Professional Conduct to various hypotheticals. I have routinely used the following:

- Public portions of private social media show inconsistencies with a represented party's legal claims. As the lawyer for the opposing party, you suspect that the private portions of social media will contain similar, contradictory content that may be used for impeachment purposes. What do you do?
- You are an attorney at a small defense-oriented law firm and represent a retailer in a products liability lawsuit. You instruct one of the law clerks to become Facebook friends with the plaintiff. The clerk submits the friend request and the plaintiff accepts. During Plaintiff's deposition, you ask the plaintiff questions about traveling, dancing, and other activities that relate to the seriousness of her injuries. Following the deposition, you also amend your discovery requests to include conversations, photos, and a video of the plaintiff dancing with her kids, all of which the law clerk obtained. Are there any ethical issues here? Assume you represent Plaintiff: How would you respond to the discovery requests? How would a judge rule on any dispute concerning the amended discovery requests?
- Plaintiff sues a cement truck company for the death of his wife after the truck crossed the centerline and tipped over on their car. Plaintiff's attorney instructed his client to clean up his Facebook page after defense counsel sought screen shots and other information. Plaintiff deleted 16 photos, including one in which he held a beer can and wore a T-shirt that said "I (heart) hot moms." Defense lawyers recovered the photos before trial and informed the jurors about the scrubbed photos at trial. As the judge, what would you do and why?
- An associate at a mid-sized law firm is active on social media, including Facebook, Twitter, LinkedIn, and blogging. The firm is defending a Fortune 500 company and one of its executives against sexual harassment claims by two women. After joining the case, the associate conducts some online research on the plaintiffs. She locates Plaintiff A's Facebook page and sees a photo from a company holiday party. The party shows Plaintiffs A and B drinking, laughing, and sitting on the lap of the executive in question. The associate immediately sends a document preservation notice to plaintiffs' counsel admonishing them to "preserve all

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the rules or substantive law pertaining to the preservation and/or spoliation of evidence, the lawyer also may advise that a client remove information relevant to the foreseeable proceeding from social media pages as long as the social media information or data is preserved." Fla. Bar, Advisory Op. 14-1 (2015).

documents, materials, photographs, and data, including content of any social media sites relating to the plaintiffs' employment with the company, including all company events." The associate then follows up with a document request. Did the associate act properly and within the parameters of the Professional Rules of Conduct?

Overall, this class is a deep dive into the ethical implications and rules that govern an attorney's use of social media for investigative and discovery purposes. Because students are often tasked with assisting in discovery and investigation at their externship placements, they find these topics on point and applicable.

*G. Teaching Plan for Ethical and Professional Implications of Social Media Use*

In every externship seminar I teach, including the semester-long social media-focused one, students learn about the ethical and professional implications of social media use. I use the ABA Standards and Foundations for Practice Survey to demonstrate the necessity for law students and lawyers to develop professional competency in social media use.<sup>281</sup> Typically, any class on this topic begins with a review of the applicable Rules of Professional Conduct, specifically Rules 1.6,<sup>282</sup> 4.2,<sup>283</sup> 4.3,<sup>284</sup> 5.3,<sup>285</sup> 5.5,<sup>286</sup> 7.1,<sup>287</sup> 7.2,<sup>288</sup> and 7.3.<sup>289</sup> I use hypotheticals that allow students to apply the rules and discern what social media behavior is permissible under the same. Examples of hypotheticals include:

- As a law student, you monitor LinkedIn regularly. A person you exchanged business cards with at a charity event sends you a message describing a set of facts. The message does not mention any names and asks whether you think there is a viable claim. You respond, "Yes." Are there any ethical concerns here?
- Second-year law student Pam B. is externing at a midsize criminal defense firm in Denver. Given her interest in criminal law, she maintains an interactive blog called *This Week in Colorado's*

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281. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FOUNDATIONS FOR PRACTICE: THE WHOLE LAWYER AND THE CHARACTER QUOTIENT 28–34 (2016).

282. MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2018) ("Confidentiality of Information").

283. *Id.* at r. 4.2 ("Communication with Person Represented by Counsel").

284. *Id.* at r. 4.3 ("Dealing with Unrepresented Person").

285. *Id.* at r. 5.3 ("Responsibilities Regarding Nonlawyer Assistance").

286. *Id.* at r. 5.5 ("Unauthorized Practice of Law; Multijurisdictional Practice of Law").

287. *Id.* at r. 7.1 ("Communication Concerning a Lawyer's Services").

