LEGAL ETHICS and SOCIAL MEDIA

A Practitioner's Handbook

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Professional Responsibility

Contents

About the Authors xiii
Acknowledgments xv
Preface xvii
Introduction 1

1

When J.D. Means "Just Don't" Know, Digital Competence Is Essential 5

QUESTIONS

1. What is the cloud and how may it be used? 5
2. What is outsourcing, and under what conditions is it acceptable? 6
3. What about using my laptop at the airport or at a coffee shop on the free Wi-Fi? 8
4. Do I need to be concerned about cybersecurity when I am working in my office? 10

2

The "Duty to Google": Representing Clients in the Digital Age 13

QUESTIONS

1. What is a social media network? 16
2. How many people participate in social media networks? 17
3. What are some examples of popular social media networks of which lawyers should be aware? 18
4. What are some of the ways in which social media has impacted the practice of law? 19
5. How has social media impacted the establishment of appropriate jurisdiction in the litigation of a matter? 21
6. Have any courts approved substituted service of process via a social media network? 23
7. What do I need to demonstrate to the court to obtain permission to use substitute service via social media? 24

3

You Posted *What*? Advising Your Client About Social Media 25

QUESTIONS

1. How did social media savvy become a component of attorney competence? 26
2. How much do I really need to know about my clients' social media activity? 28
3. May I advise my client to use or change her privacy settings? 31
4. May I advise my client as to what to post on social media? 31
5. My client has some Facebook posts that could really hurt our case. May I ethically tell her to take them down or delete them? And may I tell her to refrain from using social media during the case? 33
6. Should I monitor my client's use of social media during the case? 34

Appendix of State Ethics Advisory Opinions 37

4

Social Sleuthing and Discovery 51

QUESTIONS

1. What is informal social media discovery? 54
2. What are the primary legal ethics rules that pertain to informal social media discovery? 55
3. May I review an opposing party's social media accounts? 58
4. May I contact an opposing party by connecting or friending him on social media? If the answer is yes, what is the proper procedure for doing so? 59
5. I'm suing this company for employment discrimination, and I'm sure many of my client's former co-workers who are still there have some good dirt on the employment practices at their firm. A number of them are on Facebook. May I ethically reach out to them via social media? 61
6. May I review a witness's social media accounts? 62
7. May I contact a witness through social media? If the answer is yes, what is the proper procedure for doing so? 62
8. Do the contact rules for the opposing party or witness differ if I have a law clerk or paralegal engage in the contact? 63
9. Is it permissible to review an opposing party or witness's social media postings that are behind a privacy wall if my client, a witness, or an employee at my firm has been connected on social media to the opposing party or witness prior to the incidents that are the subject of the current lawsuit? 63
10. In the event that I permissibly view and locate potential evidence on any aspect of the social media accounts of the opposing parties or any of the witnesses in a case, what, if any, other steps should I take to preserve the evidence? 65
11. What is formal discovery as it relates to social media? 66

12. What types of questions should I be asking in interrogatories? 67
13. What questions should I include in a request for production of documents? 67
14. What questions should I pose in opposing party or witness depositions? 69
15. If I receive discovery that requests social media information or production of documents from my client, what are appropriate objections to the requests? 71
16. If the other party is refusing to respond or objecting to interrogatories or a request for production of documents, what is the likelihood that I will succeed in obtaining the information if I file a motion to compel? 71
17. Assuming that I obtain useful social media discovery, what issues arise if I choose to use social media evidence at trial? 72

5

Digital Hide-and-Seek? Preservation and Spoliation of Evidence 75

QUESTIONS

1. What is the relationship between the Model Rules of Professional Conduct and spoliation? 76
2. What if a client has changed his privacy setting prior to the lawsuit, but after the incident that gives rise to the legal claim? 78
3. Is there any problem with a client changing privacy settings during a pending case? 79
4. Does deactivating a social media account constitute spoliation? 80
5. Does an inadvertent deactivation constitute spoliation? 83
6. What happens when my client has already deleted posts? 85
7. When deletion of relevant evidence occurs after counsel is retained, will it constitute spoliation that may result in severe sanctions? And what may happen if the court finds that counsel participated in or ratified the deletion? 86
8. What are the potential repercussions of a client removing social media evidence in a criminal case? 90

6

Juror, Juror on the (Social Media) Wall, Who's the Fairest of Them All? 93

QUESTIONS

1. I have a big trial coming up, and I want to gather as much "intel" on the jury panel as I can before I make my strikes. May I research the social media profiles and online postings of the venire members? 98
2. Can I get in trouble for "Facebooking" the jury? What are the potential impediments or dangers involved? 98
3. Are there risks involved in not "Facebooking" the jury? 100
4. If a judge asks me to justify my "Facebooking the jury," or orders the parties to brief the issue, is there any case support that I may cite? 105

5. My upcoming trial is in front of a judge who doesn't seem to be the type to embrace technology. Is this typical, and what are some of the judicial concerns about online research on prospective jurors that I should anticipate? 109
6. Should I notify the judge if I plan to conduct online research of the jurors? 110
7. Do judges restrict online research of jurors? 111
8. Do some courts have identifiable rules for researching jurors? 113
9. Have any ethics opinions addressed online juror research, and what kind of guidance has been provided? 114

7

Through the Prosecutorial Looking Glass: Prosecutors, Ethics, and Social Media 127

QUESTION

1. I'm an assistant district attorney, and our office uses social media quite a bit, including for researching incriminating posts by defendants. But are there any ethical danger areas of which we should be aware? 128

8

"Friends" with No Benefits? Judges, Legal Ethics, and Social Media 139

QUESTIONS

1. I have an important hearing coming up and when I looked up opposing counsel's Facebook page, I saw that among her "friends" is the judge in our case. Is this ethically permissible? Should I file a motion to recuse? 140
2. I found out that the judge in one of my cases is a Facebook friend of a family member of one of the parties. Is this grounds for recusal? 145
3. What are some of the primary concerns about judicial misuse of social media? 146

Appendix State-by-State Alphabetical Guide of Ethics Advisory Opinions Regarding Judges on Social Media 156

9

Cover Your Digital Assets! Social Media's Impact on the Transactional Lawyer 173

QUESTION

1. How has social media impacted the fundamental ethical obligations of competence, diligence, communication, and confidentiality across various practice areas? 173

Trust and Estate Law 173
Securities Law 175
Mergers and Acquisitions 177
Bankruptcy 178
Labor and Employment Law 180
Government Law 182

10

Attorney Advertising in an Age of LinkedIn, Twitter, and Blogs 185

QUESTIONS

1. Is my law firm website compliant? 189
2. What are some guidelines for blogging? 190
3. Any problem with linking my blog to my law firm website? 193
4. Any problem with advertising on Facebook? 193
5. What about YouTube? 194
6. I have been asked to be an expert on a website on which members of the public may pose questions. Any ethical issues I need to consider? 195
7. Should I claim my Avvo page? 195
8. Any issues with using pay-per-lead or pay-per-click advertising? 196
9. May I offer a Groupon or other daily deal coupon for my services? 199
10. Is it okay to purchase Google AdWords to increase my business? 201
11. May I use LinkedIn for advertising? How should I list my skills? What about accepting endorsements and recommendations? 203

