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## Employment Law—The Elusive Enforceability of Employment Covenants Not To Compete in Arkansas

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## FRIENDING AND FOLLOWING: APPLYING THE RULES OF PROFESSIONAL CONDUCT TO SOCIAL MEDIA

Andy Taylor\*

*Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele . . . [but] the interest in expanding public information about legal services ought to prevail over considerations of tradition.*<sup>1</sup>

The most visited social media website in the United States, Facebook, is second only to Google in terms of the number of visitors per month.<sup>2</sup> In September 2011, the number of Facebook users increased to 800 million.<sup>3</sup> Facebook is so popular that it is estimated that Facebook usage accounts for one out of every seven minutes of time spent online around the world.<sup>4</sup> Twitter, the second-most popular social media website in the United States, has over 100 million “active” users around the world.<sup>5</sup> Approximately half of these users log onto Twitter every day.<sup>6</sup> In June 2011, Twitter users sent out an average of 200 million tweets per day, as compared to 65 million per day in the prior year.<sup>7</sup>

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\* Andy Taylor is a Partner at Taylor & Taylor Law Firm, P.A. The author wishes to thank Tasha Taylor for her assistance in researching and editing this article and for her overall support of the project. The author also wishes to thank Elizabeth Tucker for her exhaustive research of opinions from the Arkansas Committee on Professional Conduct.

1. MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 1 (2006); ARK. RULES OF PROF'L CONDUCT R. 7.2 cmt. 1 (2005).

2. *Top Sites*, QUANTCAST, <http://www.quantcast.com/top-sites/US/> (last visited Jan. 30, 2012); *Top Sites*, ALEXA, <http://www.alexa.com/topsites> (last visited Jan. 30, 2012).

3. Nathan Olivarez-Giles, *Facebook F8: Redesigning and Hitting 800 Million Users*, LA Times Technology Blog, (Sept. 22, 2011, 2:55 PM), <http://latimesblogs.latimes.com/technology/2011/09/facebook-f8-media-features.html>.

4. Emil Protalinski, *Facebook Accounts for 1 in Every 7 Online Minutes*, FRIENDING FACEBOOK, (Dec. 27, 2011, 11:55 AM), <http://www.zdnet.com/blog/facebook/facebook-accounts-for-1-in-every-7-online-minutes/6639>.

5. See generally ALEXA, *supra* note 1; QUANTCAST, *supra* note 1; Twitter, *One Hundred Million Voices*, TWITTER BLOG, (Sept. 8, 2011), <http://blog.twitter.com/2011/09/one-hundred-million-voices.html>.

6. Twitter, *One Hundred Million Voice*, TWITTER BLOG, (Sept. 8, 2011), <http://blog.twitter.com/2011/09/one-hundred-million-voices.html>.

7. Twitter, *200 Million Tweets Per Day*, TWITTER BLOG, (JUNE 30, 2011, 1:03 PM), <http://blog.twitter.com/2011/06/200-million-tweets-per-day.html>.

The ubiquity of social networking sites has resulted in many attorneys attempting to use social media for a variety of purposes, from building client relationships to sharing general information about the law.<sup>8</sup> This raises a variety of ethical issues, including issues of confidentiality and problems associated with an unintended attorney-client relationship arising as the result of interactions on social media.<sup>9</sup>

Both the Model Rules of Professional Conduct (the “Model Rules”) and the Arkansas Rules of Professional Conduct (the “Arkansas Rules”) recognize that, although there is a strong tradition in the law of not advertising for legal services, the interest in expanding public information about legal services trumps that tradition.<sup>10</sup> Nevertheless, with emerging technologies, there is an ongoing tug-of-war occurring in many states between the interest in providing information about legal services to the public and the traditions of advertising.<sup>11</sup> As a result, lawyers in at least one state have been advised to avoid certain types of interactive websites altogether, or otherwise risk what one attorney has dubbed a “one-click ethics violation.”<sup>12</sup>

Rather than accept a view of the Rules of Professional Conduct that essentially prohibits attorneys from using certain types of websites, this article attempts to explain how attorneys can use social networking sites without violating any Rules of Professional Conduct. In addition, this article proposes a way to modify the current rule structure so that attorneys no longer have to choose between avoiding emerging methods of communicating or risking a violation of the Rules of Professional Conduct.

This article will focus on the implications of using social networking sites for client development, and particularly at how doing so might implicate the Rules of Professional Conduct relating to advertising, direct solicitation, and other forms of communication relating to a lawyer’s services.

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8. See generally CAROLYN ELEFANT & NICOLE BLACK, *SOCIAL MEDIA FOR LAWYERS: THE NEXT FRONTIER* (2010).

9. See ABA Comm’n on Ethics 20/20 Working Group on the Implications of New Techs., For Comment: Issues Paper Concerning Client Confidentiality and Lawyers’ Use of Technology (Sept. 20, 2010), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/ethics\\_2020/clientconfidentiality\\_issuespaper.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/clientconfidentiality_issuespaper.authcheckdam.pdf); ABA Comm’n on Ethics 20/20 Working Group on the Implications of New Techs., For Comment: Issues Paper Concerning Lawyers’ Use of Internet Based Client Development Tools (Sept. 20, 2010), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/ethics\\_2020/clientdevelopment\\_issuespaper.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/clientdevelopment_issuespaper.authcheckdam.pdf).

10. MODEL RULES OF PROF’L CONDUCT R. 7.2 cmt. 1 (2006); ARK. RULES OF PROF’L CONDUCT R. 7.2 (2005).

11. See generally Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It’s Also Dangerous*, ABA JOURNAL, (Feb. 1, 2011, 4:20 AM), [http://www.abajournal.com/magazine/article/seduced\\_for\\_lawyers\\_the\\_appeal\\_of\\_social\\_media\\_is\\_obvious\\_dangerous](http://www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of_social_media_is_obvious_dangerous).

12. *Id.*; S.C. Bar Ethics Advisory Comm., Op. 09-10, 2010 available at <http://www.scbare.org/News/NewsDetails/ArticleId/107/Ethics-Advisory-Opinion-09-10.aspx>.

Because Facebook and Twitter are currently the most popular social networking sites, this article focuses on those two sites, though the general principles discussed herein are applicable to most other social networking sites. This article will evaluate the possible issues that might arise under either the Model Rules or the Arkansas Rules.

This article begins with an overview of the usage of and terminology relating to Facebook and Twitter.<sup>13</sup> Next, this article continues with an overview of the Rules of Professional Conduct that relate to lawyer communications.<sup>14</sup> The article then attempts to categorize various types of interactions on social networking sites under the Rules of Professional Conduct.<sup>15</sup> This article next addresses various issues that can arise in the context of the use of social media for client development.<sup>16</sup> Finally, this article suggests some general principles that might be considered in revising the rules to take social networking sites into account.<sup>17</sup>

There are three important caveats or assumptions that apply to this article and that are important to a complete understanding of the article:

1. This article addresses only the rules relating to communications concerning a lawyer's services, advertising, and direct solicitation. It does not address other ethical issues or pitfalls that might arise in the context of an attorney's use of social networking sites.
2. When this article refers to an attorney's usage of Facebook or Twitter, it should be understood to refer to usage that is primarily for professional purposes. This article does not address or state an opinion regarding an attorney's Facebook or Twitter presence that is maintained for personal purposes, even if that attorney occasionally addresses legal issues or occasionally discusses that attorney's practice.
3. Unless otherwise noted, when this article refers to how particular statements on a Facebook or Twitter profile would be regulated, it should be understood to refer to statements that concern a lawyer's services. Unless otherwise noted, such an analysis would not apply to statements that are either about the law generally or statements that are not law-related.

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13. See *infra* Part I.

14. See *infra* Part II.

15. See *infra* Part III.

16. See *infra* Part IV.

17. See *infra* Part V.

## I. OVERVIEW OF SOCIAL NETWORKING SITES

### A. Facebook

Facebook bills itself as a way for people to “keep up with friends, upload an unlimited number of photos, share links and videos, and learn more about the people they meet.”<sup>18</sup> Although there are many components to Facebook, the key to understanding this article is to understand a few basic terms.<sup>19</sup>

Of primary importance for purposes of this article is the difference between a user’s “profile” (or, in the case of a business or other organization, a “page”) and a user’s “news feed.” The profile is described as the “complete picture” of a user on Facebook.<sup>20</sup> On the profile, a user has the ability to post status updates, photos, videos, and links.<sup>21</sup> The profile is the page on Facebook that contains all of an individual user’s posts.<sup>22</sup> Users have the

18. FACEBOOK, <https://www.facebook.com/facebook?sk=info> (last visited Jan. 30, 2012).

19. *Facebook Glossary – Facebook Help Center*, FACEBOOK, <https://www.facebook.com/help/glossary> (last visited Jan. 30, 2012).

20. *Profile – Facebook Help Center*, FACEBOOK, <https://www.facebook.com/help/?faq=250714824948501#Profile> (last visited Jan. 30, 2012). Facebook announced in September of 2011 that it was introducing “timeline,” which it describes as a “new kind of profile,” and all profiles are being converted to the timeline format. Samuel W. Lessin, *Tell Your Story with Timeline*, THE FACEBOOK BLOG, (Sept. 22, 2011, 12:30 PM), <https://blog.facebook.com/blog.php?post=10150289612087131>; Paul McDonald, *Timeline: Now Available Worldwide*, THE FACEBOOK BLOG, (Dec. 15, 2011, 6:30 AM), <https://blog.facebook.com/blog.php?post=10150408488962131>. The primary difference between the old profile format and the new timeline format is that the timeline format is “a lot more visual.” Facebook also appears to be merging the term “wall” with “timeline.” See, e.g., *Wall: How To Use the Wall Feature and Wall Privacy – Facebook Help Center*, FACEBOOK, <https://www.facebook.com/help/?page=174851209237562> (last visited Jan. 30, 2012) (referring to the “wall (timeline)”). For purposes of this article, the differences between the profile and the timeline are not important. In addition, Twitter uses the term “profile” for the comparable portion of its site, but uses the term “timeline” to describe what on Facebook is known as the “news feed.” See *News Feed – Facebook Help Center*, FACEBOOK, <https://www.facebook.com/help/?faq=128162313943092#News-Feed> (last visited Jan. 30, 2012), *Twitter Help Center, The Twitter Glossary*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/166337-the-twitter-glossary> (last visited Jan. 30, 2012). Therefore, in an effort to avoid confusion, the term “profile” will be used throughout this article to describe both the Facebook profile (or timeline) and the Twitter profile.

21. *How do I share a status or other content on Facebook? – Facebook Help Center*, FACEBOOK, <https://www.facebook.com/help/?faq=132371443506290#How-do-I-share-a-status-or-other-content-on-Facebook?> (last visited Jan. 30, 2012).

22. *What happens when I upgrade to Timeline – Facebook Help Center*, FACEBOOK, <https://www.facebook.com/help/?faq=168122463270371#What-happens-when-I-upgrade-to-timeline?> (last visited Jan. 30, 2012).

ability to limit who sees their profile and can also limit who sees a particular post on their profile.<sup>23</sup> This ability to limit access is very flexible, with options ranging from “Public” (meaning even people who do not have a Facebook account can see the profile or the particular post) to “Custom” (meaning that a user can limit the ability to see the profile or the particular post to certain friends, or the user can even exclude certain people from the ability to see the profile or the particular post).<sup>24</sup>

Facebook allows only individuals to have a profile.<sup>25</sup> Therefore, Facebook created “pages,” which allow businesses, celebrities, bands, brands, and other organizations to connect with other Facebook users.<sup>26</sup> Although there are a few differences between profiles and pages, the two are very similar.<sup>27</sup> For purposes of this article, the key point is that because only an individual may have a profile, if a law firm chooses to maintain a presence on Facebook, it must do so through a page.<sup>28</sup> However, because of the similarity between the two, any time this article uses the term “profile,” it can be read as referring to either an individual’s profile or a business or other organization’s page.

The key feature of a profile is that it is the collection of all of the information regarding a particular individual or organization.<sup>29</sup> In contrast, the “news feed” is a list of stories about *other* Facebook users.<sup>30</sup> Because the news feed is on a user’s home page, it is generally the first thing a user sees

23. *How Do I Control Who Can See My Profile (Timeline)?* – Facebook Help Center, FACEBOOK [https://www.facebook.com/help/?faq=167941163265974#How-do-I-control-who-can-see-my-profile-\(timeline\)?](https://www.facebook.com/help/?faq=167941163265974#How-do-I-control-who-can-see-my-profile-(timeline)?) (last visited Jan. 30, 2012); *Who Can See Stories on My Timeline?* – Facebook Help Center, FACEBOOK, <https://www.facebook.com/help/?faq=286302131414169#Who-can-see-stories-on-my-timeline?> (last visited Jan. 30, 2012).

24. *When I Share Something, How Do I Choose Who Can See It?* – Facebook Help Center, FACEBOOK, <https://www.facebook.com/help/?faq=120939471321735#When-I-share-something-how-do-I-choose-who-can-see-it?> (last visited Jan. 30, 2012).