288. *Id.* at r. 7.2 ("Communications Concerning a Lawyer's Services; Specific Rules").

289. *Id.* at r. 7.3 ("Solicitation of Clients").

*Criminal Defense*, which is accessible through her LinkedIn page. The blog discusses a variety of legal issues and cases handled by the firm, which she comments on, and brags about favorable rulings and verdicts. The blog further describes, in detail, the proceedings of public criminal prosecutions spiced with her ideological commentary as an aspiring criminal defense lawyer. For example, in one blog post, she excoriated the prosecutor's decision to charge a homeowner for shooting an unarmed burglar. Some of the cases on which she comments involve the firm's current clients and former clients. Does the extern's blog raise any concerns?

- Change the facts and assume Pam maintains a personal blog where she discusses her views on current legal issues, politics, and law school. She invites comments from other people. One post sparked a debate on cannabis law, in which Pam replied by calling the commenters "idiots" and "racists," among other things. Does her personal blog raise any concerns?
- Blair, a recent law school graduate, decides to hang up her own shingle. In preparation, she prints stationary and cards, and she sets up a webpage and several social media pages. In order to avoid confusion, she places "J.D." after her name. She begins to hand out her cards with her info at networking receptions and other events in hopes of getting a running start once she is sworn in. Because her Facebook page states that she is a J.D., people begin to ask her legal questions on her Facebook page. Thinking that the designation of J.D. clearly communicates the fact that she is not yet licensed, she begins to provide answers to the inquiries, in hopes of building a client base post-licensure. Any ethical concerns here?
- You prepare press releases on your recent successes as a lawyer. You send tweets to potential clients to alert them about the press releases. What ethical issues, if any, do you see by this practice?

I generally divide the class into small groups to discuss the hypotheticals. Following a small group discussion, we reconvene as a large group. We focus on instances where lawyers have destroyed their professional reputation or have been disciplined by their state bar for unprofessional and unethical social media use. Students, considering the Rules of Professional Conduct, engage in a large class discussion of the following examples:

- Aaron Schlossberg, the New York-based lawyer whose racially-charged rant against Spanish-speaking employees went viral;<sup>290</sup>
- Haley Geftman-Gold's (in-house lawyer for CBS) Facebook post following the mass shooting in Las Vegas;<sup>291</sup>
- Andrew Leonie's (Associate Deputy General attorney in Texas) Facebook post criticizing the #MeToo movement;<sup>292</sup>
- An Austin-based attorney's resignation after tweeting that he would "be ok if #BetsyDeVos [sic] was sexually assaulted";<sup>293</sup>
- An Illinois attorney suspended after blogging about her current case;<sup>294</sup>
- A Florida attorney who received public reprimand for a blog post that contained derogatory comments concerning a judge;<sup>295</sup>
- Two attorneys who used Instagram to post a picture of a courtroom with the hashtag "#killinnazis";<sup>296</sup> and
- An attorney disciplined for posting inflammatory comments that breached confidentiality on internet websites in response to clients who posted complaints.<sup>297</sup>

To further highlight the implications of improper social media use, we discuss instances where businesses harmed their brand by using social media. These include: (1) an ill-timed tweet by American Rifleman, the official NRA journal, following a Colorado mass shooting at a movie theater;<sup>298</sup> (2) a

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290. Debra Cassens Weiss, "I Am Not a Racist," *Lawyer Says After Viral Rant About Spanish Speakers*, ABA JOURNAL (May 23, 2018), [http://www.abajournal.com/news/article/i\\_am\\_not\\_a\\_racist\\_lawyer\\_says\\_after\\_viral\\_rant\\_about\\_spanish\\_speakers/](http://www.abajournal.com/news/article/i_am_not_a_racist_lawyer_says_after_viral_rant_about_spanish_speakers/).

291. Weiss, *supra* note 115.

292. Astor, *supra* note 115.

293. James Wilkinson, *Texas Professor Tweeted He'd Be "OK" with DeVos Sexual Assault*, DAILYMAIL (Sept. 12, 2017) <http://www.dailymail.co.uk/news/article-4877732/Texas-prof-tweeted-d-ok-DeVos-sex-assault.html>.

294. *In re Disciplinary Proceedings Against Peshek*, 798 N.W.2d 879, 880–81 (Wis. 2011).

295. See *In re McCool*, 172 So. 3d 1058, 1087 n. 5 (La. 2015) (explaining the facts behind the public reprimand ordered in *Florida Bar v. Conway*, No. SC08–326, 2008 WL 4748577, at \*1 (Fla. Oct. 29, 2008)).