11

They Said *What* About Me? Ethically Filtering Your Response to a Negative Online Review 207

QUESTIONS

1. An unhappy former client of mine has slammed me on Facebook and on online consumer sites like Yelp! My reputation is being trashed, and I want to defend myself. May I go online and set the record straight by telling my side of the story? 208
2. Why can't I bring a defamation lawsuit? After all, this client is trashing me by making false statements about my handling of the case. 213
3. How does *anonymous* online criticism impact the viability of a defamation suit? 214
4. Do anti-SLAPP statutes limit defamation suits against clients for negative online criticism? 214
5. Is there a best practice for dealing with negative online reviews? 215

12

Selfie Sabotage? Lawyers Are Human, Too! 217

QUESTIONS

1. What is the culture of social media? 223
2. What are the differences between the culture of social media and the culture of the legal profession, and how do these differences contribute to ethical missteps in the legal profession? 223
3. What policies may law firms establish to limit firm exposure to liability created by firm lawyers and other firm employees who engage in social media? 224
4. What are some suggestions to assist individual lawyers in avoiding the ethical landmines on social media? 225

13

The Once and Future Lawyer: Digital Defender and Client's Keeper? 229

Final Thoughts 239

Table of Cases 241

Index 247

CHAPTER 3

You Posted *What*? Advising Your Client About Social Media

Sooner or later, virtually every lawyer practicing in the digital age will have to confront two related questions: (1) Just how aware or involved must I be in what my clients are doing on social media platforms like Facebook or Twitter? and (2) What are my ethical boundaries in advising clients to "clean up" their social media profiles?

As to the first question, the short answer is "very." Regardless of your area of practice, the ubiquitous nature of social media, combined with the dizzying array of personal information that is shared every day via social media and the increasing extent to which lawyers are mining this digital treasure trove of information, make it a critical aspect of the attorney-client relationship in the twenty-first century. Not only have entire cases been undermined by revelations from a party's Facebook page or Twitter account, but the social media missteps by attorneys and clients alike have resulted in spoliation findings and sanctions rulings in cases throughout the country, as we discuss later. As the duties of "attorney and counselor at law" expand in the digital age to include counseling clients on what is posted in the first place on a site like Facebook, whether to post anything at all, what privacy settings or restrictions to adopt, and—perhaps most importantly—what content can be taken down and what must be preserved, it has become vital for lawyers to know where the ethical lines are drawn.

This chapter provides guidance to attorneys on how the ethical landscape has shifted by discussing the entire spectrum of attorney involvement from the relatively benign (advising clients on adopting privacy settings) to the more problematic issues of removing social media content and risking spoliation of evidence. In doing so, this chapter examines the "new normal" for twenty-first-century lawyers

by analyzing the various ethics opinions and guidelines nationwide that address the limits on how far lawyers can go in this regard. In the following chapter, we explore the interrelationship among legal ethics rules, ethics advisory opinions, and the law of spoliation by examining how courts throughout the US have treated parties who have removed content from their social networking pages, deactivated their Facebook accounts, or taken other measures to keep potentially incriminating posts or photos from prying eyes.

QUESTIONS

1. How did social media savvy become a component of attorney competence?

Being at least "socially aware" (if not quite social media savvy) is now considered part of the most fundamental responsibility for attorneys: the duty to provide competent representation to clients. Social media is a relatively new phenomenon, so how did social media expertise find its way into the definition of attorney competence?

The answer begins with the recommendations of the ABA Commission on Ethics 20/20 (which was created in 2009 to study how the Model Rules of Professional Conduct should be updated in light of globalization and technology's impact on the legal profession) that resulted in the ABA adopting certain changes to the Model Rules in August 2012.[1] One of these changes was to Model Rule 1.1 (Duty of Competence). As the revised comment 8 reflects, to maintain the requisite knowledge and skill, "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."[2]

This change reflects the belated recognition of how technology affects "nearly every aspect of legal work, including how we store confidential information, communicate with clients, conduct discovery, engage in research, and provide legal services."[3] As the revision to Rule 1.1 indicates, competence

[1] ABA Comm'n on Ethics 20/20, Report to the House of Delegates Resolution 105A (2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf [hereinafter ABA Res. 105A].

[2] *Id*.

[3] Diane Karpman, *ABA Model Rules Reflect Technology, Globalization*, Cal. Bar J: Ethics Byte (Sept. 2012), http://www.calbarjournal.com/September2012/EthicsByte.aspx.

means more than just keeping current with statutory developments or common law changes in one's particular field of practice. It also requires having sufficient familiarity with, and proficiency in, technology—both insofar as to its impact on a substantive area of law itself and as to how the lawyer delivers his or her services. Regarding the latter, the ABA Commission noted, for example, that "a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document."[4] And as to the former, an understanding of social networking sites such as Facebook is critical to accomplishing lawyerly tasks in the digital age.

In fact, ethics opinions in New York, Pennsylvania, North Carolina, Florida, West Virginia, and the District of Columbia (D.C.) have specifically noted that competence requires a lawyer to understand social media so that he or she may properly advise clients.[5] Moreover, given the vast wealth of information about individuals just a few mouse clicks away, and with "digital digging" becoming the norm for attorneys, it becomes harder for an attorney to credibly maintain that he or she has met the standard of competence when he or she has ignored social media avenues.

This certainly includes the searching side. For example, in a 2010 survey of its members by the American Academy of Matrimonial Lawyers, 81 percent reported using evidence from social networking sites in their cases.[6] In a 2013 criminal case, the Ninth Circuit held that a lawyer's failure to locate and use a purported sexual abuse victim's recantation on her social networking profile constituted ineffective assistance of counsel.[7] In addition, a number of state courts nationwide considering due diligence issues have held that lawyers have a duty to make use of online

[4] ABA Res. 105A at 3. It is important to note that the Comment to Rule 1.1 also says that "Competent representation can also be provided through the association of a lawyer of established competence in the field in question."

[5] Pa. Bar Ass'n, Formal Op. 2014-300 (2014), https://www.pabar.org/members/catalogs/Ethics%20Opinions/formal/F2014-300.pdf [hereinafter Pa. Op. 300]; *see also* Prof'l Ethics of The Fla. Bar, Op. 14-1 (2015), https://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+14-1?opendocument; W. Va. Office of Disciplinary Couns., L.E.O. No. 2015-02 (2015), http://www.wvodc.org/pdf/LEO%202015%20-%2002.pdf.; D.C. Bar Ethics Opinion 371 (2016), http://www.dcbar.org/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm. An analysis of each opinion is provided in the appendix at the end of this chapter.

[6] John Browning, The Lawyer's Guide to Social Networking: Understanding Social Media's Impact on the Law (Thomson Reuters 2010).

[7] Cannedy v. Adams, 706 F.3d 1148 (9th Cir. 2013).

resources. One Florida appellate court compared a lawyer's failure to go beyond checking directory assistance to find an address for a missing defendant to the equivalent of using "the horse and buggy and the eight track stereo" in an age of Google and social media.[8]

But just as being competent in the digital age encompasses being able to do the searching and vetting online, it also includes advising one's clients that the other side will be actively engaged in such investigation as well, and that such online digging will likely include the client's social media activities, too.

