ATTORNEY PROFESSIONALISM FORUM

To the Forum:

Of late, I've noticed that many of my lawyer friends, and former law school colleagues, have been using social media outlets such as Facebook, Twitter and LinkedIn to market themselves and their recent victories in litigation or before the immigration board, etc. These are their personal (as opposed to professional) pages. I have always been wary of posting on my personal Facebook page because of the attorney advertising rules. Are those rules more relaxed in the context of social media? What guidelines apply? I am considering whether to market my work on my personal social media pages, whether it be Facebook or LinkedIn, but I want to make sure I don't run afoul of the Rules of Professional Conduct. Are there any other rules that I should be aware of before doing so?

Also, I have seen some attorneys taking pictures in the courtroom, and later tweeting about what they observed during a trial or court proceeding. Is this acceptable? Again, I assume this is just another way to market themselves but are there other issues?

Sincerely,

#mediaphobic

Dear #mediaphobic:

Your question on social media ethics and attorney advertising in the social media context is a timely one, which implicates several of the New York Rules of Professional Conduct (NYRPC). The Commercial and Federal Litigation Section of the New York State Bar Association recently updated its "Social Media Ethics Guidelines" on June 9, 2015. *See* James M. Wicks, Mark A. Berman & Ignatius A. Grande, NYSBA Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association, at 5 (2015). And while the NYRPC do not yet have a mandate requiring New York lawyers to be technologically adept, the American Bar Association recently updated its Model Rules of Professional Conduct to include a mandate that an attorney has a professional responsibility to be competent and up to date on the benefits and risks associated with relevant technology. *See* Joel Stashenko, *State Bar Updates Guidelines on Use of Social Media*, N.Y.L.J. (June 19, 2015), http://www.newyorklawjournal.com/id=1202729712423/State-Bar-Updates-Guidelines-on-Use-of-Social-Media.

Our Forum has previously addressed "What Constitutes Attorney Advertising?" in the New York State Bar Association *Journal*, Vol. 85, No. 7 (September 2013). However, this Forum discusses how the rules on attorney advertising come into play in the context of social media.

With respect to your first question, whether the attorney advertising rules apply in the social media context and whether those rules are more relaxed when it comes to social media, this depends on how you are using social media. If an attorney is on social media only for personal use, this type of profile and/or activity will not be subject to the NYRPC. However, an attorney may have a so-called "hybrid" account that is a combination of both personal and professional information. In this case, a hybrid account may need to comply with attorney advertising rules if the primary purpose of the account is to advertise an attorney's professional services. *See* Wicks et al., *supra*, at 5.

The question of a hybrid account is particularly relevant with respect to attorneys' LinkedIn profiles. The New York County Lawyers' Association (NYCLA) recently issued an opinion interpreting how attorney advertising rules apply to LinkedIn. According to NYCLA, a LinkedIn profile that contains only biographical information, such as only a listing of an attorney's education and current and past employment, would not constitute attorney advertising. N.Y. County Lawyers' Ass'n Ethics Op. 748 (2015). However, a LinkedIn profile that contains information such as an attorney's practice areas, skills, endorsements and/or recommendations from colleagues or clients would constitute attorney advertising and require the appropriate disclaimers. *See id*.

Interestingly, a December 2015 ethics opinion from the New York City Bar Association's Committee on Professional Ethics reached a different conclusion about LinkedIn profiles. According to the opinion, an attorney's individual LinkedIn profile only constitutes attorney advertising if it meets all five of the following criteria: (1) it is a communication made by or on behalf of the lawyer; (2) the primary purpose of the LinkedIn content is to attract new clients to retain the lawyer for pecuniary gain; (3) the LinkedIn content relates to the legal services offered by the lawyer; (4) the LinkedIn content is intended to be viewed by potential new clients; and (5) the LinkedIn content does not fall within any recognized exception to the definition of attorney advertising. N.Y. City Bar Ass'n Formal Opinion 2015-7: Application of Attorney Advertising Rules to LinkedIn (Dec. 2015).

Another important overarching consideration for an attorney using social media is that a social media post, whether it be on Facebook,

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

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Twitter, LinkedIn, or YouTube, has no geographic boundaries, and, as a result, it may be subject to the ethics rules not only in the state that the attorney is licensed to practice in, but also, potentially, in other jurisdictions where the recipient of the communication is located. *See* Christina Vassiliou Harvey, Mac R. McCoy, and Brook Sneath, *10 Tips for Avoiding Ethical Lapses When Using Social Media*, Business Law Today, January 2014, http://www.americanbar.org/publications/blt/2014/01/03_harvey.html. This Forum, however, will focus solely on the NYRPC.