25. *How are Pages different from profiles (timelines)?* – Facebook Help Center, FACEBOOK, [https://www.facebook.com/help/?faq=217671661585622#How-are-Pages-different-from-profiles-\(timelines\)?](https://www.facebook.com/help/?faq=217671661585622#How-are-Pages-different-from-profiles-(timelines)?) (last visited Jan. 30, 2012).

26. *Id.*; *Pages* – Facebook Help Center, FACEBOOK, <https://www.facebook.com/help/?faq=183297075069617#Pages> (last visited Jan. 30, 2012).

27. *See What Is a Facebook Page?* – Facebook Help Center, FACEBOOK, <https://www.facebook.com/help/?faq=174987089221178#What-is-a-Facebook-Page?> (last visited Jan. 30, 2012).

28. *See* FACEBOOK, *supra* note 24.

29. *What Is a Timeline?* – Facebook Help Center, FACEBOOK, <https://www.facebook.com/help/?faq=133986550032744#What-is-a-timeline?> (last visited Jan. 30, 2012); *What Is a Facebook Page?* – Facebook Help Center, FACEBOOK, <https://www.facebook.com/help/?faq=174987089221178#What-is-a-Facebook-Page?> (last visited Jan. 30, 2012).

30. *What is News Feed?* – Facebook Help Center, FACEBOOK, <https://www.facebook.com/help/?faq=210346402339221#What-is-News-Feed?> (last visited Jan. 30, 2012).

upon logging on to Facebook.<sup>31</sup> Status updates and other content from other users' profiles appear in a user's news feed.<sup>32</sup> Generally speaking, a post from an individual's profile will appear in another user's news feed if that user has connected with the individual on Facebook by creating a "friend" relationship, generally referred to as "friending" another user.<sup>33</sup> Similarly, a story from a business or other organization's page will appear in a user's news feed if the user "follows" or "likes" that particular page.<sup>34</sup> An alternative way for a user to see posts from a profile or page is to "subscribe" to that profile or page.<sup>35</sup>

With few exceptions, the only way for one user's status updates to appear in another user's news feed is for the user to take the affirmative step of connecting with the other user. The primary exception to this is that if a "friend" of a user interacts with a third user. As an example, consider Users A, B, and C, where A and B are connected, and B and C are connected. If B and C interact in some way (perhaps B comments on C's status or shares C's picture on B's own profile, or perhaps C writes something on B's profile), then A might see that interaction. However, it will be clear to A that the interaction was between B and C, and the A was not involved in the interaction.

Besides reading other users' status updates and other posts, there are additional ways that users can interact with other Facebook users with whom they have a connection. For example, users can comment on posts that appear on another user's profile.<sup>36</sup> A user can post on another user's wall.<sup>37</sup> A user may "tag" another user or page in a post, which creates a link

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31. See *News Feed – Facebook Help Center*, FACEBOOK, <https://www.facebook.com/help/?faq=128162313943092#News-Feed> (last visited Jan. 30, 2012).

32. *Id.*

33. *Id.* (stating that the news feed contains updates from "friends"); *Friends – Facebook Help Center*, FACEBOOK, <https://www.facebook.com/help/?faq=255089167852519> (last visited Jan. 30, 2012) (defining a friend as a person with whom a user has connected).

34. *News Feed – Facebook Help Center*, FACEBOOK, <https://www.facebook.com/help/?faq=128162313943092#News-Feed> (last visited Jan. 30, 2012). Based on the author's own experience with Facebook, the nomenclature used on Facebook is "Like" rather than "Follow." However, the term "follow" still appears in some sections of Facebook's help pages. Nevertheless, the term "like" is used in a few places, and will be the term used throughout this article. FACEBOOK, *supra* note 25.

35. *What are subscriptions? – Facebook Help Center*, FACEBOOK, <https://www.facebook.com/help/?faq=279614732052951#What-are-subscriptions?> (last visited Jan. 30, 2012).

36. *How Do I make a comment? – Facebook Help Center*, FACEBOOK, <https://www.facebook.com/help/?faq=187302991320347#How-do-I-make-a-comment?> (last visited Jan. 30, 2012).

37. *Who can post to my Wall? How do I block people from posting? -- Facebook Help Center*, FACEBOOK, <https://www.facebook.com/help/?faq=207589362639270#Who-can-post-to-my-Wall?-How-do-I-block-people-from-posting?> (last visited Jan. 30, 2012).

between that other user or page and the post.<sup>38</sup> Additionally, a user may send a private message to another user or to a page.<sup>39</sup>

## B. Twitter

Twitter bills itself as “an information network made up of 140-character messages called Tweets.”<sup>40</sup> In many ways, Twitter is similar to Facebook, even if the terminology is different. For example, all Twitter users have a profile (similar to the Facebook profile), which displays information about the user and all of the tweets posted by that user.<sup>41</sup> A tweet is a message on Twitter, and all Twitter messages are limited to 140 characters.<sup>42</sup> When a user logs into Twitter, they see a list of tweets from other users.<sup>43</sup> This list of tweets is similar to the news feed on Facebook, and although Twitter uses a different word to describe this list of other users’ tweets, for purposes of this article, this “feed” will be referred to as the “news stream.”<sup>44</sup>

Users on Twitter interact by “following” one another.<sup>45</sup> As with the Facebook news feed, if User A wants User B’s tweets to appear on User A’s news feed, User A must take the affirmative step of “following” User B.<sup>46</sup> This is somewhat analogous to friending, liking, or subscribing to another

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38. *Tagging – Facebook Help Center*, FACEBOOK, <https://www.facebook.com/help/?faq=232620513462357#Tagging> (last visited Jan. 30, 2012).

39. *Can a Page contact me directly if I like it? – Facebook Help Center*, FACEBOOK, <https://www.facebook.com/help/?faq=187558264665298#Can-a-Page-contact-me-directly-if-I-like-it?> (last visited May 1, 2012); *How do I send a message?*, FACEBOOK, <https://www.facebook.com/help/?faq=154917244574299#How-do-I-send-a-message?> (last visited Jan. 30, 2012).

40. *Twitter Help Center, Twitter 101: How should I get started using Twitter?*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/215585-twitter-101-how-should-i-get-started-using-twitter> (last visited Jan. 30, 2012).

41. *Twitter Help Center, The Twitter Glossary*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/166337-the-twitter-glossary#p> (last visited Jan. 30, 2012).

42. *Twitter Help Center, The Twitter Glossary*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/166337-the-twitter-glossary#t> (last visited Jan. 30, 2012).

43. *Twitter Help Center, Welcome to Your New Home*, TWITTER, <https://support.twitter.com/articles/20169520> (last visited Jan. 30, 2012).

44. See *supra* note 19 for an explanation of why using the Twitter nomenclature in this article would be problematic.

45. *Twitter Help Center, The Twitter Glossary*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/166337-the-twitter-glossary#f> (last visited Jan. 30, 2012).

46. *Twitter Help Center, The Twitter Glossary*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/166337-the-twitter-glossary#r> (last visited Jan. 30, 2012).



timeline or page on Facebook. As with Facebook, it requires an affirmative step on the part of User A for User B's tweets to show up in this timeline. There is an exception to this general rule, though, in that User B could "retweet" another user's tweet, in which case User A would then see the other user's tweet. Users retweet by either clicking the "Retweet" button on Twitter or by manually copying and pasting another user's tweet and prefacing the tweet with the letters "RT" and the other user's username.<sup>47</sup>

There are a few other terms relating to Twitter that are important for purposes of this article. First, an "@reply" is created when a user clicks the "reply" button on another user's tweet.<sup>48</sup> This creates a tweet which begins with the '@' character, followed by the other user's username.<sup>49</sup> So, if User A replies to a tweet from User B, then User A's tweet would begin with "@User\_B." This action is somewhat analogous to posting a comment on a status in Facebook.

A "mention" is created in much the same way (User A would insert "@User\_B" anywhere in the tweet) but is typically used to send a message to another user that does not relate to a tweet from that particular user.<sup>50</sup> This is somewhat analogous to "tagging" someone on Facebook. Twitter users can also send a private message (known as a "direct message") to other Twitter users, by starting a tweet with the letters "DM" followed by the other user's Twitter username.<sup>51</sup>

Users generally cannot share other content, such as photos or video, directly on Twitter, but they can post the content elsewhere on the Internet and then send a link to the content to their followers in a tweet.<sup>52</sup>

While Twitter does have a few privacy options, these options are much less flexible than those available on Facebook.<sup>53</sup> With respect to their tweets, users have two options: make all of their tweets public, or require a potential

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47. *Twitter Help Center, What Is Retweet? (RT)*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/77606-what-is-retweet-rt> (last visited Jan. 30, 2012).

48. *Twitter Help Center, What Are @replies and Mentions?*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/14023-what-are-replies-and-mentions> (last visited Jan. 30, 2012).

49. *Id.*

50. *Id.*

51. *Twitter Help Center, What Is a Direct Message? (DM)*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/14606-what-is-a-direct-message-dm> (last visited Jan. 30, 2012).

52. *Twitter Help Center, How To Post Videos on Twitter*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/75603-how-to-post-videos-on-twitter> (last visited Jan. 30, 2012).

53. *Compare Twitter Help Center, About Public and Protected Tweets*, TWITTER, <https://support.twitter.com/articles/14016-about-public-and-protected-accounts> (last visited Jan. 30, 2012), with FACEBOOK, *supra* note 22.

follower to make a request to see the user's tweets.<sup>54</sup> There is not, however, an option to limit access to particular tweets.<sup>55</sup> As with Facebook, there is an option to block particular users, but if that user has a public account, the only effect that it has is to prevent the other user from interacting with him or her.<sup>56</sup>

## II. OVERVIEW OF THE RULES OF PROFESSIONAL CONDUCT RELATING TO COMMUNICATIONS

Before delving into the topic of how the Rules of Professional Conduct might apply to social media, a brief overview of the rules is necessary. Under both the Model Rules and the Arkansas Rules, there are three categories of communications regarding legal services.<sup>57</sup> The first category is "Communications Concerning a Lawyer's Services."<sup>58</sup> This category includes all communications relating to the services that a lawyer provides.<sup>59</sup> The second category is "Advertising."<sup>60</sup> This category, which is made up of communications made through "public media," is a subset of the first category and is governed by both the rule regulating communications concerning a lawyer's services and the rule regulating advertising.<sup>61</sup> The third category is "Direct Contact with Prospective Clients."<sup>62</sup> In Arkansas, this category of communication is governed not only by the rule regulating direct contact with prospective clients, but also the rule regulating advertising and the rule regulating communications concerning a lawyer's services.<sup>63</sup> As discussed below, the Model Rules and the Arkansas Rules have very different definitions of

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54. *Id.*

55. *Id.*

56. *Twitter Help Center, How To Block Users on Twitter*, TWITTER, <https://support.twitter.com/articles/117063-how-to-block-users-on-twitter> (last visited Jan. 30, 2012).

57. MODEL RULES OF PROF'L CONDUCT R. 7.1-7.3 (2006); ARK. RULES OF PROF'L CONDUCT R. 7.1-7.3 (2005).

58. MODEL RULES OF PROF'L CONDUCT R. 7.1 (2006); ARK. RULES OF PROF'L CONDUCT R. 7.1 (2005).

59. ARK. RULES OF PROF'L CONDUCT R. 7.1 (2005).

60. MODEL RULES OF PROF'L CONDUCT R. 7.2 (2006); ARK. RULES OF PROF'L CONDUCT R. 7.2 (2005).

61. ARK. RULES OF PROF'L CONDUCT R. 7.2 (2005).

62. MODEL RULES OF PROF'L CONDUCT R. 7.3 (2006); ARK. RULES OF PROF'L CONDUCT R. 7.3 (2005).

63. ARK. RULES OF PROF'L CONDUCT R. 7.3(b)(7) (2005) (stating that such communications must "comply with all applicable rules governing lawyer advertising"); ARK. RULES OF PROF'L CONDUCT R. 7.2(a) (2005) (stating that the rule relating to advertising is "[s]ubject to the requirements of Rule[] 7.1[,]," which is the rule that governs Communications Concerning a Lawyer's Services).

direct solicitations.<sup>64</sup> Under the Model Rules, this category only applies to solicitations by “in-person, live telephone or real-time electronic contact.”<sup>65</sup> The Arkansas Rules, in contrast, apply to “any form of direct contact, in-person or otherwise.”<sup>66</sup>

#### A. Communications Concerning a Lawyer’s Services

With respect to communications concerning a lawyer’s services, both the Model Rules and the Arkansas Rules prohibit “false or misleading communication about [a] lawyer or [a] lawyer’s services.”<sup>67</sup> Both rules define a false or misleading communication as one that “contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”<sup>68</sup>

The Arkansas Rule, however, provides three additional types of statements that will cause a communication to be considered false or misleading.<sup>69</sup> The first type of statement is a statement that “is likely to create an unjustified expectation about the results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law.”<sup>70</sup> The second type of statement is a statement that “compares the lawyer’s services with other lawyers’ services, unless the comparison can be factually substantiated.”<sup>71</sup> The third type of statement is a statement that “contains a testimonial or endorsement.”<sup>72</sup>

#### B. Advertising

With respect to advertising, the Model Rules and the Arkansas Rules contain similar restrictions, although there is some variation.<sup>73</sup> Both rules allow a lawyer to advertise through “public media,”<sup>74</sup> and both rules prohibit

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64. *See infra* Part II.C.