2. How much do I really need to know about my clients' social media activity?

The short answer is that you have to know what's out there. Lawyers uncomfortable with technology cannot afford to take a "head in the sand" approach when it comes to their clients' activities on Facebook and other social media sites. One of the main reasons is the fact that social media has become the rule, rather than the exception. Seventy-five percent of all adults online use social networking sites. In addition, multiplatform use is more common than ever. Fifty-two percent of adults online use two or more social media sites, a significant increase over the 42 percent rate of just a year before.[9] Sites other than Facebook continue to have strong representation. For example, 23 percent of all adults online have a LinkedIn profile, while 22 percent are on Pinterest, 21 percent use Instagram, and 19 percent have Twitter accounts.[10] When we consider that 81 percent of all American adults use the Internet, the fact that 75 percent of the adult online population has at least one social networking presence becomes even more significant. Moreover, it's not simply the number of users (Facebook now boasts more than 1.5 billion worldwide) that is important, but also their level of engagement. With Facebook, for example, more than 70 percent of its users engage

[8] Dubois v. Butler ex. rel. Butler, 901 So.2d 1029 (Fla. 4th DCA 2005). As we discuss in chapter 6, the expectations for a lawyer to be technologically proficient also extend to jury selection. The ABA, in its Formal Opinion 466, has upheld the practice of researching the social media profiles of prospective jurors, as have the ethics bodies of every jurisdiction to examine this issue. *See* John Browning, *Should Voir Dire Become Voir Google? Ethical Implications of Researching Jurors on Social Media*, 17 SMU Sci. & Tech. L. Rev 603, 604 (2014); In one state, Missouri, the Supreme Court has even created an affirmative duty for lawyers to conduct online research of jurors during the voir dire process. Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (en banc).

[9] Maeve Duggan, et al., *Social Media Update 2014*, Pew Research Center (Jan. 9, 2015), http://www.PewInternet.org/2015/01/09/social-media-update.

[10] *Id*.

with the site on a daily basis, and 45 percent acknowledge doing so at least several times a day.[11]

The fact that so many people are active social media users assumes tremendous significance for attorneys. What a client has posted or decides to post can have significant consequences for his or her case. Incriminating statements found in a status update or photos and videos that contradict a key claim or defense can damage and even completely undermine a case. Consider the power attributed to photos posted on Facebook by a Florida appellate court considering their relevance and discoverability in a premises liability lawsuit, as follows.

> In a personal injury case where the plaintiff is seeking intangible damages, the fact-finder is required to examine the quality of the plaintiff's life before and after the accident to determine the extent of the loss. From testimony alone, it is often difficult for the fact-finder to grasp what a plaintiff's life was like prior to an accident. It would take a great novelist, a Tolstoy, a Dickens, or a Hemingway, to use words to summarize the totality of a prior life. If a photograph is worth a thousand words, there is no better portrayal of what an individual's life was like than those photographs the individual has chosen to share through social media before the occurrence of an accident causing injury. Such photographs are the equivalent of a "day in the life" slide show produced by the plaintiff before the existence of any motive to manipulate reality. The photographs sought here are thus powerfully relevant to the damage issues in the lawsuit.[12]

Moreover, a "day in the life" of a prospective client may reveal the tenuous nature of a claim. Model Rule 3.1[13] requires that lawyers have a reasonable basis in fact and in law to support a claim. If a lawyer reviews a client's social media at the initial client meeting, then there is an opportunity for the lawyer to either obtain a reasonable explanation for social media that appears to be inconsistent with the client's claim or to decline the representation. In fact, the D.C. opinion provides that a lawyer *must* address any inconsistencies between a client's social media presence and a client's legal

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[11] *Id*.

[12] Nucci v. Target Corp., 162 So.3d 146 (Fla. 4th DCA 2015).

[13] Model Rules of Prof'l Conduct r. 3.1 (Am. Bar Ass'n, 2016).

claims before submitting any court or agency filings.[14] The D.C. opinion also notes social media risks for lawyers representing clients in transactions and in a regulatory practice. The opinion explains,

> [f]or example, review of client social media for their consistency with representations, warranties, covenants, conditions, restrictions, and other terms or proposed terms of agreements could be important because inconsistency could create rights or remedies for counterparties. Similarly, competent and zealous representation under Rules 1.1 and 1.3 in regulatory matters may require ensuring that representations to agencies are consistent with social media postings and that advice to clients takes such postings into account.[15]

If the inconsistent social media evidence is discovered during the course of a lawsuit, one of the two New York opinions advised, "if a client's social media posting reveals to an attorney that the client's lawsuit involves the assertion of materially false factual statements, and if proper inquiry of the client does not negate that conclusion, the attorney is ethically prohibited from proffering, supporting or using these false statements."[16] Similarly, an attorney should take "prompt remedial action" if a client fails to answer truthfully when asked whether changes were ever made to a social media profile.[17] Finally, a lawyer who finds fundamentally inconsistent evidence may need to withdraw. For example, a plaintiff's attorney with access to her client's private Facebook page who views Facebook comments by the client making it clear in a personal injury case that the client was hurt as a result of his own horseplay and not by the negligence of the defendant should make plans to withdraw as counsel rather than continue to pursue a frivolous claim.

Thus, best practice mandates an early discussion and review of a client's social media. Some attorneys have suggested using a flash drive to download the client's social media content prior to filing suit, thereby protecting both the lawyer and the client from claims of frivolous pleading and spoliation. However, the very real prospect of social media posts coming back to haunt a client, damage a case, or create ethical exposure for the lawyer are

[14] D.C. Bar Ethics Opinion 371 (2016).

[15] *Id.*

[16] New York Cty. Law. Ass'n, Ethics Op. 745 (2013), https://www.nycla.org/siteFiles/Publications/Publications1630_0.pdf.

[17] *Id.*

the overarching reasons for attorneys to be aware of the potential impact of social media. Perhaps the more fundamental question to explore is this: what are the limits in counseling clients about policing their online selves, in taking their Facebook accounts private, or in removing potentially harmful content from a profile?

3. May I advise my client to use or change her privacy settings?

Yes! The states that have addressed this question are in accord.[18] The Philadelphia opinion explains that changing privacy settings only renders the information more difficult to obtain, but access to the other party remains possible through formal discovery channels.[19] In fact, many individuals are unaware of privacy settings,[20] and it is probably good advice, regardless of the content, to advise clients to limit the exposure of their personal lives by electing an appropriate privacy setting. However, the D.C. opinion cautions that "[t]o provide competent advice, a lawyer should understand that privacy settings do not create any expectation of confidentiality to establish privilege or work-product protection against discovery and subpoenas."[21]

4. May I advise my client as to what to post on social media?

The North Carolina opinion concludes that advising a client as to social media posting, both before and after the filing of a lawsuit, is tantamount to providing competent and diligent representation to clients.[22] In fact, North Carolina explained that if a client's social media postings might impact

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[18] Pa. Bar Ass'n, Formal Op. 2014-300 (2014), https://www.pabar.org/members/catalogs/Ethics%20Opinions/ formal/F2014-300.pdf [hereinafter Pa. Op. 300]; see also Prof'l Ethics of The Fla. Bar, Op. 14-1 (2015), https://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+14-1?opendocument; W. Va. Office of Disciplinary Couns., L.E.O. No. 2015 -02 (2015), http://www.wvodc.org/pdf/LEO%202015%20-%2002.pdf.; D.C. Bar Ethics Opinion 371 (2016), http://www.dcbar.org/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm [hereinafter known as State Examples]. An analysis of each opinion is provided in the appendix at the end of this chapter.