Turning now to the specific NYRPC that may apply, the first rule that an attorney using social media should keep in mind is Rule 1.1: Competence. Rule 1.1(a) reminds us that: "[a] lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." According to the ABA Committee on Ethics and Professional Responsibility, "it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an [electronic social media] network, a lawyer who uses an [electronic social media] network in his practice should review the terms and conditions, including privacy features – which change frequently – prior to using such a network." *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 466 (2014). A lawyer using social media has a duty to understand the basics of each social media network that either the lawyer or his client is using. Wicks et al., *supra*, at 3.

Rule 1.1(b) of the NYRPC adds that "[a] lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it." While ultimately it is each lawyer's individual responsibility to develop competence with social media platforms, if a lawyer knows that he lacks competence in this area, he should consult with others who have knowledge, including perhaps professionals in the field of electronic discovery. *Id.*

The issue of competence is so important that the American Bar Association has updated its Model Rules of Professional Conduct Rule 1.1 on this very issue. The rule tells us that "[t]o 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." *Comment on Rule 1.1*, American Bar Association Center for Professional Responsibility, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html. "Relevant technology" applies to social media.

Rule 7.1 of the NYRPC is the comprehensive rule on attorney advertising and includes detailed provisions on how an attorney can advertise without running afoul of the rules. According to Rule 7.1(f), an online ad must be labeled Attorney Advertising "on the first page, or on the home page in the case of a website." According to Rule 7.1(e)(3), any ad with statements about a lawyer's services must include the disclaimer: "Prior results do not guarantee a similar outcome."

Rule 1.0(a) of the NYRPC defines "Advertisement" as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers."

It is important to emphasize that an attorney has an ethical responsibility to include a disclaimer per Rule 7.1(f) when using all forms of social media. Twitter may pose a particular challenge to practitioners since an individual tweet is limited to 140 characters and therefore including the language "Attorney Advertising" may be difficult. However, this should not be used as an excuse for noncompliance with Rule 7.1(f). Wicks et al., *supra*, at 6.

Rule 7.1(k) states that all ads "shall be pre-approved by the lawyer or law firm, and a copy shall be retained for a period of not less than three years following its initial dissemination. Any advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year." Rule 1.0(c) defines computer-accessed communication as "any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or linked related thereto."

A social media post that qualifies as an advertisement would be considered a computer-accessed communication, and therefore would only need to be retained for one year. Wicks et al., *supra*, at 7.

Rule 7.4(a)–(c) of the NYRPC prohibits an attorney from identifying himself or herself as a "specialist" or "specializ[ing] in a particular field of law" unless the attorney is certified as a specialist in a particular area of law or law practice by a private organization or appropriate jurisdiction. This rule applies to social media. In particular, the topic of specialization is relevant to LinkedIn where an attorney fills out biographical information under headings like "Experience" and "Skills." According to NYCLA, an attorney categorizing his practice area(s) and/or experience under these headings does not violate NYRPC 7.4 as long as the attorney omits the word "specialist." N.Y. County Lawyers' Ass'n Ethics Op. 748 (2015).

LinkedIn also raises other ethical questions because of the endorsement and recommendation features of the site. According to NYCLA, every attorney with a LinkedIn profile should be responsible for monitoring it and making sure any endorsements and recommendations are truthful, not misleading, and are based on actual knowledge pursuant to Rule 7.1. *Id*.

We turn now to your question whether an attorney is permitted to take pictures in a courtroom and later tweet about what he or she observed during a trial or a court proceeding. Practitioners should keep in mind that each court and judge has its own specific policies governing the use of electronic devices in the courtroom, and that the rules governing technology use in the courtroom will vary significantly from state to state and even from one trial to the next. Reporters Committee for Freedom of the Press, *Be aware tweeting allowed in some courtrooms but not others*, Poynter (May 28, 2014), http://www.poynter.org/2014/tweeting-allowed-from-some-courtrooms-but-not-others/253548/. Various arguments, both in favor of and against the use of technology in the courtroom, have been advanced. On the one hand, judges who do not allow communication devices, like smartphones, are of the view that technology disrupts judicial order and can interfere with fact-finding and the parties' right to a fair trial. On the other hand, judges who are pro-technology view these advances as a way for the public to have immediate access to the judicial system, promoting greater public understanding, trust and confidence in our courts. *See* Cathy Packer, *Should Courtroom Observers Be Allowed to Use Their Smartphones and Computers in Court? An Examination of the Arguments*, 36 Am. J. Trial Advoc. 573, 583-85 (2013) and Richard M. Goehler, Monica L. Dias, David Bralow, *The Legal Case for Twitter in the Courtroom*, Comm. Law., April 2010, at 14.