65. MODEL RULES OF PROF’L CONDUCT R. 7.3 (2006).

66. ARK. RULES OF PROF’L CONDUCT R. 7.3 (2005).

67. MODEL RULES OF PROF’L CONDUCT R. 7.1 (2006); ARK. RULES OF PROF’L CONDUCT R. 7.1 (2005).

68. MODEL RULES OF PROF’L CONDUCT R. 7.1 (2006); ARK. RULES OF PROF’L CONDUCT R. 7.1(a) (2005).

69. *See* ARK. RULES OF PROF’L CONDUCT R. 7.1(b)–(d) (2005).

70. *Id.* at 7.1(b).

71. *Id.* at 7.1(c).

72. *Id.* at 7.1(d).

73. *See generally* MODEL RULES OF PROF’L CONDUCT R. 7.2 (2006); ARK. RULES OF PROF’L CONDUCT R. 7.2 (2005).

74. MODEL RULES OF PROF’L CONDUCT R. 7.2(a) (2006); ARK. RULES OF PROF’L CONDUCT R. 7.2(a) (2005).

a lawyer from giving “anything of value to a person for recommending the lawyer’s services.”<sup>75</sup>

In addition, both rules include certain disclosure requirements.<sup>76</sup> The Model Rules require that an advertisement “include the name and office address of at least one lawyer or law firm responsible for [the advertisement’s] content.”<sup>77</sup> The Arkansas Rules require that an advertisement “include the name of at least one lawyer who is licensed in Arkansas and who is responsible for its content, and shall disclose the geographic location of the office or offices . . . in which the lawyer or lawyers who actually perform the services advertised principally practice law.”<sup>78</sup>

The primary difference between the Model Rules and the Arkansas Rules of Professional Conduct is that the Arkansas Rules provide certain additional requirements and restrictions regarding photographs, images, and voices.<sup>79</sup> First, the Arkansas Rules provide that if an advertisement utilizes “actors or other individuals,” the actors or other individuals must be identified “by name and relationship” to the lawyer or law firm.<sup>80</sup> Additionally, the Arkansas Rules expressly prohibit the use of clients or former clients, as well as the use of dramatizations.<sup>81</sup> However, the Arkansas Rules expressly *permit* the use of photographs, images, and voices of the attorneys who will actually be performing the services.<sup>82</sup>

### C. Direct Solicitation

With respect to direct solicitation, the Model Rules and the Arkansas Rules are strikingly different. The Model Rules prohibit only direct solicitation by “in-person, live telephone or real-time electronic contact.”<sup>83</sup> Direct solicitation by any other means of communication is permissible under the Model Rules, so long as the solicitation complies with the other Model

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75. MODEL RULES OF PROF’L CONDUCT R. 7.2 (b) (2006); ARK. RULES OF PROF’L CONDUCT R. 7.2 (c) (2005). Both rules provide an exception for paying “the reasonable costs” of advertising. *See* MODEL RULES OF PROF’L CONDUCT R. 7.2(b)(1) (2006); ARK. RULES OF PROF’L CONDUCT R. 7.2(c) (2005). Both rules also provide other exceptions not relevant to this article, including participation in certain referral services and purchase of a law practice. MODEL RULES OF PROF’L CONDUCT R. 7.2(b)(2)–(4) (2006); ARK. RULES OF PROF’L CONDUCT R. 7.2(c) (2005).

76. MODEL RULES OF PROF’L CONDUCT R. 7.2(c) (2006); ARK. RULES OF PROF’L CONDUCT R. 7.2(d) (2005).

77. MODEL RULES OF PROF’L CONDUCT R. 7.2(c) (2006).

78. ARK. RULES OF PROF’L CONDUCT R. 7.2(d) (2005).

79. *Id.* at 7.2(e).

80. *Id.*

81. *Id.*

82. *Id.*

83. MODEL RULES OF PROF’L CONDUCT R. 7.3(a) (2006).

Rules.<sup>84</sup> The Arkansas Rules, on the other hand, prohibit solicitation “by any form of direct contact, in-person or otherwise.”<sup>85</sup> When soliciting people other than those with whom a lawyer has either a family or prior professional relationship, the rule has only one exception: a lawyer may send a solicitation by “written communication.”<sup>86</sup>

The other key difference between the Model Rules and the Arkansas Rules relates to the requirements for direct contact with prospective clients. Under the Model Rules, any communication directed to someone known to be in need of legal assistance must “include the words ‘Advertising Material’ on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication.”<sup>87</sup> The Arkansas Rule, on the other hand, has a detailed list of requirements.<sup>88</sup> In particular, the written communication must:

- Include the word “Advertisement” in red print on the bottom left hand corner of the envelope, in a font twice the size of that used for the addressee’s name;
- Be sent only by regular mail;
- Not have the appearance of a legal pleading or other official document;
- State “Advertisement” on each page of the communication;
- Begin with this statement: “If you have already retained a lawyer, please disregard this letter;”
- Include a statement (quoted verbatim in the rule) in all capital letters informing the recipient where to direct any complaints about the lawyer or the communication;
- Disclose how the lawyer obtained information prompting the communication, if the communication was prompted by a particular event involving the recipient of the communication.<sup>89</sup>

As mentioned previously, the communication must also comply with the requirements of Rule 7.2, relating to advertising.<sup>90</sup> Finally, if the communication involves a death claim, the written communication may not be sent until thirty days after the accident.<sup>91</sup>

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84. There are two common-sense exceptions: (1) if the person being solicited has indicated to the lawyer a desire not to be contacted; or (2) if “the solicitation involves coercion, duress, or harassment.” *Id.* at 7.3(b).

85. ARK. RULES OF PROF’L CONDUCT R. 7.3(a) (2005).

86. *Id.* at 7.3(b).

87. MODEL RULES OF PROF’L CONDUCT R. 7.3(c) (2005).

88. ARK. RULES OF PROF’L CONDUCT R. 7.3(b), (d) (2005).

89. *Id.* at (7.3)(b)(1)–(6), (d).

90. *Id.* at 7.3(b)(7).

91. *Id.* at 7.3(c).

### III. CATEGORIZING SOCIAL MEDIA: A COMMUNICATION REGARDING LEGAL SERVICES, AN ADVERTISEMENT, OR A DIRECT SOLICITATION?

Because of the variety of methods of communicating via social media, determining whether communications via Facebook or Twitter fall under the category of “communications concerning a lawyer’s services,” “advertisements,” or “direct solicitations” is not an easy task. However, these communications can be categorized into three broad categories: (1) the entire Facebook or Twitter profile page (which contains all of the user’s updates or tweets, along with information about the user); (2) the individual Facebook status updates or the individual tweets; and (3) communications with one user on Facebook (by tagging a user, writing on the user’s profile wall, or sending the user a private message) or Twitter (by mentioning the user, sending the user an @reply, or sending the user a direct message). This part of this article addresses the first two categories.<sup>92</sup> The third category (messages directed at a specific user) requires a more thorough analysis and is addressed in Part IV.E.

This section of the article attempts to provide some guidance as to how particular communications on Facebook and Twitter would be treated under both the Model Rules and the Arkansas Rules. With respect to some types of interaction via social media, this section does not purport to provide an absolute answer to the question because, as will be shown, it is difficult to analogize communications via social media to other types of communications, or to fit those communications within the definitions provided by either the Model Rules or the Arkansas Rules.

One important distinction to bear in mind relates to the content of the communication itself. For example, a status update or tweet that describes a law firm’s areas of practice might be treated differently than a status update or tweet from that same firm that is law-related but does not describe in any way the services provided by that law firm.<sup>93</sup>

#### A. Facebook and Twitter Profiles

As discussed previously, a Facebook or Twitter profile is the page that contains all of the information about a user, such as all of the user’s status updates, photos, videos, and other content (on Facebook) or all of the user’s

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92. See *infra* Parts III.A, III.B.

93. As an example of this, the author’s firm “live-tweeted” a panel discussion of several of the people involved in the West Memphis 3 case, held on August 25, 2011. Max Brantley, *Who Killed the West Memphis Children?*, ARKANSAS TIMES BLOG, <http://www.arktimes.com/ArkansasBlog/archives/2011/08/25/who-killed-the-west-memphis-children> (August 25, 2011). For a sample tweet from the event, visit <https://twitter.com/#!/TaylorTaylorLaw/status/106868866055016449>.

tweets (on Twitter).<sup>94</sup> There appear to be no reported cases or ethics opinions addressing the issue of whether such a profile page should be treated as an advertisement, a communication concerning a lawyer's services, or something else.<sup>95</sup> In all likelihood, a profile page would be treated as an advertisement. However, based on the "opt-in" nature of Facebook and Twitter, there is at least an argument that a profile page would be subject to the less restrictive rules relating to communications concerning a lawyer's services.

Because Facebook and Twitter profiles are somewhat analogous to websites, a look at how states have treated websites is instructive. In most states, websites are treated as advertisements and are governed by the rule relating to advertising.<sup>96</sup> This seems to be in line with the way that the Model Rules treat websites.<sup>97</sup> At least one author has opined that, in Arkansas, "[m]ost [w]eb pages *will* be considered advertising."<sup>98</sup>

There are two states, Florida and Louisiana, that treat websites as information provided about a lawyer's or law firm's services upon request.<sup>99</sup> According to the comments, the rationale of the Florida rule is that a website is "accessed by the viewer upon the viewer's initiative."<sup>100</sup> Even though websites fall under a different category of communications in those two states, that category is still governed by the rule regulating advertising.<sup>101</sup>

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94. See *supra* Part I.

95. There are opinions that address other Facebook-related ethical issues, such as whether a judge may properly maintain a Facebook account. See, e.g., *In re Judicial Ethics Opinion 2011-3*, 2011 Okla. Jud. Eth. 3 (July 6, 2011).

96. See Vanessa S. Browne-Barbour, *Lawyer and Law Firm Web Pages As Advertising: Proposed Guidelines*, 28 RUTGERS COMPUTER & TECH. L.J. 275, 302 (2002) (writing that "[i]n most instances, a website maintained by a lawyer to disseminate information about the lawyer or his services constitutes advertising because such websites essentially propose commercial transactions to prospective clients.") (internal citations omitted). Ms. Browne-Barbour catalogs twenty-one states' approaches to websites, all of which concluded (or were based on the assumption) that websites are advertising. *Id.* at 302–13.

97. See ABA Comm'n on Ethics 20/20, *ABA Commission on Ethics 20/20 Revised Proposal – Technology and Client Development*, at 7, (Sept. 19, 2011), [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20110919\\_ethics\\_20\\_20\\_technology\\_and\\_client\\_development\\_posting.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110919_ethics_20_20_technology_and_client_development_posting.authcheckdam.pdf) (referring to websites as "forms of advertising").

98. Judith Kilpatrick, *Arkansas' Amended Advertising Rules, Solicitation, and the Internet*, 2000 ARK. L. NOTES 39, 41 (2000) (emphasis in original).

99. See FLA. RULES OF PROF'L CONDUCT R. 4-7.6(b)(3) (2008); LA. RULES OF PROF'L CONDUCT R. 7.6(b)(3) (2011).

100. FLA. RULES OF PROF'L CONDUCT R. 4-7.6(b)(3) & cmt. 2 (2008).

101. See *id.* at 4-7.9(a); LA. RULES OF PROF'L CONDUCT R. 7.9(a) (2011). Under both states' rules, communications categorized as information provided about a lawyer's or law firm's services upon request are exempted from the prohibition of statements of past results. FLA. RULES OF PROF'L CONDUCT R. 4-7.9(b)(5) (2008); LA. RULES OF PROF'L CONDUCT R. 7.9(b)(3) (2011).

Therefore, even in those two states, websites are, in a sense, treated as advertisements.<sup>102</sup>

Although all states that have addressed the issue appear to treat websites as an advertisement, there is an argument that a profile page is not an advertisement at all, and that it is merely a response to an inquiry. The argument is based on the same reasoning, addressed below, that there are several affirmative steps that a user must take before getting to a profile page.<sup>103</sup> This is particularly true where a lawyer or law firm makes the profile page private, so that users must take an affirmative step to connect with the lawyer or law firm to be able to even see the profile. Nevertheless, there is no specific authority for this position. Therefore, although there is an argument that profile pages are not advertisements, a cautious lawyer is well-advised to treat the profile page as an advertisement.