[19] Phila. Bar Ass'n, Op. 2014-5 (2014), http:www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion 2014-5Final.pdf.

[20] New York Cty. Law. Ass'n, Ethics Op. 745 (2013), https://www.nycla.org/siteFiles/Publications/Publications1630_0.pdf.

[21] D.C. Bar Ethics Opinion 371 (2016).

[22] N.C. St. Bar, Formal Ethics Op. 2014-5 (2015), https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-5/ [hereinafter N.C. Op. 2014-5].

that client's legal matter, then "the lawyer must advise the client of the legal ramifications of existing postings, future postings, and third party comments."[23]

The New York opinion agrees, "it is permissible for an attorney to review what a client plans to publish on a social media page in advance of publication . . . [and] . . . to guide the client appropriately, including formulating a corporate policy on social media usage."[24] The New York opinion further explains that guidance could involve the following attorney tasks: counseling the client to publish truthful, favorable information; discussing the content and advisability of social media posts; advising the client how social media posts might be perceived; advising the client about how legal adversaries might obtain access to even "private" social media pages; reviewing both posts not yet published and those that have been published; and discussing potential lines of questioning that might result.[25]

Consider, for example, a lawyer defending a chemical plant operator in a wrongful death suit brought by the surviving family members of workers killed in an explosion at the plant. Pursuant to North Carolina and New York's guidance, the lawyer may advise the company that it is fine, and even advantageous, to post on its Facebook page about the operator being cleared of wrongdoing in a subsequent Occupational Safety and Health Administration (OSHA) investigation. The lawyer might also discuss the timing of a post about the plant's longtime safety manager's retirement, due to how it might appear in close temporal proximity to the underlying accident. Defense counsel might even approve of Facebook posts touting the company's upcoming sponsorship of a community event or a charitable donation, given the anticipated spike in goodwill and burnishing of his client's public image. However, the same lawyer adhering to his ethical obligations should counsel against company employees tweeting gossip about one of the surviving children not having standing to sue due to not being the decedent's biological child—especially if the lawyer knows such a statement to be false.

Of course the commonsense caveat here is one that runs through most of the ethics opinions: a lawyer may not advise a client to post any false or misleading information on a social media website.

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[23] *Id*.

[24] New York Cty. Law. Ass'n, Ethics Op. 745 (2013), https://www.nycla.org/siteFiles/Publications/Publications1630_0.pdf.

[25] *Id*.

5. My client has some Facebook posts that could really hurt our case. May I ethically tell her to take them down or delete them? And may I tell her to refrain from using social media during the case?

Generally the states that have opined on this issue have concluded that an attorney may advise a client to remove social media posts as long as relevant information is otherwise preserved so that it may be produced in discovery.[26] (Consider the use of a flash drive discussed above.) A failure to preserve and produce the evidence when appropriately requested not only implicates competence, but also the ethical obligations of fairness to opposing counsel and candor to the tribunal.[27]

Of course, the New York State Bar opinion notes that if litigation is not pending or reasonably anticipated, then removing social media content is fair game[28]; however, carefully query as to whether "reasonably anticipated" applies to the client's situation. By way of illustration, a lawyer whose client wants to delete some embarrassing photos from the office Halloween costume party that were posted to the company Facebook page would normally have no problem advising the client to go ahead and do so. However, if the client had received a letter from an attorney representing a recently terminated employee and asserting claims of sexual harassment and hostile workplace (including actionable comments or conduct at that office Halloween party), then these photos are potentially relevant, and the attorney should take steps to preserve them electronically (although they may still be taken down).

The Florida opinion noted that determining relevance may require "a factual case-by-case determination,"[29] because social media evidence that may not be "related directly" to the incident for which damages are being sought may nevertheless be deemed relevant to a case.[30] For example, social media comments on a personal injury plaintiff's Facebook page about her "personal best" times in local running events may on the surface not relate

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[26] State Examples, *supra* note 18.

[27] For a comprehensive discussion of the ethical implications that may arise during discovery, see chapter 4.

[28] The Social Media Comm. of the Commercial & Fed. Litig. Section, N.Y. St. Bar Ass'n Social Media Guidelines of the Commercial And Federal Litigation Section of the New York State Bar Association 15. (2015), http://www.nysba.org/socialmediaguidelines/ [hereinafter N.Y. St. Bar Social Media Guidelines].

[29] Prof'l Ethics of The Fla. Bar, Op. 14-1 (2015), https://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+14-1?opendocument.

[30] *Id*.

directly to her subsequent accident. However, if she asserts a claim that she is unable to enjoy the same kind of success in post-accident competitive running, then such content is certainly relevant to her damages claims.

Additionally, attorneys may also advise clients to refrain from using social media during the case—much like the old-school advice to a client not to talk about his or her case. The Pennsylvania opinion notes, "[i]t has become common practice for lawyers to advise clients to refrain from posting any information relevant to a case on any website, and to refrain from using these websites until the case concludes."[31]

6. Should I monitor my client's use of social media during the case?

Since it has become reasonable to expect that opposing counsel will monitor a client's social media account, the Pennsylvania opinion reasoned, "[t]racking a client's activity on social media may be appropriate for an attorney to remain informed about developments bearing on the client's legal dispute."[32]

While monitoring is a judgment call that depends on assessing both your client and his or her case, consider the following real-world examples of the importance of knowing what your client is up to on social media. In a recent Florida employment discrimination case, *Gulliver Schools, Inc. v. Snay*, the former headmaster of a private academy sued for discrimination.[33] The case resulted in a $150,000 settlement ($70,000 of which was attorney's fees and back wages), which contained a standard confidentiality provision calling for any settlement monies paid to be forfeited if the plaintiff disclosed the amount or terms of the settlement to any third parties. When the defendants learned of a Facebook post by the settling plaintiff's daughter that breached this confidentiality clause (reading "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."), they sued. The court found that the disclosure by Snay to his teenage daughter leading to the Facebook post was a breach of the settlement agreement; it ordered a disgorgement of Snay's $80,000 settlement.

And in West Virginia, Kanawha County public defender Sara Whitaker found herself before a judge accused of contempt in December 2015 after allegedly giving her client a copy of a packet containing the identity of a

[31] Pa. Bar Ass'n, Formal Op. 2014-300 (2014), https://www.pabar.org/members/catalogs/Ethics%20Opinions/formal/F2014-300.pdf.

[32] *Id*.

