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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DEAR FORUM:

I am a judge who is old enough to remember practicing law without a computer. I have done a reasonable job of keeping abreast of recent technology, but it is a running joke in our house that my kids think I need help finding the power button on my laptop. I recently joined a social media site to keep up with photos of my grandchildren and have been connecting with some colleagues I have worked with over the years. I have been cautious with whom I connect, but as I connect with more friends in the legal community, I have been receiving more and more "friend" requests from people whose names I recognize from the courthouse or bar association events, but I am not sure I would consider them a "friend." One attorney I connected with asked me to subscribe to her blog on an area of law that she knows is of interest to me and asked if she could interview me for a podcast about my experiences as a practitioner and judge. At first I thought these "connections" were no different from any other attorney networking, but then I started to think about whether anyone could misconstrue this as inappropriate or as a violation of my ethical duties. Should I be concerned that by engaging in social media, I am violating any ethics rules since I know that many of my online "friends" could appear before me in a case?

In one circumstance that I am particularly embarrassed about, I accidentally accepted a "friend" request and next thing I know, I am getting messages from a litigant in a case I was hearing. I quickly "unfriended" the person once I realized what happened, but I am worried that this could have a significant impact on the case. I know I need to disclose to the attorneys on the case that the communication occurred, but is this a situation where I should automatically recuse myself since I actively accepted the friend request?

There are so many new social media platforms that are showing up in court cases, it is hard to keep up with them all. I noticed recently that some attorneys appear to be using social media platforms as a means of gathering evidence for their cases while others appear to be advising their clients on how to restrict public access to their social media accounts during discovery. Do you have any advice for a social media newbie as to where to draw some lines in how attorneys use social media within the bounds of their ethical obligations?

Very truly yours,
Justice Online

DEAR JUSTICE ONLINE:

The rapid expansion of social media can create potentially sticky situations for judges. New York's Rules Governing Judicial Conduct, 22 N.Y.C.R.R. Part 100 (the "Rules"), set forth the relevant guidelines and obligations that judges must consider when using social media. Judges should be particularly mindful of Rule 100.2, which provides that a judge must always strive to avoid impropriety and the appearance of impropriety. Obviously, judges should not post anything to their social media accounts that could potentially violate the Rules such as an offer of legal advice or comments on a matter before their court. *See* 22 N.Y.C.R.R. §§ 100.3(B) (8), 100.4(G). That is a an easy one, but the quasi-public nature of social media and its associated privacy concerns can raise a host of unique issues that are often difficult to answer and may not have been specifically contemplated by the Rules.

Subscribing to Attorney's Blog and Participating in a Podcast

Important ethical considerations arise when judges subscribe to legal blogs or participate in podcast interviews. The New York State Advisory Committee on Judicial Ethics (the "Committee") recently observed that "the question is not whether a judge may participate in blog posts, podcasts, social media or the like, but how he/she does so." *See* N.Y. Adv. Comm. on Jud. Ethics, Op. 18-126 (2018).

In response to your question whether you can accept your attorney connection's request for a podcast interview, the

Committee has advised that a fact-intensive inquiry is required before the question can be answered. *See id.* Specific factors considered by the Committee include: (1) whether the judge is compensated for participation, (2) whether the material is accessible to the public, (3) whether the podcast host/sponsor appears before the judge, and (4) whether the podcast host is sponsored by a private law firm. *See id.* For full-time judges, the "key factor" is whether the podcast is sponsored by a private law firm. *See id.* The decision whether to participate in the interview should therefore turn on a careful analysis of these factors, giving particular weight to whether the your attorney connection's podcast is hosted or sponsored by a law firm or otherwise closely connected to the for-profit practice of law.

When asked about private law firm blogs that require registration and the subscriber's consent to receive the firm's marketing materials as a condition of the subscription, the Committee advised judges to refrain from subscribing to such blogs because a judge's subscription "could convey the impression that such chosen law firms are in a special position to influence the judge or his/her colleagues." *See id.* Where this is the case, the Committee has stated that a judge's use of a private email address to subscribe to the blog would not sufficiently eliminate the appearance of impropriety. *See id.* The Committee also advised that a judge in a specialized court should not remain on an email list prepared by a one-sided legal services group where the list is not generally available to the public or the bar. *See id.*, citing N.Y. Adv. Comm. on Jud. Ethics, Op. 15-148 (2015). The Committee recently expressed that it "presume[s] a for-profit law firm which prepares and distributes [material] to the public on its website and elsewhere does so for commercial reasons, i.e. primarily for marketing or promotional purposes." *See* N.Y. Adv. Comm. on Jud. Ethics, Op. 18-126 (2018). Based on these opinions, and perhaps charting the safest course for you, it is probably best that you refrain from subscribing to the blog and avoid the risk that your subscription might be misunderstood. *See id.* As the Committee noted, however, visiting a law firm's blog online, without subscribing or registering, would avoid all of these concerns. *See id.*