#### B. Individual Status Updates (on Facebook) and Tweets (on Twitter)

Although there is a strong argument that an attorney or law firm's profile on Twitter or Facebook is an advertisement, there is a strong argument that the individual posts on those two social networking sites are not advertisements, but rather are communications concerning a lawyer's services. In other words, the argument is that the posts, taken in the aggregate, are an advertisement, but the individual posts are not advertisements, but rather are communications concerning a lawyer's services. This distinction is important because otherwise, not only would an attorney be required to put any required disclosures on the profile, the attorney would be required to put any required disclosures in each individual post as well. This would make use of most social networking sites by attorneys impractical, if not impossible. Before addressing that issue, however, it is important first to dispel with the possibility that an individual post might be treated as a direct solicitation.

##### 1. *Status Updates and Tweets as Direct Solicitations*

The reason a post might be considered a direct solicitation is that, as discussed previously, when a user first logs onto Facebook or Twitter, that user will see status updates and tweets from other people or organizations that the user follows.<sup>104</sup> However, it is again important to remember that, generally speaking, a user will not see an individual status update or tweet in the user's news feed unless that user has taken some initiative to see the

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102. LA. RULES OF PROF'L CONDUCT R. 7.9(b)(3) (2011).

103. See *infra* Part III.B.

104. See *supra* Part I.



status updates or tweets by connecting with the other user.<sup>105</sup> Although neither the Model Rules nor the Arkansas Rules provide a separate rule for information provided in response to an inquiry from a prospective client, the comments to both rules strongly imply that the restrictions imposed on direct solicitations do not apply to a communication when the other party has initiated the conversation.<sup>106</sup> It is also worth noting that both the Model Rules and the Arkansas Rules refer to solicitation of “a prospective client,” which implies that the communication must be a directed communication to one person.<sup>107</sup> A post on Facebook or Twitter, on the other hand, is available to all of an attorney’s followers.<sup>108</sup>

An opinion of the New York State Bar Association Committee on Professional Ethics is consistent with this reading of the rules.<sup>109</sup> The opinion, which addressed several issues that could arise in the context of a lawyer offering a prize to users on social networking sites, specifically addressed whether the offer itself would constitute a direct solicitation.<sup>110</sup> The New

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105. See *supra* Part I.

106. See MODEL RULES OF PROF’L CONDUCT R. 7.3 cmt. 7 (2006); ARK. RULES OF PROF’L CONDUCT R. 7.3 cmt. 11 (2005). The comment to the Model Rules states that “[t]he requirement in Rule 7.3(c) that certain communications be marked ‘Advertising Material’ does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors.” See MODEL RULES OF PROF’L CONDUCT R. 7.3 cmt. 7 (2006). This is essentially the only requirement for written communications, so written communications in response to an inquiry from a prospective client are, for all practical purposes, not governed by Rule 7.3. See generally MODEL RULES OF PROF’L CONDUCT R. 7.3 (2006). The Arkansas comment is identical to the comment to the Model Rules, with two minor variations (the reference to Rule 7.3(c) in the Model Rule is replaced with a reference to Rule 7.3(b) in the Arkansas Rule, and the words “Advertising Material” are replaced with the word “Advertisement” in the Arkansas Rule). See MODEL RULES OF PROF’L CONDUCT R. 7.3 cmt. 7 (2006); ARK. RULES OF PROF’L CONDUCT R. 7.3 cmt. 11 (2005). Taken literally, this would mean that, in Arkansas, a written communication in response to an inquiry by a prospective client would not have to be marked “Advertisement,” but would need to meet the other requirements of Rule 7.3, including a notation to ignore the communication if the person has already retained a lawyer and a statement, in all capital letters, informing the client of where to direct any complaints regarding the communication or the lawyer. See ARK. RULES OF PROF’L CONDUCT R. 7.3(b) cmt. 11 (2005). Further, the only way to provide this information in written form would be by “regular mail,” which, as addressed below, would prohibit a lawyer from communicating with a potential client by email. See ARK. RULES OF PROF’L CONDUCT R. 7.3(b)(2) (2005); see *infra* part IV.E. This would lead to an odd result under the Arkansas Rules, so it seems more likely that the comment is intended to render most of the rule regarding direct solicitation inapplicable.

107. MODEL RULES OF PROF’L CONDUCT R. 7.3(a) (2006) (emphasis added); ARK. RULES OF PROF’L CONDUCT R. 7.3(a) (2005) (emphasis added).

108. See *supra* Part I.

109. N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Opinion 873, (2011) available at [http://www.nysba.org/AM/Template.cfm?Section=Ethics\\_Opinions&template=/CM/ContentDisplay.cfm&ContentID=50963](http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&template=/CM/ContentDisplay.cfm&ContentID=50963) (2011).

110. *Id.*

York Rules of Professional Conduct, which are similar to the Model Rules, prohibit direct solicitation “by in-person or telephone contact, or by real-time or interactive computer-accessed communication.”<sup>111</sup> The comments to the New York rules provide that “[o]rdinarily email and web sites are not considered to be real-time or interactive communication.”<sup>112</sup>

Based on these definitions, the Committee opined that the offer is not a “solicitation” within the meaning of the rule, concluding that “if the [attorney] merely posts the . . . offer on his Facebook or other social networking site, or sends the offer to recipients by email, then the offer will not be considered a prohibited ‘real-time or interactive computer-accessed communication’ under Rule 7.3(a).”<sup>113</sup>

Of course, as discussed previously, the Arkansas Rules prohibit all forms of direct solicitation, except by written communications sent by regular mail (among other restrictions).<sup>114</sup> Therefore, the fact that a communication is not “real-time or interactive” would not end the inquiry in Arkansas.<sup>115</sup> However, the Committee’s Opinion is instructive on this point, as it refers to an attorney who “merely posts the . . . offer *on his Facebook or other social networking site*.”<sup>116</sup> The New York Committee goes on to refer to an attorney who “*sends* the offer to recipients by email.”<sup>117</sup> Although not explicitly stating it, the Committee appears to be accepting a distinction between an attorney posting on something to his or her *own* profile page and an attorney who *sends* something to another user.<sup>118</sup>

Because an individual post usually will appear in a social networking user’s news feed only if there has been some affirmative step on the part of that user to create a connection, an individual post would generally not be treated as a direct solicitation in jurisdictions following the Model Rules, and probably not even in Arkansas, even with its strict prohibitions regarding direct solicitation.<sup>119</sup>

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111. Compare N. Y. RULES OF PROF’L CONDUCT R. 7.3(a)(1) (2009), with MODEL RULES OF PROF’L CONDUCT R. 7.3(a) (2006).

112. N.Y. RULES OF PROF’L CONDUCT R. 7.3 cmt. 9 (2009).

113. N.Y. State Bar Ass’n Comm. on Prof’l Ethics, *supra* note 109.

114. ARK. RULES OF PROF’L CONDUCT R. 7.3(a), (b), & (b)(2) (2005).

115. See ARK. RULES OF PROF’L CONDUCT R. 7.3(a) (2005).

116. N.Y. State Bar Ass’n Comm. on Prof’l Ethics, *supra* note 109 (emphasis added).

117. *Id.* (emphasis added).

118. *Id.*

119. As will be discussed below, the analysis would be different if the communication were directed to a particular user on a social networking site. See *infra* Part IV.E.

2. *Individual Status Updates and Tweets as Advertisements or Communications Concerning a Lawyer's Services.*

The next question is whether an individual status update or tweet should be classified as an advertisement. For the reasons addressed above, the author suggests that they should not. First, recall that we are not addressing here the Facebook or Twitter profile, where all of the status updates and tweets are stored and publicly available.<sup>120</sup> As discussed previously, a cautious attorney will treat the profile as an advertisement.<sup>121</sup> Rather, we are addressing here an individual status update or tweet. Recall that, with limited exceptions, the only way for the individual status update or tweet of an attorney to appear in a user's news feed is for the user to take an affirmative step to make *that particular attorney's* updates or tweets appear in the user's news feed.<sup>122</sup> As discussed previously, in that sense, these are communications in response to an inquiry, and the rules regulating direct solicitations would appear not to govern such communications.

This article addressed previously the issue of whether responses to an inquiry from a potential client would constitute a direct solicitation, and it concluded that they would not.<sup>123</sup> If we accept that an individual post is a response to an inquiry from a potential client, the question arises as to whether such a communication would be an advertisement. There is a strong argument that such communications are not advertisements. Consider, for example, an attorney who returns a telephone call from a potential client. Such a phone call would not be classified as a direct solicitation (because it is the potential client, and not the attorney, who initiated the contact), and would not be classified as an advertisement (because it is not a communication through "public media" and because compliance with the rules relating to advertising would be impractical).<sup>124</sup> The same analysis would apply to a letter that is sent in response to an inquiry from a potential client. Therefore, the only category into which such communications could sensibly fall would be the category of communications concerning a lawyer's services.<sup>125</sup> In much the same way, an individual post on Facebook or Twitter is in response to an inquiry from the potential client, in that the potential client will

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120. See *supra* Part I.

121. See *supra* Part III.A.

122. See *supra* Part I.

123. See *supra* Part III.B.1.

124. In Arkansas, it would also be impractical for a phone call to comply with the requirements of the advertising rules, particularly the requirement that a recording of such communications be retained for a period of five years. See ARK. RULES OF PROF'L CONDUCT R. 7.2(b) (2005).

125. ARK. RULES OF PROF'L CONDUCT R. 7.1 (2005).

have taken the affirmative step of “friending,” “liking,” or “following” the lawyer or law firm.<sup>126</sup>

Even if one does not accept the argument that whether or not a communication is an advertisement is determined, at least in part, by whether the attorney or the prospective client initiated the contact, there is another argument that each individual post is not an advertisement. The idea that an attorney's presence on a website, taken in its entirety, might be considered an advertisement, while the individual parts might not, has some support from other jurisdictions.<sup>127</sup> There are a few states, including Kentucky, that require all advertisements to be submitted to and approved by that state's bar prior to publication.<sup>128</sup> The Kentucky Attorney Advertising Commission addressed the issue of whether attorneys who maintain a blog must submit each blog post to the bar for approval prior to publication.<sup>129</sup> The Commission ultimately determined that attorneys would be required to submit only the “About” page of a blog (or any other page that contained biographical information about the attorney), but not each individual blog post.<sup>130</sup>

Based on this reasoning, an attorney or law firm's individual status updates and tweets are best treated as information regarding a lawyer's services. This is because, generally speaking, a social networking user will see such posts in only two instances: (1) on the lawyer's or law firm's profile page (which, as discussed earlier, is best treated as an advertisement and where any required disclosures can appear); or (2) in the user's news feed, but usually only after the user has connected with the lawyer or law firm.<sup>131</sup> In addition, as will be discussed below, there are constitutional problems with treating an individual post as an advertisement (and requiring the disclosures required by the rules governing advertising).<sup>132</sup> Even if a court or committee on professional conduct were to view each individual status update or tweet as an advertisement, it is again worth noting that the content of the status update or tweet would come into play. A post about a non-legal matter, or even a legal matter that does not promote the law firm, would almost certainly not be treated as an advertisement.

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126. See *supra* Part I.

127. Adrienne E. Carter, *Blogger Beware: Ethical Considerations for Legal Blogs*, 14 RICH. J.L. & TECH. 5, 9–10 (2007).

128. See, e.g., KY. SUP. CT. R. 3.130.

129. Carter, *supra* note 127, at 18.

130. *Id.*

131. See *supra* Part I.

132. See *infra* Part IV.C.

## IV. ETHICAL ISSUES

Regardless of how communications via social networks are classified under the Rules, ethical issues will arise. Unfortunately, the unclear classification of some communications via social networks complicates these issues in some instances. Although there are numerous ethical issues that arise in the context of promoting a lawyer or law firm on social networking sites, this section addresses only five. First, this section addresses the issue of testimonials and endorsements.<sup>133</sup> Second, this section addresses the issue of retention policies.<sup>134</sup> Third, this section addresses the issue of required disclosures.<sup>135</sup> Fourth, this article addresses the issue of contests conducted on social networks to increase the number of connections to a law firm.<sup>136</sup> Finally, this article addresses whether or not a lawyer may directly solicit clients via social networking sites.<sup>137</sup>

## A. Testimonials and Endorsements

Although not prohibited by the Model Rules, Rule 7.1 of the Arkansas Rules prohibits communications that contain a “testimonial or endorsement.”<sup>138</sup> The rule does not define either term, but the Ethics Advisory Committee of the South Carolina Bar has stated that “a testimonial is a statement by a client or former client about an experience with the lawyer, whereas an endorsement is a more general recommendation or statement of approval of the lawyer.”<sup>139</sup>

In a recent opinion, the South Carolina Bar’s Ethics Advisory Committee addressed the application of a similar rule to lawyer rating websites, such as Avvo.<sup>140</sup> The South Carolina rule banned any advertising that “contains a testimonial.”<sup>141</sup> The comment to the rule went on to state that this ban included a ban on “client endorsements.”<sup>142</sup> Avvo and similar sites allow lawyers to “claim” their listing (which allows them to update their information and photos), but gives them limited ability to edit what third parties (such as

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133. *See infra* Part IV.A.

134. *See infra* Part IV.B.

135. *See infra* Part IV.C.

136. *See infra* Part IV.D.

137. *See infra* Part IV.E.