[33] Gulliver Sch., Inc. v. Snay, 137 So.3d 1045, 1046 (Fla. 3d DCA 2014).

confidential informant.[34] The informant's name and address were posted on Facebook by the former roommate of client Tracie Jones, complete with captions like "exposed" and "cheap whore." Although Whitaker ultimately received only a fine, this case illustrates how quickly a client's social media posts could lead to witness intimidation charges as well as potential ethical violations for the lawyer.

Another cautionary tale about the importance of monitoring a client's social media activities comes straight from the headlines. Famed rapper 50 Cent filed for bankruptcy in 2015 in the wake of a $7 million jury verdict against him. But evidently, 50 Cent (real name: Curtis Jackson, III) didn't quite grasp the underlying concept of Chapter 11 bankruptcy, because he proceeded to post numerous photos to his social media accounts, including Instagram, depicting him holding, pointing to, or surrounded by stacks and stacks of cash. One photo showed stacks of cash stashed in his refrigerator. Another featured the rapper with money strewn across his bed (along with a caption referencing 50 Cent's song "I'm Too Rich"), and yet another showed the singer with stacks of cash carefully arranged to spell the word "BROKE."[35]

His creditors, including headphone company Sleek Audio and SunTrust Bank, were not amused and filed pleadings bringing the photos to the court's attention, and implying that 50 Cent was hiding assets. The rapper's lawyers insisted that the photos were being publicized in an attempt to "smear" 50 Cent, said that his social media postings were simply part of maintaining "his brand and image," and even maintained that the stacks of cash were from a Hollywood prop company and were not actual currency.

Concerned about "allegations of nondisclosure and a lack of transparency in the case," Connecticut bankruptcy Judge Ann Nevin ordered 50 Cent to appear and explain the photographs at a hearing. Despite the gravity of his situation, 50 Cent continued to post on Twitter and Instagram, including one photo depicting the rapper with stacks of cash stuck in his waistband that was apparently taken inside the federal courthouse in Hartford. Judge Nevin was clearly not amused and scolded the rapper saying: "There's nothing funny going on here. This is very serious stuff." Ultimately, though, the court stopped short of banning him from posting to social media accounts.[36]

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[34] Erin Beck, *Lawyer Will Have to Explain Informant ID Release*, Charleston Gazette-Mail (Dec. 17, 2015), http://www.wvgazettemail.com/news/20151217/lawyer-will-have-to-explain-informant-id-release.

[35] Katy Stech, *Bankruptcy Judge Scolds Fifty Cent for Courthouse Photo*, Wall Street J.: Bankruptcy Beat (Apr. 7, 2016, 4:26 PM), http://blogs.wsj.com/bankruptcy/2016/04/07/bankruptcy-judge-scolds-50-cent-for-courthouse-photo/.

[36] *Id*.

Final Thoughts on the "Clean Up" Issue

Pragmatic questions continue to plague lawyers when it comes to counseling clients on their postings on social media and the presentation of social networking content. For example, in what form should social media content be preserved? Is a paper "print-out" or screenshot of information enough, or does information need to be saved in a way that preserves all metadata? No ethics regulatory bodies have tackled the question of whether a paper print-out of a Facebook post or Twitter tweet violates Rule 3.4. In the e-discovery arena, a number of courts have mandated that electronically stored information (ESI) must be preserved and produced in its native format. Given the dynamic nature of social media content, an argument can certainly be made that such data should be produced in its "original" format.

Another practical issue that is likely to present ethical concerns in this area for the foreseeable future is the explosive growth in self-deleting applications that delete data shortly after it is shared. The wildly popular Snapchat, as well as similar apps like Telegram, Confide, and Wickr, actively erase text or pictures once the recipient has viewed them. If a party uses such applications, the question shifts from whether such erased or disintegrated content can be retrieved to whether, for evidence preservation purposes, it was ever evidence that "existed" in the first place. And, is it spoliation if a user didn't have control over the evidence and a duty to preserve it at the time of its loss?

As a matter of providing competent representation in a world of seemingly endless amounts of data being shared and ever-changing mechanisms for that data to be shared, lawyers must embrace new responsibilities insofar as counseling clients on their social media activities is concerned. An attorney must be aware of what his or her client has done, is doing, and plans to do in terms of the client's online presence. Lawyers should address this issue in the very first client interview, as well as in the initial written communication or engagement agreement (a sample of such a first letter appears in the Appendix). In other words, when it comes to advising clients on "cleaning up" their Facebook profiles and other social media musings, a lawyer must serve as a kind of "client's keeper."

Appendix of State Ethics Advisory Opinions

This appendix provides a chronological state-by-state discussion of the advisory opinions that address advising a client on social media. It includes some of the examples provided above, but offers the reader a more detailed look at the specifics and nuances of the individual opinions and provides insight as to how the opinions connect and build on one another.

New York

The first ethics governing body to address the question of just how far a lawyer may go in advising a client regarding his or her social media presence was the New York County Lawyers Association Committee on Professional Ethics in July 2013, with its Formal Opinion 745.

In this opinion, the committee began by noting not only the prevalence of social media use (with an estimated 20 percent of Americans' online time being spent on social networking sites), but also the highly personal nature of the information being posted on these platforms.[37] With so many people posting information that could be viewed and used by everyone from potential employers to admissions officers to romantic contacts, and so many social media users ignorant of or oblivious to privacy settings, the Committee noted—with a nod to ethics opinions from around the country that have concluded that attorneys may ethically access publicly viewable social media pages—that attorneys have to be cognizant of what their clients are risking. Because serious privacy concerns may be implicated, the committee concluded, "it is permissible for an attorney to review what a client plans to publish on a social media page in advance of publication." It advised lawyers "to guide the client appropriately, including formulating a corporate policy on social media usage."[38] Such guidance, according to the committee, could involve the following attorney tasks: counseling the client to publish truthful, favorable information; discussing the content

[37] New York Cty. Law. Ass'n, Ethics Op. 745 (2013), https://www.nycla.org/siteFiles/Publications/Publications1630_0.pdf.

[38] *Id*.

and advisability of social media posts; advising the client how social media posts might be perceived; advising the client about how legal adversaries might obtain access to even "private" social media pages; reviewing both posts not yet published and those that have been published; and discussing potential lines of questioning that might result.[39]

However, in addition to such proactive rules, the committee cautioned that the attorney's advice regarding social media use by clients must still abide by other overarching ethical responsibilities. These include refraining from bringing or defending a frivolous proceeding; accordingly, the committee reasoned, "if a client's social media posting reveals to an attorney that the client's lawsuit involves the assertion of materially false factual statements, and if proper inquiry of the client does not negate that conclusion, the attorney is ethically prohibited from proffering, supporting or using these false statements."[40] Similarly, an attorney should take "prompt remedial action" if a client fails to answer truthfully when asked whether changes were ever made to a social media profile.[41]

But after reaffirming that an attorney may proactively counsel a client about keeping his social media privacy settings maximized, or counseling against posting certain content, the committee dropped its biggest bombshell with only a fleeting reference. An attorney, the committee stated, may offer advice as to what content may be "taken down" or removed, "[p]rovided that there [are] no violations of the rules or substantive law pertaining to the preservation and/or spoliation of evidence."[42] This bit of advice is provided with no further discussion or elaboration as a kind of afterthought in the opinion's brief conclusion—and yet it is arguably the most important subject mentioned by the committee. Many questions are left unanswered: for example, what kind of conduct might constitute spoliation in the digital age? Would deactivating an account suffice? And about deleting content—would it matter if content of questionable relevance were deleted, or if the "taking down" of content occurred prior to suit actually being filed? These questions, and others, were left unanswered. It would be up to later ethics opinions and to courts to fill in some of the blanks.