"Friending" Potential Litigants on Social Media

Turning to whether you can become Facebook "friends" with those who may appear in your court, the simple answer is yes. The Committee has opined that it "cannot discern anything inherently inappropriate about a judge joining and making use of a social network. A judge generally may socialize in person with attorneys who appear in the judge's court, subject to the Rules Governing Judicial Conduct." *See* N.Y. Adv. Comm. on Jud. Ethics, Op. 08-176 (2009). In fact, the Committee has even suggested that the "mere status" of a Facebook friendship with an *actual litigant*, "without more, is an insufficient basis to require recusal." *See* N.Y. Adv. Comm. on Jud. Ethics, Op. 13-39 (2013). As recently noted by the Florida Supreme Court, with the notable exceptions of California, Connecticut, Massachusetts, and Oklahoma, this is the "clear majority position." *See Law Offices of Herssein and Herssein, P.A. v. U.S. Automobile Assn.*, No. 3D17–1421 (Fl. Sup. Ct. Nov. 15, 2018). In those jurisdictions following the minority view, a Facebook "friendship" between a judge and a litigant "standing alone, creates the appearance of impropriety because it reasonably conveys or permits others to convey the impression that they are in a special position to influence the judge in violation of the applicable code of judicial conduct." *Id.*

Where a judge is Facebook "friends" with an actual litigant, there are additional ethical concerns that arise, particularly New York's rules governing judicial conduct that require that judges avoid impropriety and the appearance of impropriety in all of their activities. *See* 22 N.Y.C.R.R. § 100.2. As stated by the Committee, in those situations judges must consider whether the presence of the online connection "alone or in combination with other facts, rise[s] to the level of a 'close social relationship' requiring disclosure and/or recusal." *See* N.Y. Adv. Comm. on Jud. Ethics, Op. 08-176 (2009).

As you indicate, the nature of the actual relationship that you have with your Facebook "friends" likely varies widely from acquaintances to close personal friends. Such is the case with many Facebook users. Therefore, if one of your Facebook "friends" becomes an actual litigant in your court, whether you must recuse yourself will be based on the particular Facebook "friend" who may be involved. If you believe the Facebook "friend" is a mere acquaintance, and would not create so much as the appearance of impropriety, in our opinion, recusal would not be required.

Receiving Social Media Communications from a Party

With respect to the *ex parte* communications that you reviewed from a party, we believe that you correctly decided to disclose the communication to all parties involved in the matter. Generally, "if a judge reviews a substantive *ex parte* communication, it must ordinarily be disclosed to all parties." *See* N.Y. Adv. Comm. on Jud. Ethics, Op. 17-53 (2017) (citations omitted); 22 N.Y.C.R.R. § 100.3(B)(6).

Whether you must now recuse yourself is a more complicated question. As with any other case, recusal is mandated if a judge has reason to believe that his or her impartiality might reasonably be questioned, including if disclosure of an *ex parte* communication would likely erode public confidence in the judiciary. *See* NY Adv. Comm. on Jud. Ethics, Op. 17-53 (2017) (*citing* 22 N.Y.C.R.R. § 100.3(E)(1)). Recusal is also required if the communication leads to some personal bias by the judge, or provides the judge with knowledge of a disputed evidentiary fact. See 22 N.Y.C.R.R. § 100.3(E)(1)(a)(i). In other cases, however, recusal will generally be left to the sole discretion of the judge. *See* N.Y. Adv. Comm. on Jud. Ethics, Op. 17-53 (2017).

Since you have told us that your acceptance of the Facebook "friend" request was inadvertent, it appears likely that disclosing the communication would not result in your impartiality being reasonably questioned, or otherwise erode the public confidence in the judiciary. Therefore, it is advisable that your decision for whether to recuse yourself be guided by the actual substance of the communication, and your determination of whether it could potentially influence your decision in the case. Regardless of your eventual decision, the Committee has recommended that judges faced with similar circumstances write a memorandum to the file documenting the bases for any decision of whether or not to recuse in the event the decision is later questioned. *See* N.Y. Adv. Comm. on Jud. Ethics, Op. 13-39 (2013).

Using Social Media to Obtain Discovery

Given that many people use social media to document significant life events, it is not surprising that many attorneys use Facebook and other forms of social media in an attempt to obtain relevant discovery in a matter. Luckily, some bright line guidelines exist.

For example, it is largely accepted that an attorney representing a client in litigation may access and obtain information from an adverse or third party's social media page, for use in the litigation, so long as that information is accessible to the entire public. *See* NYSBA Comm. on Prof'l Ethics, Op. 843 (2010); New York County Lawyers Association (NYCLA) Prof'l Ethics Comm., Op. 745 (2013). Under those circumstances, the attorney would not run afoul of any ethical rules because accessing an entirely public social media website is "conceptually no different from reading a magazine article or purchasing a book written by that adverse party." NYCLA Prof'l Ethics Comm., Op. 745 (2013); *see* NYSBA Comm. on Prof'l Ethics, Op. 843 (2010) ("Obtaining information about a party available in a [social media] profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription service such as Nexis or Factiva, and that is plainly permitted.").