296. Debra Cassens Weiss, *Judge Punishes Lawyer for Using Hashtag #killinnazis, Tosses \$27.8M Xarelto Verdict on Other Grounds*, ABA JOURNAL (Jan. 11, 2018), [http://www.abajournal.com/news/article/judge\\_punishes\\_lawyer\\_for\\_killinnazis\\_hashtag\\_tosses\\_27.8m\\_xarelto\\_verdict](http://www.abajournal.com/news/article/judge_punishes_lawyer_for_killinnazis_hashtag_tosses_27.8m_xarelto_verdict).

297. *People v. Underhill*, Nos. 15PDJ040, 15PDJ044, 15PDJ059, 2015 WL 4944102, at \*1–2 (Colo. Aug. 12, 2015).

298. John D. Sutter, *NRA Tweeter Was "Unaware" of Colorado Shooting, Spokesman Says*, CNN (July 20, 2012), <https://www.cnn.com/2012/07/20/tech/social-media/nra-tweet-shooting/index.html>.

racist “College Gameday” tweet by Home Depot as part of a college football promotion on ESPN;<sup>299</sup> and (3) DiGiorno’s “#WhyIStayed” pizza gaffe.<sup>300</sup>

All of these examples spark thoughtful discussion. In fact, students are often astonished that lawyers and businesses have engaged in such improper social media use. The lesson I try to impart is that modern society operates in an immediate, instant gratification mode. In other words, people and businesses use social media to immediately respond to trending topics, current events, and social issues, which can, of course, include oversharing and personal venting. Unfortunately, it is only with 20/20 hindsight that they realize such behavior does not comport with professionalism and ethical standards.

I dedicate the last part of class to more small group work. I assign students to read the character and fitness qualifications for admission to the Colorado bar prior to class, which are set forth in Colorado Rules of Civil Procedure Rule 208.<sup>301</sup> Rule 208.1(6) specifically outlines relevant conduct that shall be treated as cause for scrutiny of whether the applicant possesses the necessary character and fitness.<sup>302</sup> Once in class, students divide into small groups to dissect these qualifications as they pertain to social media use. The questions posed to the small groups are:

- Should law students expect bar admission committees to review social media content when evaluating their character?
- Considering Colorado’s Character & Fitness Standards, would investigation of an applicant’s social media content have a rational connection to the applicant’s fitness or capacity to practice law?
- What should the criteria be to determine whether an applicant’s social media activity deems him or her unfit to practice law?
- Does your review and consideration of Colorado’s Character & Fitness Standards impact your online behavior?
- Should law schools implement a social media use policy for their students? If so, what would that policy look like?<sup>303</sup>

After the students engage in small groups, the class reconvenes to debrief. Students generally agree that they should expect bar admission

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299. Associated Press, *Home Depot Apologizes for Racist Tweet*, N.Y. POST (Nov. 8, 2013), <https://nypost.com/2013/11/08/home-depot-apologizes-for-racist-tweet/>.

300. Laura Stampler, *DiGiorno Used a Hashtag About Domestic Violence to Sell Pizza*, TIME (Sept. 9, 2014), <http://time.com/3308861/digiorno-social-media-pizza/>.

301. COLO. R. CIV. P. 208 (2018).

302. *Id.* at 208.1(6).

303. “The College of Law at West Virginia University [social media] policy ‘encourage[s] students to use [social media] as a professional tool, [and] educate[s] them about etiquette, ethics, and best practices. [The university] seek[s] to model how social networking can contribute to a professional public presence by using it to communicate with the world.’” *See, e.g.* Skinner, *supra* note 268, at 283 (alterations in original) (footnotes omitted).



committees to review social media content. Often times, however, students disagree on whether certain online activity has a rational connection to their fitness to practice law. They argue that it should not be a blanket approach. Rather, bar admission committees should consider the following: (1) What is the timeframe of the questionable online activity? (Did the conduct happen five years ago? Ten years ago?); (2) Did the student engage in the social media activity, or was she implicated by another user that tagged her?; (3) Is there a pattern of improper social media engagement, or is this a one-time bad decision?; (4) Did the student undertake any steps to mitigate the damage?; and (5) Has the student demonstrated remorse for such conduct?

This class always sparks thoughtful, reflective, and lively conversations. Students walk away with the tools to engage in social media in a professional capacity, as well as with an appreciation for the ethical pitfalls of improper use.