New York would return to this issue and re-affirm Formal Opinion 745 in March 2014, when the New York State Bar Association's

[39] *Id*.

[40] *Id*.

[41] *Id*.

[42] *Id*.

Commercial and Federal Litigation Section issued a sweeping set of "Social Media Ethics Guidelines."[43] These guidelines address a broad array of attorney tasks when using social media, including lawyer advertising, communicating with clients via social networking platforms, furnishing legal advice on social media, case investigation using social media, and researching the social media profiles of prospective and actual jurors. In its section on "Ethically Communicating with Clients," the New York Committee includes some advice on counseling clients about their social media activities. Guideline No. 4.A makes it clear that advising a client on what privacy settings should be used is within the lawyer's purview, noting that "[a] lawyer may advise a client as to what content may be maintained or make private on her social media account."[44] Later on, as part of Guideline No. 4.B on "Adding New Social Media Content," the committee also indicates there is no problem in advising a client on posting new content on a social media profile.[45] In its comment, the committee points to the scenario of pre-publication review by a lawyer on what the client plans to post, as well as providing appropriate guidance to that client (including formulating a policy on social media usage for business clients). The only caveat is that the proposed content must not be something the lawyer knows to be "false or misleading information that may be relevant to a claim."[46]

As the comment to this guideline discusses, a lawyer may "counsel the client to publish truthful information favorable to the client; discuss the significance and implications of social media posts (including their content and advisability); review how the factual content of a post may affect a person's perception of the post; and how such posts might be used in litigation, including cross-examination."[47] As to the last item, this guideline points out that the lawyer's proactive role in this regard may include advising a client "to consider the possibility that someone may be able to view a private social media profile through court order, compulsory process, or unethical conduct."[48]

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[43] The Social Media Comm. of the Commercial & Fed. Litig. Section, N.Y. St. Bar Ass'n Social Media Guidelines of the Commercial And Federal Litigation Section of the New York State Bar Association 15. (2015), http://www.nysba.org/socialmediaguidelines/ [hereinafter N.Y. St. Bar Social Media Guidelines].

[44] *Id*.

[45] *Id*.

[46] *Id*.

[47] *Id*.

[48] *Id*.

To reinforce the lawyer's ethical obligation to avoid being complicit in offering false statements or testimony, the committee added Guideline No. 4.C on "False Social Media Statements." In this guideline, the committee reminds lawyers of their ethical duties not to bring a frivolous claim or assert a baseless defense, including asserting materially factual statements that are false. No. 4.C cautions a lawyer against "proffering, supporting, or using false statements if she learns from a client's social media posting that a client's lawsuit involves the assertions of materially false factual statements or evidence that supports such a conclusion."[49]

In an age in which one of the most persistent criticisms of the Internet has been its potential for the dissemination of false or inaccurate information, this is a timely warning. And while some of these guidelines' directions may seem to place the lawyer in the role of "public relations flak" more than that of "attorney at law," there are valid and pragmatic reasons for doing so.

Consider the example on page 32, in which a lawyer defending a chemical plant operator in a wrongful death suit brought by the surviving family members of workers killed in an explosion at the plant. Pursuant to these guidelines, the lawyer may advise the company that it is fine, and even advantageous, to post on its Facebook page about the operator being cleared of wrongdoing in a subsequent Occupational Safety and Health Administration (OSHA) investigation. The lawyer might also discuss the timing of a post about the plant's longtime safety manager's retirement, due to how it might appear in close temporal proximity to the underlying accident. Defense counsel might even approve of Facebook posts touting the company's upcoming sponsorship of a community event or a charitable donation, given the anticipated spike in goodwill and burnishing of his client's public image. However, the same lawyer adhering to his ethical obligations and these guidelines should counsel against company employees tweeting gossip about one of the surviving children not having standing to sue due to not being the decedent's biological child—especially if the lawyer knows such a statement to be false.

On the flip side, a plaintiff's attorney may be alerted that it is time to withdraw rather than file a frivolous claim after a review of a client's social media presence reveals that the client's mishap was caused by the client's own carelessness rather than the defendant's alleged negligence.

[49] *Id.*

But what about removing or deleting social media content? Guideline No. 4.A states that a lawyer may advise a client "as to what content may be 'taken down' or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information."[50] The guideline goes on to reinforce this obligation to preserve evidence, stating that "Unless an appropriate record of the social media information or data is preserved, a party or non-party may not delete information from a social media profile that is subject to a duty to preserve."[51]

Just what kind of content must be preserved, and when? The Comment to Guideline No. 4.A points out that this preservation obligation extends to "potentially relevant information," and that it begins "once a party reasonably anticipates litigation."[52] It follows and even quotes from NYCLA Formal Opinion 745, observing that as long as the removal of content does not constitute spoliation of evidence, "there is no ethical bar to 'taking down' such material from social media publications."[53] In a situation when litigation is neither pending nor reasonably anticipated, the guideline notes, "a lawyer may more freely advise a client on what to maintain or remove from her social media profile."[54] And, like Formal Opinion 745, Guideline No. 4.A also reminds lawyers that in the digital age, "delete" doesn't necessarily translate to "gone forever." It cautions lawyers "to be aware that the act of deleting electronically stored information does not mean that such information cannot be recovered through the use of forensic technology," particularly if a "live" posting is "simply made 'unlive.'"[55]

For example, as discussed above, a client who wants to remove embarrassing office party photos from the company's Facebook page may be advised to do so; however, if there is a pending sexual harassment claim against the company by a terminated employee (that includes actionable comments or conduct at the office party)

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[50] The Social Media Comm. of the Commercial & Fed. Litig. Section, N.Y. St. Bar Ass'n Social Media Guidelines of the Commercial And Federal Litigation Section of the New York State Bar Association 15. (2015), http://www.nysba.org/socialmediaguidelines/ [hereinafter N.Y. St. Bar Social Media Guidelines].

[51] *Id*.

[52] *Id*.

[53] *Id*.

[54] *Id*.

[55] *Id*.

then the client must be advised to electronically preserve the removed photos.