The catch is that the analysis will change where a person's social media information is not completely accessible to the general public. In those circumstances, gaining access invariably requires an affirmative request by the person seeking to gain access – such as a "friend request" on Facebook – and an acceptance by the person that owns the social media account. Two important ethical considerations arise as a result.

First, because the request to gain access is a form of communication, the attorney cannot make the request when he or she knows that the owner of the social media account is represented. *See* NYCLA Prof'l Ethics Comm., Op. 750 (2017); RPC 4.2 (prohibiting lawyer from communicating with a represented party about the subject of a representation.). As with all communications with represented persons, "the lawyer seeking access must first contact the lawyer representing the party or witness to seek permission." NYCLA Prof'l Ethics Comm., Op. 750 (2017). The prohibition against contacting jurors also means that an attorney may not request access to a juror's social media information. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 466 (2014); RPC 3.5(a)(4) (a lawyer shall not communicate with a member of the jury venire before or during trial unless authorized to do so by law or court order).

Second, even where the request to gain access to social media information would otherwise be permissible, the NYCLA Professional Ethics Committee has found that when making the request, the attorney must simultaneously inform the social media account holder of the lawyer's role in the relevant litigation and the reason for making the request, as the failure to do so constitutes a misrepresentation by omission. *See* NYCLA Prof'l Ethics Comm., Op. 750 (2017). Where the social media platform does not allow requesting parties to simultaneously communicate a message, such as Snapchat, the attorney may not request access. *See* NYCLA Prof'l Ethics Comm., Op. 750 (2017). Finally, it should be obvious that the attorney may not make an end-run around these obligations by causing a third person to make the

request. We addressed this, as well as other related social media issues, in a prior Forum that may also be helpful to you. *See* Vincent J. Syracuse and Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., June 2013, Vol. 85, No. 5.

Advising a Client to Restrict Public Access to His or Her Social Media Account

It is also generally considered permissible for an attorney to advise a client to restrict public access to social media accounts. The NYCLA Professional Ethics Committee has advised that there "is no ethical bar" to counseling clients to prohibit or restrict public access to their social media accounts; attorneys are permitted tell a client to "tak[e] down" particular information posted to their social media accounts that may be harmful in litigation. *See* NYCLA Prof'l Ethics Comm., Op. 745 (2013). Under both circumstances, however, attorneys must be mindful of state and federal laws, which generally require parties to preserve potentially relevant evidence, and prohibit the destruction and spoliation of that potential evidence. *See id.*, *citing VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93. A.D.3d 33 (1st Dep't 2012) ("Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data."). These rules are no less relevant when it comes to information contained on a litigant's social media account (or information that was previously contained in a social media account). While such information may implicate privacy concerns, it remains discoverable so long as there is a sufficient showing by the party seeking disclosure. *See Forman v. Henkin*, 30 N.Y.3d 656, 664 (2018) (holding that when evaluating discovery demands involving social media accounts, "courts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found" as well as balance "the potential utility of the information sought against any specific 'privacy' or other concerns raised by the account holder").

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com)
Carl F. Regelmann, Esq.
(regelmann@thsh.com)
Maxwell W. Palmer, Esq.
(palmer@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am negotiating with an adversary over the terms of a complicated contract that has gone through numerous revisions. My adversary and I have been exchanging redlined Word documents and PDFs showing the edits. When you move the cursor over the edits, the program identifies who made the changes and the date and time of the edits. This has been helpful to both sides because there have been so many revisions and sometimes it is difficult to remember who made each edit. Sometimes I add comments to my client in the document when I send proposed edits for her review. Before I send it back to my adversary, however, I always make sure to remove my comments to my client.

In the last draft I received from my adversary, it included a tiny note bubble that I clicked on because I thought the comment was intended for me. But when I opened it, I discovered the comment was my adversary's comment to *his* client. I am sure it wasn't for me since it said, "They'll never go for this sentence and I don't think we should push back if they strike it." I realized from the metadata in the edits that the sentence at issue was added by the adversary client, not the attorney. I am not sure what to do. My adversary was right; I wouldn't have gone for it and I am definitely going to strike that sentence in the next version. Do I have an obligation to tell my adversary that I saw his comment? I don't want this to derail all of the time and work we spent negotiating this contract and I really don't think the comment had any impact on me because I certainly would have rejected the proposal. Even if I do tell my adversary about the comment, what happens if I discover other metadata that is beneficial to my client? Am I permitted to review and use information I obtain from the metadata in the document?

This got me thinking about all of the information that gets embedded in documents that we are exchanging with adversaries. Although I am pretty familiar with the information that is embedded in the documents, these programs are adding new features all the time and there is probably some information that is embedded that isn't even on my radar. What are my obligations to my client when it comes to eliminating the metadata in documents I send to an adversary? In litigation discovery, are there any bright line rules as to what metadata I can use in documents produced by my adversary or what I should be removing before sending to an adversary?

Sincerely,
B. Hinds Sedock