138. ARK. RULES OF PROF’L CONDUCT R. 7.1(d) (2005); *see also* MODEL RULES OF PROF’L CONDUCT R. 7.1 (2006).

139. S.C. Bar Ethics Advisory Comm., Opinion 09-10, (2010) *available at* <http://www.scbar.org/News/NewsDetails/ArticleId/107/Ethics-Advisory-Opinion-09-10.aspx>.

140. *Id.*

141. S.C. RULES OF PROF’L CONDUCT R. 7.1(d) (2011).

142. *Id.* at 7.1 cmt. 1.

clients or other attorneys) post on their profile page.<sup>143</sup> In the opinion, using the definitions outlined above, the Committee stated that client testimonials and client endorsements are both prohibited.<sup>144</sup>

The Committee stated that once a lawyer “claims” a listing, that lawyer becomes responsible for the content of the listing, even though the lawyer has no control over whether a client posts a comment and does not have the ability to remove the comment.<sup>145</sup> In spite of this, the Committee stated that the lawyer must “monitor a ‘claimed’ listing to keep all comments in conformity with the Rules” by, for example, removing any material that would create a violation of the rules.<sup>146</sup> The Committee further stated that if a site does not allow the removal of such information, “the lawyer should remove his or her entire listing and discontinue participation in the service.”<sup>147</sup>

This particular recommendation was subject to a fair amount of derision.<sup>148</sup> Mercer University law professor David Hricik wrote on his blog that the opinion “baffles” him.<sup>149</sup> Josh King, general counsel for Avvo, described the opinion as “largely a nonissue,” and argued that the rules upon which the opinion was based are “likely unconstitutional” anyway.<sup>150</sup> Indeed, the opinion itself states that it “does not take into consideration any constitutional-law issues regarding lawyer advertising.”<sup>151</sup>

Notwithstanding the Committee’s conclusions with respect to client testimonials or endorsements, the Committee reached a different conclusion with respect to endorsements from other attorneys.<sup>152</sup> The Committee opined that a lawyer “may invite peers to rate the lawyer and may invite and allow the posting of peer and client comments,” but the Committee also made clear that such comments would still be subject to the other rules of professional conduct.<sup>153</sup>

The Committee based its opinion regarding endorsements from other attorneys, in part, on *Mason v. Florida Bar*<sup>154</sup> and *In re Opinion 39 of*

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143. S.C. Bar Ethics Advisory Comm., *supra* note 139.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. See generally Debra Cassens Weiss, *Want to Update Your Avvo Listing? If So, Start Policing Client Comments, Opinion Says*, ABA JOURNAL (Oct. 28, 2009, 10:36 AM) [http://www.abajournal.com/news/article/want\\_to\\_update\\_your\\_avvo\\_listing\\_if\\_so\\_start\\_policing\\_client\\_comments\\_opini](http://www.abajournal.com/news/article/want_to_update_your_avvo_listing_if_so_start_policing_client_comments_opini).

149. David Hricik, *South Carolina Issues Opinion that Impacts Linked In, Plaxo, Avvo and related services*, LEGAL ETHICS (Oct. 26, 2009) <http://www.legalethics.com/?p=471>.

150. Weiss, *supra* note 148.

151. S.C. Bar Ethics Advisory Comm., *supra* note 139.

152. *Id.*

153. *Id.*

154. 208 F.3d 952 (11th Cir. 2000).

*Committee on Attorney Advertising*.<sup>155</sup> Both of those opinions held that certain advertisements by lawyers that used or relied on ratings organizations, such as Martindale-Hubbell or Super Lawyers, were protected by the First Amendment because the information contained in the advertisements was factually verifiable.<sup>156</sup> In *In re Opinion 39*, for example, the New Jersey Supreme Court held that "state bans on truthful, fact-based claims in lawful professional advertising could be ruled unconstitutional when the state fails to establish that the regulated claims are actually or inherently misleading and would thus be unprotected by the First Amendment commercial speech doctrine."<sup>157</sup>

A more recent opinion, this one from the Fifth Circuit, reaches a similar conclusion regarding even claims that are not verifiable.<sup>158</sup> In fact, the opinion seems to support Mr. King's argument that the ban on testimonials is unconstitutional.<sup>159</sup> In *Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board*, the court addressed Louisiana's prohibition of communications that "contain[] a reference or testimonial to past successes or results obtained."<sup>160</sup> Because this speech is commercial speech, the Eleventh Circuit applied the oft-cited *Central Hudson* test.<sup>161</sup> Under that test, so long as commercial speech concerns lawful activity and is not misleading, a government restriction on that speech must meet three requirements: (1) "the asserted governmental interest is substantial;" (2) "the regulation directly advances the governmental interest asserted;" and (3) the regulation must not be "more extensive than is necessary to serve that interest."<sup>162</sup>

In *Public Citizen*, the court held that the Louisiana Attorney Discipline Board had met the first prong of the *Central Hudson* test.<sup>163</sup> The two asserted interests were "protecting the public from unethical and potentially misleading lawyer advertising and preserving the ethical integrity of the legal profession."<sup>164</sup>

With respect to the second prong of the test, the court noted the distinction between objective, verifiable facts (such as that a lawyer has tried fifty cases to verdict or has obtained a one million dollar settlement) and subjective, unverifiable opinion (such as "he helped me" or "I'm glad I hired

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155. 961 A.2d 722 (N.J. 2008).

156. *Id.* at 731; *Mason*, 208 F.3d at 959.

157. *In re Opinion 39*, 961 A.2d at 731.

158. *See Pub. Citizen, Inc. v. La. Att'y Discipline Bd.*, 632 F.3d 212, 218, 229 (5th Cir. 2011).

159. *See id.*

160. *Id.* at 217 (alternation in original).

161. *Id.* at 219 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N. Y.*, 447 U.S. 557 (1980)).

162. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

163. *Public Citizen*, 632 F.3d at 220.

164. *Id.*

her”).<sup>165</sup> With respect to verifiable facts, the court, quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, held that “a state [cannot] . . . prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in that area.”<sup>166</sup> The court in *Public Citizen* held that “[t]o the extent that [the Louisiana rule] prevents attorneys from presenting ‘truthful, non-deceptive information proposing a lawful commercial transaction,’ it violates the First Amendment.”<sup>167</sup>

The court in *Public Citizen* went on to address subjective, unverifiable statements and held that this restriction also violated the First Amendment.<sup>168</sup> The court based its holding on its conclusion that the Louisiana Board of Attorney Discipline had not met its burden of establishing that unverifiable statements are likely to be misleading.<sup>169</sup> In order to attempt to meet its burden, the Board had conducted a telephone survey of 600 Louisiana residents.<sup>170</sup> The survey results showed that 83% of the public disagreed with the statement that “client testimonials in lawyer advertisements are completely truthful,” 26% agreed that lawyers endorsed by a testimonial have more influence on courts in Louisiana, 40% believed that, in general, lawyers are “dishonest,” and 61% believed that advertisements for lawyers are “less truthful” than non-lawyer advertising.<sup>171</sup>

The court in *Public Citizen* held that the evidence submitted by the Board was insufficient to meet the second prong of the *Central Hudson* test, finding that the responses had more than one interpretation.<sup>172</sup> For example, with respect to the survey results showing that most people did not believe that client testimonials are completely truthful, the court held that the results “might be read to show that a majority of the Louisiana public may be unswayed by testimonials.”<sup>173</sup>

Even though the court held that the Board had not satisfied the second prong of the *Central Hudson* test, the court went on to hold that the Board had also failed to satisfy the third prong of the test, which requires that the regulation be “no more extensive than reasonably necessary to further [its]

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165. *Id.* at 221.

166. *Id.* at 222 (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 640 n.9 (1985)).

167. *Public Citizen*, 632 F.3d at 222 (quoting *Edenfield v. Fane*, 507 U.S. 761, 765 (1993)).

168. *Id.* at 222–23.

169. *Id.* at 223.

170. *Id.* at 216.

171. *Id.* at 222.

172. *Id.*

173. *Public Citizen*, 632 F.3d at 222.



substantial interests.”<sup>174</sup> In particular, the court held that the Board had not explained why a disclaimer, as opposed to an outright ban on testimonials, would not have alleviated the potential consumer deception that might result from testimonials as to past results.<sup>175</sup>

Of course, the holding in *Public Citizen* is not binding in Arkansas, so Arkansas attorneys and those in other states banning testimonials should exercise caution in this area. Although the South Carolina Committee’s opinion did not specifically address Facebook or Twitter, its analysis is still relevant to social networking sites. Both Facebook and Twitter involve more interaction than more traditional means of communication, including websites or even blogs.<sup>176</sup> Therefore, there is always the possibility that a client, attorney, or even a random user might post a statement on an attorney’s Facebook profile that could be construed as a testimonial or endorsement.<sup>177</sup> Likewise, although a Twitter user cannot post directly on an attorney’s twitter profile, the user could “mention” the attorney in a post.<sup>178</sup>

If another user posted a statement on an attorney’s or law firm’s profile that could be construed as a testimonial or endorsement, the attorney or law firm could delete the post from the profile or page.<sup>179</sup> In contrast, if a user on Twitter “mentions” an attorney, the attorney cannot delete that tweet from the other user’s profile.<sup>180</sup> However, the “mention” appears on the other user’s profile (not on the attorney’s profile), and the attorney will not have “claimed” that other user’s profile.<sup>181</sup> Of course, on any social networking site, a user can always include an attorney’s name in a post on that user’s

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174. *Id.* at 223 (quoting *Bd. of Tr. of State Univ. of N. Y. v. Fox*, 492 U.S. 469, 477 (1989)).

175. *Id.*

176. DAVE KERPER, LIKEABLE SOCIAL MEDIA, 6–7 (2011) (describing social networking sites as “the world’s largest cocktail party”).

177. *See supra* Part I.A.

178. *See supra* Part I.B.

179. *How do I remove a Wall post or story?* – Facebook Help Center, FACEBOOK <https://www.facebook.com/help/?faq=203594616344678#How-do-I-remove-a-Wall-post-or-story?> (last visited Jan. 30, 2012).

180. Even if the attorney on Twitter blocks the user, the tweet remains on the other user’s profile. *Twitter Help Center – How to Block Users on Twitter*, TWITTER <https://support.twitter.com/entries/117063> (last visited Jan. 30, 2012). However, in order to find the “mention,” another user would have to search for the ‘@’ symbol followed by the attorney’s user name on Twitter. *Id.*

181. *Twitter Help Center – Types of Tweets and Where They Appear*, TWITTER <https://support.twitter.com/articles/119138-types-of-tweets-and-where-they-appear> (last visited Jan. 30, 2012) (stating that if a user is mentioned in a tweet, the mention will not appear on the user’s profile).

own profile, even if the attorney is not a user of that particular social networking site.<sup>182</sup>

In jurisdictions, such as those adopting the Model Rules, that do not prohibit testimonials or endorsements, the only time a testimonial would become an issue is if a client's testimonial or endorsement violates some other rule, such as the rule banning false or misleading communication.<sup>183</sup> In jurisdictions, like Arkansas, that completely ban testimonials or endorsements, an issue would arise any time a user makes a statement on an attorney's profile that could be construed as an endorsement.<sup>184</sup> In either case, in spite of the constitutional implications of such a ban, the most cautious approach would be to follow the advice from the South Carolina advisory opinion and take affirmative steps to remove communications that could be interpreted as testimonials or endorsements.<sup>185</sup>

Of course, on Facebook, Twitter, or any other social networking site, a user can always post something on their own profile about a lawyer. The key difference between Facebook and Twitter, as opposed to sites like Avvo, is that on Facebook and Twitter the lawyer can always control what appears on his or her *own* profile. Therefore, it would not appear that a lawyer on Facebook or Twitter would have to take the rather drastic step of removing his or her profile or discontinuing use of either of the social media platforms.<sup>186</sup> Instead, the lawyer or law firm should be diligent to monitor his or her own profile for comments that might be construed as testimonials or endorsements, and remove such statements when and if they arise.<sup>187</sup>

## B. Retention Policies

Although the Model Rules do not require attorneys to retain copies of advertisements, many states, including Arkansas, require that copies of ad-

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182. Presumably, even the South Carolina opinion would not prohibit an attorney from having a presence on a social networking site merely because a user writes something positive or negative about the attorney on that user's own profile page, so long as there was not a connection between the attorney and the user.

183. See MODEL RULES OF PROF'L CONDUCT R. 7.1 (2006).

184. See ARK. RULES OF PROF'L CONDUCT R. 7.1(d) (2005).

185. See generally S.C. Bar Ethics Advisory Comm., *supra* note 139. While the author would not suggest that marketing considerations should trump ethical considerations, it is worth noting that deleting a negative comment is somewhat of a *faux pas* on social networking sites, and deleting a positive comment would undoubtedly puzzle the user who posted the comment. See KERPEN, *supra* note 176, at 77–78 (referring to the “do-not-delete” rule and recommending that “*unless a comment is obscene, profane, bigoted, or contains someone's personal and private information, never delete it from a social network.*”) (emphasis in original).