While there has been a decent amount of discourse about the implications of jurors and journalists tweeting from the courtroom, there has been much less discussion about lawyers who tweet. However, in December 2015, a partner at the law firm of Barnes & Thornburg in Chicago was sanctioned for tweeting evidence during a high-profile financial crimes trial in the United States District Court for the Northern District of Illinois. The partner was writing about the trial on his law firm blog and without thinking about the court's rules – specifically a sign outside the courtroom stating "no photography" – he took pictures using his cell phone and posted nine tweets with pictures from inside the courtroom. Lisa Needham, *You Probably Should Not Live-Tweet a Trial You Are Watching*, Lawyerist.com (December 10, 2015), https://lawyerist.com/95941/95941/. The partner was sanctioned for his tweets by an Illinois federal judge, including being ordered to donate $5,000 to the Chicago Bar Foundation within 30 days, attend a continuing legal education seminar addressing the use of social media and its implications for lawyers, and dedicate at least 50 hours in 2016 to community service. Kali Hays, *Barnes & Thornburg Atty Sanctioned For Tweeting Evidence*, Law360 (Dec. 10, 2015), http://www.law360.com/articles/736468/barnes-thornburg-atty-sanctioned-for-tweeting-evidence.

Separate and apart from the judge's rules, if an attorney is tweeting for marketing purposes, then it is likely that the rules for attorney advertising discussed above will apply. One additional rule not previously discussed is Rule 7.3(a), which prohibits an attorney from engaging in a solicitation "by real-time or interactive computer accessed communication." Rule 7.3(b) defines solicitation as "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain."

An attorney who is tweeting pictures or observations from a courtroom or trial proceeding should also be extra cautious about protecting client confidences – whether it be a former, current or prospective client under the relevant professional rules. Rule 1.6 of the NYRPC governs Confidentiality of Information, Rule 1.9(c) holds that a lawyer is generally prohibited from using or revealing the confidential information of a former client and NYRPC 1.18(b) holds that a lawyer is prohibited from using or revealing the confidential information of a prospective client.

In sum, with all of the technological advances that lawyers now have access to at their fingertips, it is a wise decision for every attorney to stop and think before he or she posts, blogs, shares, likes, or tweets.

Sincerely,

The Forum by
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am the lead attorney on a big and important case for the litigation group at my firm, which is currently short-staffed. When I received an email from our managing clerk that our opposition papers to our adversary's motion to dismiss would be due in one week, I started to panic!

Not only was my mother recently hospitalized, but the senior associate on the case (and his wife) just had a baby and he was going to be out of the office for the next week. With so many personal and professional commitments, I had just completely overlooked this looming deadline.

Out of desperation, I called my adversary. I calmly and politely explained the situation and asked for a 30-day extension of time to draft our opposition. My adversary did not seem sympathetic at all and told me he would consult with his client and get back to me. Within the hour, my adversary called me back and told me that his client wanted to aggressively pursue this case and was tired of what he perceived as constant delays and postponements. In short, my adversary informed me that his client wanted a "take no prisoners" approach in the case and was instructed by his cli-

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ward in telling you what you can and can't do in writing a covenant not-to-compete clause into your contract.[82] These statutes differ from state to state.[83] In California, for example, covenants not-to-compete are strictly prohibited; they are *void ab initio*. In other words, any contract that restrains "anyone" (businesses included) "from engaging in a lawful profession, trade, or business

Using different language to refer to the same thing is a mistake.

of any kind is to that extent void."[84] To get around this rule, the drafter should focus on drafting anti-solicitation and confidentiality provisions into the contract. By contrast, there's no specific statutory law in New York on covenants not-to-compete.[85] If your client wants to put a covenant not-to-compete clause into the contract in New York, the best way to ensure that you're following the proper jurisdictional standards is to do a thorough search of the case law.[86]

In the next issue of the *Journal*, the *Legal Writer* continues with representations and warranties, covenants and rights, conditions, discretionary authority, and declarations. ■