#### CONCLUSION

Developing social media skills is fundamental to an attorney's success in the legal profession. As a result, law students need to develop competency with, and become effective users of, this technology. Not only do they have to understand how to effectively and professionally utilize social media, they should appreciate the perils of improper use. The bottom line is that it is imperative to take control; even if you do not, "you still have an online presence. The problem is that you will be at the mercy of what other people say about you."<sup>304</sup>

Given that the ABA now recognizes technology as part of a lawyer's required competency,<sup>305</sup> law schools can better prepare its students to enter the practice by teaching basic and fundamental social media skills, including how to engage in a professional manner on these platforms and the legal and ethical risks of using this technology. Experiential legal education courses, particularly externship seminars, would be an appropriate venue to do so. These seminars help "bridge the gap" between law school and the practice of law.<sup>306</sup> Externship seminars provide ample opportunity for self-reflection, development of one's professional identity, and advancement and refinement of skills. Law professors can create semester-long social media seminars or, to start, can simply integrate the topic into existing seminars. Regardless of the format one chooses, it is vital to educate students on the importance of e-

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304. Menachem Wecker, *Law Students Should Embrace Social Media, Study Suggests*, U.S. NEWS (Sept. 7, 2012), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2012/09/07/law-students-should-embrace-social-media-study-suggests>.

305. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2018).

306. Buiteweg, *supra* note 261.

professionalism. Law schools must prepare students for the realities of living and working in a technology-driven age. However, teaching e-professionalism and social media skills to law students within experiential education is just one step in the right direction.

#### APPENDIX A: SOCIAL MEDIA LAW SCHOOL COURSES

Law School	Course
University of Chicago Law School	<i>Ethical Quandaries in Legal Practice</i> <sup>307</sup>
Columbia Law School	<i>Law and Regulation of Social Media</i> <sup>308</sup>
NYU School of Law	<i>Professional Responsibility and the Regulation of Lawyers</i> <sup>309</sup>
University of Pennsylvania Law School	<i>Social Media Law</i> <sup>310</sup>
Berkeley Law	<i>Regulation of New Technologies-FinTech &amp; Social Media</i> <sup>311</sup>
Northwestern Pritzker School of Law	<i>Privacy Law</i> <sup>312</sup>
Cornell Law School	<i>Internet Transactions</i> <sup>313</sup>

307. *Legal Practice and Ethics Courses*, UNIV. OF CHICAGO L. SCH., <https://www.law.uchicago.edu/prospective/ethicscourses> (last visited Jan 12, 2020).

308. *L8106 S. Law and Regulation of Social Media*, COLUMBIA L. SCH., <https://www.law.columbia.edu/courses/sections/22732> (last visited Jan. 12, 2020).

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Georgetown Law	<i>Law in a New Media World</i> <sup>314</sup>
The University of Texas at Austin School of Law	<i>Law &amp; Social Media</i> <sup>315</sup>
UCLA School of Law	<i>News Media Law in the Digital Age</i> <sup>316</sup>
Emory University School of Law	<i>Advanced Legal Writing: Blogging and Social Media</i> <sup>317</sup>
University of Alabama School of Law	<i>Information Privacy Law</i> <sup>318</sup>
University of Georgia School of Law	<i>The Law of Social Media</i> <sup>319</sup>
Wake Forest University School of Law	<i>Privacy in the Workplace</i> <sup>320</sup>
The Ohio State University Moritz College of Law	<i>Lawyers and the Media</i> <sup>321</sup>
UNC School of Law	<i>Media Law</i> <sup>322</sup>
SMU Dedman School of Law	<i>Social Media Law</i> <sup>323</sup>

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University of Richmond School of Law	<i>Media and Privacy Law</i> <sup>324</sup>
Cardozo School of Law of Yeshiva University	<i>Social Media Law</i> <sup>325</sup>
University of Miami School of Law	<i>Social Media and the Law</i> <sup>326</sup>
American University Washington Law	<i>Social Media and the Law</i> <sup>327</sup>
Brooklyn Law School	<i>Media Law and Policy Seminar</i> <sup>328</sup>
St. John's School of Law	<i>Social Media and the Law</i> <sup>329</sup>
Chicago-Kent College of Law at Illinois Institute of Technology	<i>Emerging Technologies</i> <sup>330</sup>
LSU Paul M. Hebert Law Center	<i>Privacy Law</i> <sup>331</sup>
Harvard Law School	<i>Social Media and the Law</i> <sup>332</sup>
Stetson University College of Law	<i>Legal Ethics and Technology</i> <sup>333</sup>

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