186. A rule that completely prohibits a lawyer from participating in a certain method of advertising would be constitutionally suspect anyway. See *infra* Part IV.C.

187. S.C. Bar Ethics Advisory Comm., *supra* note 139.

vertisements be retained for a certain period of time.<sup>188</sup> There appears to be very little guidance from any jurisdictions regarding retention policies for websites, and there appears to be no such guidance at all for social networking sites. If, however, an attorney's Facebook or Twitter profile or page is to be viewed as an advertisement, it is important to determine how to retain such information. This can be challenging, however, in light of the ever-changing nature of such sites.

In 1997, the State Bar of Arizona's Committee on the Rules of Professional Conduct opined as to the necessity of retaining printouts of websites.<sup>189</sup> Although the opinion predates any of the major social networking sites currently in existence, it is instructive on the topic.<sup>190</sup> The opinion was drafted in response to several questions from members of that state's bar, including the question of whether lawyers must keep a copy of their websites and any changes made to the website.<sup>191</sup> The Committee opined that lawyers must keep a copy of the website for the period of time required by the rules.<sup>192</sup> Further, the Committee stated that a lawyer should keep a copy of the website if there is a "material substantive change" to the site.<sup>193</sup>

In a review of Arkansas's rules, Professor Judith Kilpatrick reached a similar conclusion.<sup>194</sup> She suggested that, with respect to website changes, "common sense should prevail."<sup>195</sup> She argued that "only changes 'material' to the purpose of the Rule and over which the lawyer maintains control are required to be retained."<sup>196</sup> She noted that that Rules provide "no guidance" on this issue, and suggested that, at the very least, attorneys should retain copies of any information that would be relevant to enforcing the rule.<sup>197</sup>

Generally speaking, a Facebook or Twitter user's communications on those sites are retained permanently.<sup>198</sup> In fact, on Facebook, a user's status

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188. See MODEL RULES OF PROF'L CONDUCT R. 7.2 (2006); ARK. RULES OF PROF'L CONDUCT R. 7.2(b) (2005). Many other states require that advertisements be retained for a certain period of time. See, e.g., N.Y. RULES OF PROF'L CONDUCT R. 7.1(k) (2011); TEX. RULES OF PROF'L CONDUCT R. 7.04(f) (2005). In Arkansas, the retention period is five years. ARK. RULES OF PROF'L CONDUCT R. 7.2(b) (2005).

189. State Bar of Ariz. Comm. on the Rules of Prof'l Conduct, Opinion 97-04: Computer Technology; Internet; Advertising and Solicitations; Confidentiality, (1997), available at <http://www.myazbar.org/ethics/opinionview.cfm?id=480>.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. Kilpatrick, *supra* note 98, at 44-45.

195. *Id.* at 45.

196. *Id.*

197. *Id.*

198. See generally *Profile - Facebook Help Center*, FACEBOOK <https://www.facebook.com/help/?faq=250714824948501#Profile> (last visited Jan. 30, 2012) (defining a Facebook profile as a complete picture of yourself on Facebook); *Twitter Help*

updates and other content are retained indefinitely if the user deactivates his or her account, although they would be hidden from public view.<sup>199</sup> On Twitter, a user's tweets are retained for thirty days upon deactivation (although, as with Facebook, the tweets are not available for public view), after which point they would be deleted.<sup>200</sup> However, as long as the user remains active, the information posted is maintained indefinitely.<sup>201</sup>

Although an attorney's status updates or tweets are permanently preserved, active users of social networking sites constantly tweak their profiles. In fact, as discussed above, lawyers are well-advised to delete content that might be construed as a testimonial or that might otherwise violate the rules of professional conduct. If we adopt the view of the State Bar of Arizona's Committee on the Rules of Professional Conduct and of Professor Kilpatrick, it would seem that the deletion of occasional comments that are made by another social media user would not require retention.<sup>202</sup> In fact, requiring retention of every single deleted post might very well delay removal of the material in the first place. If, however, the attorney were planning to delete an entire profile or make some other drastic change, the lawyer should probably create an electronic or paper copy of the profile first.

### C. Required Disclosures

Although they vary slightly in detail, the Model Rules and the rules in many states, including Arkansas, require disclosure of two pieces of information in all communications classified as advertisements: (1) the name of at least one attorney responsible for the content of the advertisement, and (2) the geographic location of that attorney's office.<sup>203</sup> Some states require more disclosures.<sup>204</sup> For example, Alabama requires a statement that "[n]o repre-

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*Center – The Twitter Glossary*, TWITTER <https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/166337-the-twitter-glossary> (last visited Jan. 30, 2012) (defining a Twitter profile as a "page displaying information about a user, as well as *all the Tweets* they have posted from their account") (emphasis added).

199. *How Do I Permanently Delete My Account?*, Facebook Help Center, FACEBOOK <https://www.facebook.com/help/?faq=224562897555674#How-do-I-permanently-delete-my-account?> (last visited Jan. 20, 2012). There is an option whereby a user can permanently delete his or her account, and that action would remove all such content permanently. *Id.*

200. *Twitter Help Center, How To Deactivate Your Account*, TWITTER <https://support.twitter.com/articles/15358-how-to-deactivate-your-account> (last visited Jan. 30, 2012).

201. *Supra* note 195.

202. *See generally* Kilpatrick, *supra* note 98, at 44–55; State Bar of Ariz. Comm. on the Rules of Prof'l Conduct, *supra* note 189.

203. MODEL RULES OF PROF'L CONDUCT R. 7.2(c) (2006); ARK. RULES OF PROF'L CONDUCT R. 7.2(d) (2005).

204. *See, e.g.,* ALA. RULES OF PROF'L CONDUCT R. 7.2(e) (2011).

sensation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers.”<sup>205</sup>

If an attorney’s profile page on Facebook or Twitter is viewed as an advertisement, compliance is fairly straightforward in jurisdictions in which only the name and location of a responsible attorney is required. On a Facebook page for a business or organization, an attorney could simply input the required disclosures in one of several fields, such as the “About,” “Description,” or “General Information” fields for a profile page.<sup>206</sup> On Twitter, the same information could be put into the “bio” field, which appears at the top of a user’s Twitter profile.<sup>207</sup>

There are two instances in which the disclosure requirements could become problematic. First, if each individual status update or tweet is viewed as an advertisement (instead of, as this author proposes, merely a communication regarding a lawyer’s services), the disclosure requirements become onerous. This is particularly the case with Twitter, where tweets are limited to 140 characters each.<sup>208</sup> If the disclosure of the sponsoring attorney’s name and location were required to be included in each tweet, use of Twitter by attorneys would become impractical.<sup>209</sup> The second problem is that, even if only the profile page (and not each individual tweet) is treated as an advertisement, there would still be problems on Twitter in jurisdictions (like Alabama) that require lengthy disclosures because the Twitter bio is limited to 160 characters.<sup>210</sup>

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205. *Id.*

206. *See generally* *Why Do Some Pages Have Certain Information, While Others Do Not?* Facebook Help Center, FACEBOOK <https://www.facebook.com/help/?faq=122109974538310#Why-do-some-Pages-have-certain-information-fields,-while-others-do-not?> (last visited Jan. 30, 2012).

207. *Twitter Help Center, The Twitter Glossary*, TWITTER <https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/166337-the-twitter-glossary> (Jan. 30, 2012).

208. *Twitter Help Center, How To Post a Tweet*, TWITTER <https://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/15367-how-to-post-a-tweet> (last visited Jan. 30, 2012). The issue is even more problematic with pay per click advertising, such as Google Adwords. With Adwords, ads are limited to a total of 105 characters: twenty-five characters in the headline, and seventy characters in the text of the advertisement itself. *How Much Text Can I Have in My Ads?* AdWords Help, GOOGLE <http://support.google.com/adwords/bin/answer.py?hl=en&answer=6095> (last visited Jan. 30, 2012). Although outside the scope of this article, it would seem that a reasonable solution would be to allow the information to appear on the page to which the ad links. Otherwise, the required disclosures would appear to run afoul of the decision in *Public Citizen, Inc. v. Louisiana Attorney Discipline Board*. *See infra* Part IV.C.

209. For example, for this author, the disclosure required by the Model Rules would take up nearly half of the tweet, even if very heavily abbreviated.

210. *Twitter Help Center, The Twitter Glossary*, TWITTER <https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/166337-the-twitter-glossary> (last visited Jan. 30, 2012).

The previously discussed case of *Public Citizen, Inc. v. Louisiana Attorney Discipline Board* is instructive on this issue.<sup>211</sup> In addition to the rules regarding testimonials and endorsements, the plaintiffs in that case challenged certain requirements relating to disclosures.<sup>212</sup> The challenged rules required that all written disclosures and disclaimers “use a print size at least as large as the largest print size used in the advertisement.”<sup>213</sup> In addition, the rules required that all spoken disclosures and disclaimers “be plainly audible and spoken at the same or slower rate of speed as the other spoken content of the advertisement.”<sup>214</sup> If the advertisement was televised or displayed electronically, then the rule required that any disclosures or disclaimers be “spoken aloud and written legibly.”<sup>215</sup>

The Plaintiffs in *Public Citizen* argued that the font-size requirements for disclosures and disclaimers made it impossible for an advertisement to convey its message.<sup>216</sup> With respect to the “speed-of-speech” rule, the Plaintiffs argued that the disclaimers required so much time that attorneys could not effectively use short television or radio advertisements.<sup>217</sup>

The court in *Public Citizen* agreed with the plaintiffs.<sup>218</sup> The court held that the restrictions “‘effectively rule out’ an attorney’s ability to include one or more of the disclaimer-requiring elements in television, radio, and print advertisements of shorter length or smaller size.”<sup>219</sup> The court based its decision in part on the Supreme Court’s opinion in *Ibanez v. Florida Board of Accountancy*,<sup>220</sup> in which the Court had held that the disclosure requirements in that case, which “effectively rule[d] out” attorneys from including their specialties “on a business card or letterhead, or in a yellow pages listing,” were unduly burdensome.<sup>221</sup>

If individual Facebook or Twitter posts were treated as advertisements, such that each post was required to include the disclaimers, there are two components of *Public Citizen* that are worth noting. First, the court held that the disclaimer requirements in that case were too burdensome, even though those restrictions did not rule out all television, radio, and print advertisements, but only those that were of “shorter length or smaller size.”<sup>222</sup> Applying this rationale, it would not be enough to say that the requirements would

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211. *Public Citizen*, 632 F.3d at 212.

212. *Id.* at 228–29.

213. *Id.* at 217.

214. *Id.*

215. *Id.*

216. *Id.* at 228.

217. *Public Citizen*, 632 F.3d at 228.

218. *Id.* at 229.

219. *Id.*

220. 512 U.S. 136 (1994).

221. *Public Citizen*, 632 F.3d at 229 (citing *Ibanez*, 512 U.S. at 146–47).

222. *Id.*

not be unduly burdensome because a lawyer or law firm could simply switch from a social networking website that limits the number of characters (i.e., Twitter) to one that does not have such a limit (i.e., Facebook).

Second, it is worth noting that even though the court based its decision on its conclusion that the restrictions were unduly burdensome on advertisements that were of "shorter length or smaller size," the court struck down the requirements completely, and not just as applied to these shorter or smaller advertisements.<sup>223</sup> Applying this rationale, if a disclosure is unduly burdensome for one social networking site (i.e., Twitter), then presumably the disclosure requirement would not apply to other social media platforms (i.e., Facebook).

As has been previously suggested in this article, there is a solution that is both practical and that satisfies these constitutional concerns. That approach is to view the attorney's profile page as an advertisement, and then to treat each individual status update or tweet as a communication concerning a lawyer's services, rather than as a separate advertisement.<sup>224</sup> This approach still leaves the open question of how to deal with jurisdictions that require disclosures that are so long that the restrictions of the social networking site will not even allow the disclosure on that site's profile pages. As stated previously, simply requiring an attorney to use a different social networking platform is arguably unconstitutional. For now, however, no court has addressed this issue, and it remains an open question.

#### D. Contests

One frequently used method of interacting with users on social media platforms is to conduct a contest.<sup>225</sup> In order to participate in such a contest, a user often must connect with the lawyer or law firm's social media page, by either liking it or following it.<sup>226</sup> This raises a very important issue, because the Model Rules and the rules of most states (including Arkansas)

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223. *Id.*

224. See *supra* Parts III.A, III.B.2.

225. KERPER, *supra* note 176, at 204 (stating that "[c]ontests and sweepstakes definitely create excitement . . ."). Given that this issue has been addressed by both the New York State Bar Association Committee on Professional Ethics and the American Bar Association Commission on Ethics 20/20 (and given that so few other issues relating specifically to social have been addressed), it appears that attorneys are frequently using contests as well. See N.Y. State Bar Ass'n Comm. on Prof'l Ethics; *supra* note 109; ABA Comm. on Ethics 20/20, *supra* note 97, at 4–5.