Philadelphia

The next ethics body to consider this issue was the Philadelphia Bar Association Professional Guidance Committee. In its Opinion 2014-5, issued in July 2014, the committee considered the following questions:

1. Whether a lawyer may advise a client to change the privacy settings on a Facebook page so that only the client or the client's "friends" may access the content
2. Whether a lawyer may instruct a client to remove a photo, link, or other content that the lawyer believes is damaging to the client's case from the client's Facebook page
3. Whether a lawyer who receives a Request for Production of Documents must obtain and produce a copy of a photograph posted by the client, which the lawyer previously saw on the client's Facebook page, but which the lawyer did not previously print or download
4. Whether a lawyer who receives a Request for Production of Documents must obtain and produce a copy of a photograph posted by someone other than the client on the client's Facebook page, which the lawyer previously saw on the client's Facebook page, but which the lawyer did not previously print or download[56]

As to the first question, Philadelphia's Committee held that a lawyer can certainly counsel a client to restrict access to his or her social media information, reasoning that changing privacy settings only made it more cumbersome for an opposing party to obtain the information, not impossible thanks to formal discovery channels.[57] Helping a client manage the content of her account, the committee opined, was simply part of a lawyer's responsibilities, especially in light of the changing standard of attorney competence. Providing competent representation, according to the committee, necessarily entailed having a basic knowledge of how social media sites work

[56] Phila. Bar Ass'n, Op. 2014-5 (2014), http:www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion2014-5Final.pdf.

[57] *Id*.

as well as advising clients about issues that might arise due to their use of such platforms.[58]

For the remaining questions posed, the committee held that a lawyer may not instruct or knowingly allow a client to delete or destroy a relevant photo, link, text, or other content.[59] Citing to and adopting the New York Bar's Social Media Guidelines, the committee reasoned that a lawyer could only instruct her client to "delete" damaging information if she also took care to "take appropriate action to preserve the information in the event it should prove to be relevant and discoverable."[60] The committee, citing the now-infamous Virginia social media spoliation case of *Allied Concrete Co. v. Lester*, also reminded lawyers of their duties under Rule 3.3(b) of the Pennsylvania Rules of Professional Conduct to take reasonable remedial measures, "including if necessary, disclosure to the tribunal,"[61] if the lawyer learns that her client has destroyed evidence.

As to the remaining issues presented, Philadelphia's Committee ruled that in order to comply with a Request for Production (or any other discovery request), a lawyer "must produce any social media content, such as photos and links, posted by the client, including posts that may be unfavorable to the client."[62] Reminding lawyers of their obligations under the Rules of Professional Conduct not to engage in conduct "involving dishonesty, fraud, deceit, or misrepresentation," the committee held that a "lawyer must produce all of the requested photographs and other information from Facebook, regardless of whether it was favorable to the client."[63] Furthermore, if a lawyer knows or reasonably believes that extant social media content has not been produced by the client (and the social media content is in the client's or lawyer's possession), then the lawyer "must make reasonable efforts to obtain" the "photograph, link or other content about which the lawyer is aware."[64]

The Philadelphia Committee's opinion is significant not only because it adopts and builds upon the New York Bar's Social Media Guidelines, but because it elaborates and lends context to the discussion surrounding the issue that NYCLA Ethics Opinion 745 only mentioned in passing—advising a client on "taking down"

[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *Id*.
[63] *Id*.
[64] *Id*.

damaging social media content. Equally important, the Philadelphia Committee's insights are set against the backdrop of the attorney's duty of competence in the digital age. Being able to provide both proactive and reactive counseling to clients regarding their online presence is an expected part of the attorney-client relationship in the twenty-first century, not an added value or special distinguishing trait for a lawyer.

Pennsylvania

Soon after the Philadelphia Committee's opinion, the Pennsylvania Bar Association handed down its Formal Opinion 2014-300, an eighteen-page opinion that provided comprehensive guidance on a whole host of issues related to an attorney's use of social media.[65] These issues ranged from using social media for marketing purposes to mining social media for evidence on witnesses and even researching jurors on social media.[66]

A significant portion of Formal Opinion 2014-300 is devoted to the subject of advising clients on the content of their social media accounts. Referencing cases like the Gulliver Schools opinion from Florida, the Pennsylvania Bar reminded lawyers that "a competent lawyer should advise clients about the content that they post publicly online and how it can affect a case or other legal dispute."[67] Since it has become reasonable to expect that opposing counsel will monitor a client's social media account, the committee reasoned, "[t]racking a client's activity on social media may be appropriate for an attorney to remain informed about developments bearing on the client's legal dispute."[68]

Lawyers, according to the Pennsylvania Bar, "should be certain that their clients are aware of the ramifications of their social media actions," and "should also be aware of the consequences of their own actions and instructions when dealing with a client's social media account."[69] The Pennsylvania Bar Committee agreed with and followed both the Philadelphia Bar's advice as well as the New York Bar's Social Media Guidelines, stating that a lawyer "may not instruct a client to alter, destroy, or conceal any relevant

[65] Pa. Op. 300, *supra* note 5.

[66] *Id*.

[67] *Id*.

[68] *Id*.

[69] *Id*.

information regardless of whether that information is in paper or digital form."[70] However, consistent with its predecessors, the Pennsylvania Bar concluded that a lawyer may "instruct a client to delete information that may be damaging from the client's page, provided the conduct does not constitute spoliation or is otherwise illegal, but must take appropriate action to preserve the information in the event it is discoverable or becomes relevant to the client's matter."[71]

In addition, citing the same Rules of Professional Conduct as its Philadelphia and New York counterparts, the Pennsylvania Bar Committee stated that attorneys may neither advise clients to post false or misleading information on a social networking page nor offer evidence that the lawyer knows to be false from a social media site.[72] The Pennsylvania Bar pointed out that, while it may be newly articulated, the reasoning underlying this advice is itself not exactly novel. As the opinion noted, "[i]t has become common practice for lawyers to advise clients to refrain from posting any information relevant to a case on any website, and to refrain from using these websites until the case concludes."[73]

North Carolina

In April 2014, the North Carolina Bar Association's Ethics Committee weighed in with its 2014 Formal Ethics Opinion 5, on "Advising a Civil Litigation Client about Social Media."[74] This opinion posed three questions. First, both prior to and after the filing of a lawsuit, may a lawyer give a client advice about the legal implications of posting on social media sites and coach the client on what should and should not be shared via social media? Second, may a lawyer instruct a client to remove existing social media postings—either before or after litigation commences? Third, may a lawyer instruct the client to change her security and privacy settings on a social media page, either before or after litigation?[75]

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[70] *Id*.

[71] *Id*.

[72] *Id*.

[73] *Id*.

[74] N.C. St. Bar, Formal Ethics Op. 2014-5 (2015), https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-5/ [hereinafter N.C. Op. 2014-5].

[75] *Id*.

As to the first question, the North Carolina Committee answered in the affirmative, pointing out that providing such advice, both before and after the filing of a lawsuit, is part of the lawyer's duty to provide competent and diligent representation to clients.[76] As the opinion states, if a client's social media postings might impact that client's legal matter, then "the lawyer must advise the client of the legal ramifications of existing postings, future postings, and third party comments."[77] This last observation about third-party postings is interesting, and apparently unique to the North Carolina Ethics Committee's opinion. In an age where public reaction occurs not only in response to the postings by the user himself, but also to the "likes," "shares," "comments," "retweets," and "tags" by those reading such a post, it is timely and valuable advice to remind a client about the sort of comments his post might generate. In a small but growing number of cases, individuals have experienced legal fallout not from their own social media post, but from the comments and reactions by other parties.[78]

In responding to the second question, the committee (citing NYCLA Ethics Opinion 745) answered that as long as the removal of postings "does not constitute spoliation and is not otherwise illegal or a violation of a court order," then a lawyer may instruct a client to take down existing social media posts.[79] The committee did add the caveat that if there is the potential that removing such content might constitute spoliation, the lawyer "must also advise the client to preserve the postings by printing the material, or saving the material to a memory stick, compact disc, DVD, or other technology (including web-based technology) used to save documents, audio, and video."[80] In addition, according to the committee, a lawyer "may also take possession of the material for purposes of preserving the same."[81]

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[76] *Id*.