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1. William K. Sjostrom, Jr., An Introduction to Contract Drafting 2 (2d ed. 2013).
2. Tina L. Stark, Drafting Contracts: How and Why Lawyers Do What They Do 86 (2d ed. 2014).
3. *See* Deborah B. McGregor & Cynthia M. Adams, International Lawyer's Guide to Legal Analysis and Communication in the United States 282 (2008).
4. *See id.*
5. *Id.*
6. Stark, *supra* note 2, at 68.
7. *Id.* at 67.
8. *See generally*, M.H. Sam Jacobson, *A Checklist for Drafting Good Contracts*, 5 J. Ass'n Legal Writing Directors 79, 89 (2008).
9. *See* Barbara Child, Drafting Legal Documents: Principles and Practices 131-32 (2d ed. 2001).
10. George W. Kuney, The Elements of Contract Drafting with Questions and Clauses for Consideration 37 (3d ed. 2011).
11. Stark, *supra* note 2, at 276.
12. *Id.* at 65
13. Duke McDonald, *The Ten Worst Faults in Drafting Contracts*, 11 Scribes J. Legal Writing 25, 28 (2007).
14. Stark, *supra* note 2, at 69.
15. *Id.*
16. Jacobson, *supra* note 8, at 89.
17. Kenneth A. Adams, A Manual of Style for Contract Drafting 18 (3d ed. 2013).
18. *Id.*
19. Stark, *supra* note 2, at 75.
20. *Id.*
21. *Id.* at 69.
22. Sjostrom, *supra* note 1, at 3.
23. Sjostrom, *supra* note 1, at 3; Stark, *supra* note 2, at 74.
24. Sjostrom, *supra* note 1, at 3; Stark, *supra* note 2, at 72.
25. Sjostrom, *supra* note 1, at 4; Stark, *supra* note 2, at 72.
26. Adapted from Vincent R. Martorana, Fundamental Concepts in Drafting Contracts: What Most Attorneys Fail to Consider, PPT slide 16 (N.Y. St. B. Ass'n, CLE, Feb. 2015) (Martorana I).
27. Sjostrom, *supra* note 1, at 3.
28. *Id.*
29. *Id.* at 4.
30. James P. Nehf, *Writing Contracts in the Client's Interest*, 51 S.C.L. Rev. 153, 157 (1999).
31. *Id.*
32. Stark, *supra* note 2, at 82.
33. *Id.* at 48.
34. Sjostrom, *supra* note 1, at 5.
35. Stark, *supra* note 2, at 81 (citing *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917)).
36. Jacobson, *supra* note 8, at 91.
37. *Id.*
38. *Id.*; Scott J. Burnham, Drafting and Analyzing Contracts 224 (3d ed. 2003).
39. Vincent R. Martorana, Supplemental Outline, The Nuts and Bolts of Contract Drafting: From Basic to Advanced Topics 4 (N.Y. St. B. Ass'n, CLE, June 2015) (Martorana II).
40. Sjostrom, *supra* note 1, at 5.
41. *Id.*
42. Vincent R. Martorana, Supplemental Outline, Fundamental Concepts in Drafting Contracts: What Most Attorneys Fail to Consider 4 (N.Y. St. B. Ass'n, CLE, Feb., 2015) (Martorana III).
43. Sjostrom, *supra* note 1, at 6.
44. *Id.*
45. *Id.*
46. Stark, *supra* note 2, at 85.
47. *Id.* at 101.
48. McGregor & Adams, *supra* note 3, at 302; Jacobson, *supra* note 8, at 94.
49. Stark, *supra* note 2, at 101.
50. *Id.* at 102.
51. *See id.* at 286.
52. Burnham, *supra* note 38, at 226.
53. Stark, *supra* note 2, at 110.
54. Sjostrom, *supra* note 1, at 42.
55. Kenneth A. Adams, Legal Usage in Drafting Corporate Agreements 82 (2001).
56. Sjostrom, *supra* note 1, at 41.
57. *Id.*
58. *See* Burnham, *supra* note 38, at 227.
59. *See id.*
60. *Id.* at 231; Stark, *supra* note 2, at 100.
61. Sjostrom, *supra* note 1, at 41.
62. Martorana III, *supra* note 42, at 7.
63. Adapted from Stark, *supra* note 2, at 104.
64. Martorana II, *supra* note 39, at 18.
65. *Id.*
66. *Id.* at 105.
67. *Id.* at 49.
68. *See* Stark, *supra* note 2, at 117–18.
69. *Id.* at 119.
70. *Id.* at 120.
71. Sjostrom, *supra* note 1, at 19.
72. Martorana III, *supra* note 42, at 22.
73. *Id.*
74. Martorana I, *supra* note 26, PPT slide 122.
75. Adapted from *id.* at 118.
76. *Id.* at 119.
77. Sjostrom, *supra* note 1, at 19.
78. Martorana III, *supra* note 42, at 22.
79. Stark, *supra* note 2, at 51.
80. *Id.* at 130.
81. *Id.*
82. Scott J. Burnham, *Transactional Skills Training: Contract Drafting — Beyond the Basics*, 2009 Transactions: Tenn. J. Bus. L. 253, 271 (2009).
83. *Id.*
84. Cal. Bus. & Prof. Code § 16600.
85. Burnham, *supra* note 82, at 275.
86. *Id.*

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ent to not grant any requests to extend deadlines or courtesies. Although I tried to reason with opposing counsel and explain that an extension of time is a basic courtesy and would not prejudice his client, he responded that his client was "sick and tired of lawyers being nice to each other," and the extension was denied.

Is my adversary's conduct a violation of the Rules of Professional Conduct? What about the Standards of Civility? Are there ethical considerations that have to be addressed? Does opposing counsel's conduct warrant or require a report to the Disciplinary Committee?

Sincerely,
A.M. Civil