226. KERPER, *supra* note 176, at 204. See also N.Y. State Bar Ass'n Comm. on Prof'l Ethics, *supra* note 109 (the prize discussed in that opinion was offered as "as an incentive [for another user] to connect to [an attorney] on social networking sites.").

prohibit a lawyer from “giv[ing] anything of value to a person for recommending the lawyer’s services.”<sup>227</sup>

As discussed previously, the Committee on Professional Ethics of the New York State Bar Association has opined on the issue of contests.<sup>228</sup> While the Committee went into great detail regarding whether such a contest would fall under the restrictions relating to direct solicitations or advertisements, the analysis of whether such a contest would violate the ban on giving anything of value was rather succinct.<sup>229</sup> The Committee concluded the following:

[T]he proposed prize offer does not violate Rule 7.2(a)’s ban against compensating or giving “anything of value” to a person “to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client . . . .” The [attorney] is offering the chance to win a prize merely for connecting to the [attorney] on a social networking site, not for recommending or employing the [attorney] as a lawyer.<sup>230</sup>

Although the analysis of this specific issue is not particularly deep, the Committee does seem to be particularly concerned with whether the attorney is offering a prize to the user merely for connecting with the attorney, or whether the prize is in return for the user either hiring the attorney or recommending that others do so.<sup>231</sup> So long as the prize is offered merely for connecting to the attorney, the Committee opined that the attorney was not in violation of the rule prohibiting giving something of value in return for recommending a lawyer’s services.<sup>232</sup>

The ABA Commission on Ethics 20/20 has also addressed the issue of whether contests on social networking sites violate the prohibition of giving

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227. ARK. RULES OF PROF’L CONDUCT R. 7.2(c) (2005); MODEL RULES OF PROF’L CONDUCT R. 7.2(b) (2006). The Rules allow exceptions for such things as the reasonable cost of advertisements. *Id.*

228. N.Y. State Bar Ass’n Comm. on Prof’l. Ethics, *supra* note 109.

229. For a discussion of the Committee’s opinion of whether such a contest constitutes a direct solicitation, see *supra* Part III.B.1.

230. N.Y. State Bar Ass’n Comm. on Prof’l. Ethics, *supra* note 109 (omission in original).

231. *Id.*

232. In contrast to both the Model Rules and the Arkansas Rules, the New York Rules appear to prohibit not only offering something of value for recommending a lawyer, but also offering something of value in exchange for retaining the lawyer. *Contrast* MODEL RULES OF PROF’L CONDUCT R. 7.2(b) (2006) (“recommending the lawyer’s services”), *and* ARK. RULES OF PROF’L CONDUCT R. 7.2(c) (2005) (“recommending the lawyer’s services”), *with* N.Y. RULES OF PROF’L CONDUCT R. 7.2(a) (2011) (“recommend or *obtain employment by a client*”) (emphasis added).



something of value in return for recommending a lawyer's services.<sup>233</sup> The Commission used the example of a law firm that had distributed free t-shirts bearing the law firm's name, and had then offered a chance to win a prize to anyone who posted on Facebook a photo of themselves wearing the t-shirt.<sup>234</sup> The Commission noted that this arrangement "might be viewed as running afoul of the existing version of Rule 7.2"<sup>235</sup>

In its analysis of the contest (and other Internet-based marketing tools), the Commission examined the original goals of the restrictions on payments for recommendations of services, one of which was "to prohibit payments to other people to develop clients in a manner that the lawyer was not permitted to employ."<sup>236</sup> In particular, the Commission focused on the goal of prohibiting "runners" from engaging in direct solicitation.<sup>237</sup> The Commission stated that "[t]he legitimate concerns associated with the use of 'runners,' however, are not apparent when lawyers use" Internet-based marketing tools, such as the contest involving t-shirts.<sup>238</sup> Therefore, the Commission recommended "clarifying language" regarding this prohibition.<sup>239</sup>

Based on the Commission's statement that it recommended "clarifying" the rule regarding payments for recommendations, and based on the fact that the Commission did not actually recommend a revision to the text of the rule itself (only to the comments), it would appear that the Commission concluded that the rules do not prohibit the methods of lead-generation it discussed, including the t-shirt giveaway.<sup>240</sup> The Commission's Report has not yet been approved by the American Bar Association, and even if it were, it is not binding. Nevertheless, there appears to be at least some consensus that offering a prize of nominal value in exchange for some sort of interaction with a lawyer or law firm on a social networking site does not violate the prohibition of offering something of value in exchange for recommending a lawyer's services.

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233. ABA Comm'n on Ethics 20/20, *supra* note 97. The ABA Commission on Ethics 20/20 was established in 2009 to review the Model Rules and other lawyer regulations in the context of advances in technology. *ABA Commission on Ethics 20/20, ABA Board of Governors, Comm'n on Ethics 20/20*, AMERICAN BAR ASS'N [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html) (last visited Jan. 30, 2012). As part of its work on the issue of technology and client development, the Commission has released proposed revisions to the Model Rules, along with an accompanying report. ABA Comm'n on Ethics 20/20, *supra* note 95. As of the publication of this article, neither the report nor the proposed revisions had been accepted by the American Bar Association, and therefore do not necessarily represent the policy of the Association. *Id.* at 1.

234. ABA Comm'n on Ethics 20/20, *supra* note 97, at 4–5.

235. *Id.*

236. *Id.* at 5.

237. *Id.*

238. *Id.*

239. *Id.*

240. ABA Comm'n on Ethics 20/20, *supra* note 97, at 5.

### E. Direct Solicitation Via Social Media

As discussed previously, the analysis of whether a communication on Facebook or Twitter constitutes a direct solicitation changes if the communication is a solicitation directed to a particular user, especially if the communication is the result of the attorney learning that the user is in need of legal services.<sup>241</sup> This could very easily become an issue on social networking sites because with the openness of Facebook and Twitter, it is not at all unusual for a user to post information about themselves that would indicate to other followers that there was a need for legal services.<sup>242</sup>

If such a communication is considered a direct solicitation, then the question becomes whether an attorney may directly solicit another user on a social network. Because of the difference between the Model Rules and the Arkansas Rules, the outcome is different under the two rules.

As discussed previously, the Model Rules prohibit solicitation by “in-person, live telephone or real-time electronic contact.”<sup>243</sup> Applying a similar rule, the Professional Guidance Committee of the Philadelphia Bar Association recently opined that the use of “social media for solicitation purposes is acceptable” under the Pennsylvania Rules.<sup>244</sup> Although the Philadelphia Bar Association had been asked to opine as to whether a lawyer is permitted to interact with potential clients via blogs, the Committee also addressed whether internet “chat rooms” and social networking sites are covered by the Rule’s prohibition of solicitation by “real-time electronic contact.”<sup>245</sup>

The Committee concluded that communications via such sites are not prohibited by the rule, basing its opinion on two factors.<sup>246</sup> First, it opined that a ban on direct solicitation was unconstitutional under *Shapero v. Kentucky Bar Association*.<sup>247</sup> Second, it looked to the text of the rule itself—and

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241. See *supra* Part III.B.

242. Probably the most vivid example of this would be a user posting information about an automobile accident. The author was involved in an accident in late 2008, and posted several status updates, including photographs of the car, on Facebook. While admittedly, the author would not have been much of a potential client (no one was injured, and the accident [a collision with a road sign that totaled the author’s car] was the author’s fault), it is just one of many examples of such incidents that have been posted on Facebook. Andy Taylor, *My First (Real) Wreck*, (Nov. 16, 2008) at <https://www.facebook.com/media/set/?set=a.36008397409.45034.818167409&type=3&l=177c719491>.

243. MODEL RULES OF PROF’L CONDUCT R. 7.3(a) (2006).

244. Phila. Bar Ass’n Prof’l Guidance Comm., Opinion 2010-6, 6 (2010), available at <http://www.philadelphiabar.org/WebObjects/PBAReadingOnly.woa/Contents/WebServerResources/CMSResources/Opinion%202010-6.pdf>. The Pennsylvania Rule prohibits solicitation “in-person, by telephone or by real-time electronic communication.” PENN. RULES OF PROF’L CONDUCT R. 7.3(a) (2005).

245. Phila. Bar Ass’n Prof’l Guidance Comm., *supra* note 244, at 1.

246. *Id.* at 3–7.

247. *Id.* at 6; *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 469–70 (1988).

the comments—and determined that the language of the rule did not forbid direct solicitation by real-time electronic contact.<sup>248</sup>

In *Shapero*, the Supreme Court had examined a Kentucky rule that prohibited attorneys from mailing written advertisements “precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.”<sup>249</sup> The Court had previously held, in *Ohralik v. Ohio State Bar Association*, that a blanket ban on all in-person solicitation was constitutional.<sup>250</sup> The Court in *Shapero* distinguished the holding in *Ohralik*, noting that the *Ohralik* decision had been based on two factors that were not applicable to written communication:

First was our characterization of face-to-face solicitation as “a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud.” Second, “unique difficulties” would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban because such solicitation is “not visible or otherwise open to public scrutiny.”<sup>251</sup>

In applying the *Shapero* decision to the question of whether the rules prohibited solicitation in chat rooms, the Philadelphia Bar Association Professional Guidance Committee noted that *Shapero*, a 1988 decision, was handed down “generations ago in the development of electronic modes of communication.”<sup>252</sup> The committee addressed three popular forms of electronic communication—e-mail, blogging, and chat rooms—and opined that, under *Shapero*, a ban on direct solicitation by any of these methods would not withstand constitutional scrutiny.<sup>253</sup> The Committee opined that these communications were different from in-person direct solicitation in two important respects.<sup>254</sup> First, in electronic communications, “a recipient can readily and summarily decline to participate in the communication.”<sup>255</sup> Second, interactions via electronic communication may be retained, so as to comply with that state’s rule requiring that copies of direct solicitations be retained for a period of two years.<sup>256</sup>

Having concluded that a ban on direct solicitation via chat rooms would be unconstitutional, the Committee next examined the text of the

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248. Phila. Bar Ass’n Prof’l Guidance Comm., *supra* note 244, at 6.

249. *Shapero*, 486 U.S. at 469–70. The Rule in question was former Kentucky Supreme Court Rule 3.135(5)(b)(i).2. *Id.*

250. *Id.* at 467.

251. *Id.* at 475 (internal citations and omissions omitted).

252. Phila. Bar Ass’n Prof’l Guidance Comm., *supra* note 244, at 4–5.

253. *Id.* at 5.

254. *Id.*

255. *Id.*

256. *Id.*; PENN. RULES OF PROF’L CONDUCT R. 7.2(b) (2005).

Rule itself.<sup>257</sup> The Committee noted that the rule prohibits solicitation by “real-time electronic communication,” and acknowledged that the ABA Reporter’s Explanation states that the rule is meant to prohibit communications in “chat rooms.”<sup>258</sup> However, the Committee opined that the Pennsylvania Rule does not apply to chat rooms, for two reasons.<sup>259</sup> First, the Committee noted that the writers of the rules had not included the words “chat rooms” in the text of the rule itself.<sup>260</sup> Therefore, the Committee opined, the exact meaning of the phrase “real-time electronic communication” is open to interpretation, given the changing nature of electronic communication.<sup>261</sup> Second, the Committee opined that even if technology itself relating to “chat rooms” had not changed, the “social attitudes and developing rules of internet etiquette are changing.”<sup>262</sup> The Committee opined:

[W]ith the increasing sophistication and ubiquity of social media, it has become readily apparent to everyone that they need not respond instantaneously to electronic overtures, and that everyone realizes that, like targeted mail, e-mails, blogs and chat room comments can be readily ignored, or not, as the recipient wishes.<sup>263</sup>

Based on these arguments, the committee concluded that the Pennsylvania Rules do not prohibit direct solicitation via social media, so long as the recipient of the communication has the ability to ignore the communication.<sup>264</sup> So long as that is the case, the Committee opined that “those risks which might be inherent in an individualized, overbearing communication are not sufficiently present to bar the use of such methods of social interaction for any solicitation purposes.”<sup>265</sup>

Although the Committee’s textual analysis of the Pennsylvania rule allowed for communications via social media, a textual analysis of the Arkansas rule leads to the opposite conclusion.<sup>266</sup> As stated previously, the Arkansas Rule begins with a blanket prohibition of solicitation “by any form of direct contact, in-person or otherwise.”<sup>267</sup> The only exception is for “written communication.”<sup>268</sup> Although a communication by Facebook or Twitter might appear to meet the definition of a written communication, there are

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257. Phila. Bar Ass’n Prof’l Guidance Comm., *supra* note 244, at 6.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. Phila. Bar Ass’n Prof’l Guidance Comm., *supra* note 244, at 5.