[77] *Id*.

[78] *See*, *e.g.*, Jake New, *Suspended for Spouse's Comments?*, Inside Higher Ed (Feb. 13, 2015), https://www.insidehighered.com/news/2015/02/13/u-tulsa-student-banned-campus-over-facebook-comments-posted-his-husband https://www.insidehighered.com/news/2015/02/13/u-tulsa-student-banned-campus-over-facebook-comments-posted-his-husband (discussing the case of University of Tulsa student George Barnett, who was suspended by the school over allegedly offensive Facebook posts on his page made by his spouse).

[79] N.C. Op. 2014-5, *supra* note 74.

[80] *Id*.

[81] *Id*.

For the North Carolina Committee, the third question presented was the easiest to answer. Devoting no discussion to the issue, the committee stated simply that a lawyer may indeed advise his or her client to implement heightened privacy settings, whether before or after suit is filed, as long as such counseling "is not a violation of law or a court order."[82]

Florida

One of the more recent ethics bodies to consider whether or not lawyers may advise clients to "clean up" their social media profiles was the Florida Bar's Professional Ethics Committee with its Proposed Advisory Opinion 14-1, issued January 23, 2015.[83] In this opinion, limiting itself to a pre-litigation time frame, the committee considered the following questions:

- May a lawyer advise a client to remove posts, photos, videos, and information from social media pages/accounts "that are related directly to the incident for which the lawyer is retained"? How about social media content that is not directly related to the incident for which the lawyer is retained?
- May a lawyer advise a client to change her social media privacy settings in order to remove the profile or account from public view?
- If the lawyer has advised the client to implement more restrictive privacy settings, must a lawyer advise a client not to remove social media content whether or not directly related to the litigation?

Not surprisingly, the Florida Bar's opinion cited and agreed with the conclusions of the ethics opinions that had preceded it from the New York, Philadelphia, Pennsylvania, and North Carolina bars. Florida's Committee also agreed that "the general obligation of competence" mandates that lawyers must advise clients "regarding removal of relevant information from the client's social media pages, including whether removal would violate any legal duties regarding preservation of evidence, regardless of the privacy settings."[84] With

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[82] *Id*.

[83] Prof'l Ethics of The Fla. Bar, Proposed Advisory Op. 14-1 (Jan. 23, 2015), https://www.floridabar.org/DIVEXE/RRTFBResources.nsf/Attachments/8E73C71636D8C23785257DD9006E5816/$FILE/14-01%20PAO.pdf?OpenElement.

[84] *Id*.

respect to the most benign level of involvement with a client's social media activities, the Florida Bar's Ethics Committee stated that "a lawyer may advise that a client change privacy settings on the client's social media pages so that they are not publicly accessible."[85]

As far as actual removal of content is concerned, Florida's Committee held that, "[p]rovided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, a lawyer also may advise that a client remove information relevant to the foreseeable proceeding from social media pages as long as an appropriate record of the social media information or data is preserved."[86] But just what did Florida's Committee mean by "relevant" to the reasonably foreseeable proceeding?

The committee acknowledged that relevance may certainly lie in the eyes of the beholder, or at least require "a factual case-by-case determination."[87] The committee noted that social media content that may not be "related directly" to the incident that made the basis for a lawsuit may nevertheless be deemed relevant to a case.[88] For example, social media mentions on a personal injury plaintiff's Facebook page about her weight training accomplishments and goal to become a personal trainer may not directly relate to the alleged accident, but may be relevant to her damages claim if she is alleging that her injuries are life altering.

Like earlier ethics opinions, Proposed Advisory Opinion 14-1 makes reference to the emerging body of case law on social media spoliation including the *Lester* and *Gatto* decisions discussed later on. And interestingly, prior to issuing this proposed opinion, Florida considered an alternative approach that would have prohibited removal of social media content completely, regardless of steps taken to preserve that content.

West Virginia

West Virginia issued one of the most recent opinions addressing social media advice to clients.[89] The opinion echoes the views of the other states regarding both privacy settings and the removal and

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[85] *Id*.

[86] *Id*.

[87] *Id*.

[88] *Id*.

[89] W. Va. Office of Disciplinary Couns., L.E.O. No. 2015-02 (2015), http://www.wvodc.org/pdf/LEO%202015%20-%2002.pdf.

preservation of social media. The opinion advises lawyers that they should advise their clients about social media use and must also be mindful of the consequences of their own conduct in providing such advice. It also cautions lawyers about the impermissible use of social media evidence that lawyers know to be false. Notably, the West Virginia opinion acknowledges that "social media is a rapidly and constantly evolving entity" and observes that there is no way certain to anticipate such changes.[90] Therefore, West Virginia "instructs attorneys to adhere to the spirit of the . . . Rules when using social media and not simply the language" of the opinion.[91]

District of Columbia

In November 2016, the District of Columbia issued a comprehensive social media opinion geared to the general provision of legal services. As discussed above, the D.C. opinion is notable in its acknowledgment of the impact of social media in litigation, transactional, and regulatory practice areas.[92] In all three practice areas, D.C. joins the state opinions in advising that competence requires lawyers to understand social media and "at least consider whether and how social media may benefit or harm client matters in a variety of circumstances."[93]

In considering advice to clients about social media, the D.C. opinion notes that competence may require that lawyers review all of their clients' relevant social media postings and advise clients to change privacy settings. The D.C. opinion adds that lawyers should understand and advise clients that a privacy setting does not create an expectation of confidentiality that will establish privilege or work product protection.[94]

Regarding the removal of social media postings, D.C. advises that lawyers may "need to include social media in advice and instructions to clients about litigation holds, document preservation, and document collection."[95] The opinion addresses whether clients may remove social media once litigation or regulatory

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[90] *Id*. at 2.

[91] *Id*.

[92] D.C. Bar Ethics Opinion 371 (2016), http://www.dcbar.org/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm.

[93] *Id.*

[94] *Id.*

[95] *Id.*

proceedings are anticipated by directing lawyers to consider not only the legal ethics rules, but also the other statutes, regulations, and case law relevant to the specific legal matter—so there is no clear answer here.[96] The only clear direction is that if anything is removed, an accurate copy must be retained.[97] The opinion does suggest that "in the absence of unlawful activity or anticipation of litigation or adversary proceedings" a lawyer advising a client in a transactional or regulatory matter may be able to advise a client to adjust his social media content so long as the client does not make "fraudulent or unlawful adjustments."[98]

Given the murkiness and lingering uncertainty for attorneys surrounding the "clean up your Facebook page" issue, it is likely that the District of Columbia will not be the last jurisdiction that will address this subject.

[96] *Id.*

[97] *Id.*

[98] *Id.*