264. *Id.*

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

266. See generally ARK. RULES OF PROF’L CONDUCT R. 7.3 (2005).

267. ARK. RULES OF PROF’L CONDUCT R. 7.3(a) (2005).

268. *Id.* at 7.3(a)–(b).

multiple requirements on written communication by direct solicitation.<sup>269</sup> Two of those requirements—that the envelope within which the communication is contained must contain the word “Advertisement,” and that the communication must “only be sent by regular mail”—are relevant in this regard.<sup>270</sup>

Applying a similar rule, the Committee on the Rules of Professional Conduct of the State Bar of Arizona opined that electronic communications were permissible.<sup>271</sup> In its opinion, the Committee addressed the question of whether it was permissible for a lawyer to contact a prospective client directly via email.<sup>272</sup> The applicable rule required that any written communication “be clearly marked *on the envelope* and on the first page of the communication *contained in the envelope* as follows: ADVERTISING MATERIAL: THIS IS A COMMERCIAL SOLICITATION.”<sup>273</sup> Of course, there is no way to mark an envelope in red ink when the communication is via email.<sup>274</sup> However, the Committee called this a “slight application dilemma,” and then advised attorneys how to comply.<sup>275</sup> The Committee opined that, “[i]f technologically feasible, lawyers should make reasonable efforts to comply with this requirement.”<sup>276</sup> The Committee advised lawyers to include the disclaimer language in the subject line of the email and in the body of the email message.<sup>277</sup>

In an opinion from 2003, the Arkansas Supreme Court Committee on Professional Conduct reached the opposite conclusion.<sup>278</sup> In that case, an attorney had sent, via email, a notice of pendency of a class action lawsuit, a notice that the attorney claimed was required under federal law.<sup>279</sup> Therefore, the attorney argued that the communication was a permitted communication under the Arkansas Rules.<sup>280</sup> However, in addition to the required notices, the email also included the following statement:

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269. *Id.* at 7.3(b), (d).

270. *Id.* at 7.3(b)(1)–(2).

271. State Bar of Ariz. Comm. on the Rules of Prof'l Conduct, *supra* note 189. The Arizona rule at the time prohibited telephone or in-person solicitation. *Id.* Although worded differently than the Arkansas rule, in essence, they are the same in that they both allow solicitation by written communication, with certain restrictions. *Id.*; ARK. RULES OF PROF'L CONDUCT R. 7.3(b) (2005).

272. State Bar of Ariz. Comm. on the Rules of Prof'l Conduct, *supra* note 189.

273. *Id.* (emphasis added).

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *In re S. Gene Cauley*, Sup. Ct. Comm. on Prof'l Conduct, CPC Docket No. 2003-157, <https://courts.arkansas.gov/opc/20040610/2003-157.htm>.

279. *Id.*

280. *Id.*; see also ARK. RULES OF PROF'L CONDUCT R. 7.2 cmt. 4 (2005).

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The Committee found that this general language about the firm "cause[d] the email to become one of solicitation and not notification."<sup>282</sup>

Because the Committee considered the communication to be a direct solicitation, it applied the requirements of Rule 7.3 to the communication.<sup>283</sup> The Committee found that the communication violated the Arkansas Rules because it had not been sent by regular mail, had not stated the word "Advertisement" on each page, had not begun with the statement instructing the recipient to disregard the communication if the recipient had already retained counsel, had not instructed the recipient to contact the Committee on Professional Conduct with any complaints, and had not disclosed how the attorney had obtained the information that prompted the communication.<sup>284</sup> In an electronic communication—other than by Twitter, which has a 140-character limit—most of the deficiencies could easily be remedied. However, the very first finding is important: the Committee found that the email message violated Rule 7.3 because it "was sent through the internet rather than by regular mail."<sup>285</sup>

This opinion is instructive on two levels. First, it shows the ease with which a communication can cross the line from being a permitted communication to being a direct solicitation. While certain portions of the above-quoted language from the email message certainly could be considered advertising, to the extent that it proposed a commercial transaction, it was somewhat subtle in doing so.<sup>286</sup> Second, based on this opinion, there is no permissible method by which an attorney in Arkansas may ever directly solicit a potential client via any form of electronic communication, including, of course, social media.<sup>287</sup> Instead, it appears that the only permissible means of direct solicitation is by physically placing a communication in an envelope and sending it via regular mail.<sup>288</sup>

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281. *In re S. Gene Cauley*, CPC Docket No. 2003-157, *supra* note 278.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *See In re S. Gene Cauley*, CPC Docket No. 2003-157, *supra* note 278.

288. *See id.*

Based on this opinion, it seems that direct solicitations via electronic communications, including via social networking sites, are not permitted under the Arkansas Rules. However, the Philadelphia Bar Association Professional Guidance Committee's analysis of the *Shapero* opinion is relevant to this issue.

Consider such non-real-time communications as a private message or a direct message on Facebook or Twitter. To the extent that the Philadelphia Bar Association's opinion's *Shapero* analysis applies real-time communications, it presumably would apply with even more force to social media interactions that are not in real time. For example, to the extent that a user can "readily and summarily decline to participate" in a chat room discussion, one can more easily ignore or even delete a non-real-time communication made via social media. In fact, on both Facebook and Twitter, users have the ability to make their profile pages completely inaccessible to other users.<sup>289</sup>

Therefore, while the text of the Arkansas Rule quite clearly prohibits these types of interactions, there is certainly an argument that such a blanket rule is impermissible under the *Shapero* opinion. Nevertheless, an Arkansas practitioner would be well-advised to avoid such solicitations via social media, either by direct message, mentions, or tagging, until there is more authority for this position.

## V. CONCLUSION

Applying the Rules of Professional Conduct to emerging methods of communication is difficult, and leaves many unanswered questions. This result is not a reflection of poor drafting, but rather a reflection of the fact that the rules were drafted in a different environment. The problem is that because the rules were drafted specifically to apply to certain modes of communication (particularly telephone communications and communication via mail), they simply do not easily translate to emerging technologies.

However, the author does not believe that simply amending the rules to apply specifically to current technologies is the appropriate response. There are two reasons for this. First, the modes of communication that people use are constantly changing. For example, the number of first-class mail pieces has declined by nearly 30% just over the past decade.<sup>290</sup> Over that period of

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289. Steve Kovach, *How To Go Completely Invisible on Facebook*, BUSINESS INSIDER (Jan. 19, 2011), <http://www.businessinsider.com/facebook-privacy-settings-2011-1>; *Twitter Help Center, About Public and Protected Tweets*, TWITTER <https://support.twitter.com/articles/14016-about-public-and-protected-tweets> (last visited Jan. 30, 2012).

290. U.S. Postal Service, *First Class Mail Volume Since 1926*, (Dec. 2011) <http://about.usps.com/who-we-are/postal-history/first-class-mail-since-1926.pdf> (from a high in 2001 of approximately 104 million first class mail pieces to a low in 2011 of approximately 74 million).

time, other forms of electronic communication have risen and fallen (or at least declined in usage). For example, the number of unique visitors to MySpace, one of the earliest social networking websites, has declined from 66 million in June 2010 to 33.5 million in June 2011.<sup>291</sup> In June 2010, Facebook had nearly 161 million unique visitors, and LinkedIn had nearly 34 million unique visitors.<sup>292</sup> This does not even take into account other, non-social networking forms of electronic communication, such as text messaging.<sup>293</sup>

Not only do social media platforms rise and fall, the methods of communication within a given social media platform also change. For example, in late 2010, Facebook announced a change to its messaging system that Business Week characterized as “mashing together e-mail with instant messages and cell phone texts into a single stream of chatter.”<sup>294</sup> That obviously raises the question of whether or not, under the Model Rule, an e-mail message sent through Facebook is a “real-time electronic communication.”<sup>295</sup> The answer, quite literally, turns on the question of whether the recipient of the message is sitting at his or her computer at the time the message is sent, because if so, a message that begins as a message not sent in real time immediately becomes a real-time chat session.

For these reasons, drafting a set of rules that applies to a particular social networking site (or even social networking sites generally) is no longer practical, because the rules would become obsolete over a very short period of time. As any Facebook user will attest, Facebook can change overnight.<sup>296</sup>

The rules related to advertising need to be reconsidered, with the purpose of the rules in mind:

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition

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291. Brandon Griggs, *LinkedIn Passes Myspace as No. 2 U.S. Social Network*, (July 11, 2011) [http://articles.cnn.com/2011-07-11/tech/linkedin.myspace\\_1\\_linkedin-myspace-social-network?\\_s=PM:TECH](http://articles.cnn.com/2011-07-11/tech/linkedin.myspace_1_linkedin-myspace-social-network?_s=PM:TECH).

292. *Id.*

293. According to CTIA-The Wireless Association, the number of text messages sent annually has increased from 113 billion in 2006 to 2.1 trillion in 2011. The Wireless Association, *Wireless Quick Facts*, CITA <http://www.ctia.org/advocacy/research/index.cfm/aid/10323> (last visited Jan. 30, 2012).

294. Brad Stone, *Dear Email: Die Already. Love, Facebook*, BLOOMBERG BUSINESSWEEK, (Nov. 18, 2010) [http://www.businessweek.com/magazine/content/10\\_48/b4205050135485.htm](http://www.businessweek.com/magazine/content/10_48/b4205050135485.htm).

295. See MODEL RULES OF PROF'L CONDUCT R. 7.3 (2006).

296. Doug Gross, *Users Not Happy with New Facebook Changes*, (Sept. 21, 2011) [http://articles.cnn.com/2011-09-21/tech/tech\\_social-media\\_facebook-changes-react\\_1\\_facebook-top-stories-users?\\_s=PM:TECH](http://articles.cnn.com/2011-09-21/tech/tech_social-media_facebook-changes-react_1_facebook-top-stories-users?_s=PM:TECH).



that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition.<sup>297</sup>

The problem is that if the rules are not drafted so that they are readily applicable to new forms of communication, lawyers must either avoid the new form of communication altogether, or risk running afoul of a rule that was written before that form of communication existed.

Consider, for example, the previously discussed South Carolina Ethics Advisory Committee's opinion regarding Avvo.<sup>298</sup> The committee considered Avvo problematic because an attorney might claim a profile, only to have a former client post a testimonial, which Avvo will not allow the attorney to delete.<sup>299</sup> Rather than allow the free flow of information, the opinion would require the attorney to abandon Avvo for some other method of online communication, perhaps Facebook. Once there, however, the attorney would be required to delete any feedback—positive or negative—regarding the attorney. One cannot imagine a scheme that more directly inhibits “the interests of expanding public information about legal services.”

It seems that there are two approaches to correcting this problem. One approach would be to draft the rules so that rather than ban entire categories of communication, they target specifically the communications that are deceptive. In fact, in the aftermath of the South Carolina opinion regarding Avvo, the South Carolina Supreme Court revised that state's rules to do just that.<sup>300</sup> Rather than completely banning testimonials and endorsements, the new rule specifically targets the components of testimonials and endorsements that tend to make them deceptive.<sup>301</sup> In particular, the rule requires disclosure of the testimonial or endorsement as a testimonial or endorsement, and requires a statement that any results obtained in the past do not necessarily indicate that future clients will obtain the same results.<sup>302</sup> In addition, if the lawyer paid for the testimonial or endorsement, or if the testimonial or endorsement is from someone other than an actual client, the attorney must disclose that information as well.<sup>303</sup>

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297. ARK. RULES OF PROF'L CONDUCT R. 7.2 cmt. 1 (2005).

298. See *supra* Part IV.A.

299. S.C. Bar Ethics Advisory Comm., *supra* note 139.

300. *In re* Amendments to the South Carolina Rules of Professional Conduct, Rule 407 of the South Carolina Appellate Court Rules (SCACR), Docket No. 2011-08-22-01 (Aug. 22, 2011).

301. See S.C. RULES OF PROF'L CONDUCT R. 7.1(d) (2011).

302. *Id.*

303. *Id.*

The second approach would be to make the rules less specific. This appears to be the approach adopted by the American Medical Association.<sup>304</sup> That organization's Code of Ethics provides some guidance as to what will be considered to be deceptive advertising.<sup>305</sup> However, the Code specifically states that it is not "intended to discourage or to limit advertising and representations which are not false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act."<sup>306</sup> Of course, "advertising by lawyers entails the risk of practices that are misleading or overreaching."<sup>307</sup> And, of course, a person in need of legal services "may already feel overwhelmed by the circumstances giving rise to the need for legal services [and] may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest."<sup>308</sup> What is not entirely clear is why those dangers would be more pressing in the legal field than in the medical field.

Although the author proposes that the rules be revised either to target specifically the communications that are deceptive, or to more broadly ban deceptive or overbearing communications, there is a possibility that neither approach will be adopted. Rather, one court has recently stated that there is "a long and undeniable trend towards increasingly restrictive measures to control attorney advertising."<sup>309</sup> From the author's perspective, it is counter-intuitive for the profession that takes an oath to uphold the constitution to at the subject itself to "increasingly restrictive measures" governing their own communications with potential clients. Not only does this affect the ability of attorneys to build their practice, but more important, it inhibits the "interest in expanding public information about legal services."<sup>310</sup>

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304. See AMA Code of Ethics, Opinion 5.02 – Advertising and Publicity (updated June 1996), <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion502.page?>.

305. *Id.*

306. *Id.*

307. See MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 1 (2006).

308. *Id.*

309. Harrell v. The Florida Bar, 608 F.3d 1241, 1248 (11th Cir. 2010).

310. See MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 1 (2006); ARK. RULES OF PROF'L CONDUCT R. 7.2 cmt. 1 (2005).

