

**“YOU TWEETED WHAT?”
ETHICS OF ADVISING YOUR CLIENTS ABOUT THEIR
SOCIAL MEDIA POSTS**

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“YOU TWEETED WHAT?” ETHICS OF ADVISING YOUR CLIENTS ABOUT THEIR SOCIAL MEDIA POSTS

It is a question that, sooner or later, most attorneys will have to confront: just how far can one go in advising a client about “cleaning up” his or her Facebook page or other social networking profiles? Regardless of one’s area of practice, the ubiquitous nature of social media, combined with the dizzying array of personal information that is shared every day via social networking platforms 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 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 article will provide 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 article will examine the “new normal” for twenty-first century lawyers by not only analyzing the various ethics opinions and guidelines nationwide which address the limits on how far lawyers can go in this regard, but also by studying how courts through the U.S. 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. As this article points out, the duty to preserve evidence has assumed new dimensions in an age dominated by electronic communications, as has a

lawyer’s threshold duty of providing competent representation.

I. THE IMPORTANCE OF KNOWING 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. According to the Pew Internet Research Project, as of January 2014 74% of all online adults use social networking sites.¹ In addition, multi-platform use is more common than ever. 52% of online adults use two or more social media sites, a significance increase over the 42% rate of just a year before.² Sites other than Facebook continue to have strong representation. For example, 23% of all online adults have a LinkedIn profile, while 22% are on Pinterest, 21% use Instagram, and 19% have Twitter accounts.³ When we consider that 81% of all American adults use the Internet, the fact that 74% 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 1.3 billion worldwide) that is important, but also their level of engagement. With Facebook for example, 70% of its users engage with the site on a daily basis, and 45% acknowledge doing so at least several times a day.⁴

Social media has become increasingly important for people not just to maintain or expand social contacts, but also as a source for news and information. Half of all Facebook and Twitter users receive news on these sites, while 62% of Reddit users get their news from that site.⁵ In addition, social media users are not limited to the purely passive experience of receiving information this way. Engagement with the news is a key feature of social media use with 50% of social networking site users reporting that they have shared or reposted news stories, images, or video.⁶ 46% acknowledge discussing a news issue or event online, while 14% have posted photos they took of a news event.⁷ In fact, one study has demonstrated that, as of August 2012, 46% of all online adults have acted in the role of “content creator,” posting originals photos or videos online that they themselves had created, while 41% had assumed the role of “content curator,” reposting photos or videos that

¹ Pew Internet Project Social Networking Fact Sheet (January 2014) <http://www.PewInternet.org/fact-sheets/social-networking-fact-sheet>

² Pew Internet Project Social Media Update 2014 (January 2015), <http://www.PewInternet.org/2015/01/09/social-media-update>

³ Id.

⁴ Id.

⁵ Id.

⁶ Super note 1

⁷ Id.

they found online for the purpose of sharing with others.⁸

The fact that so many people are active social media users, and that their use transcends mere social content and includes generating and sharing information and content such as photos and videos 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 video 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:

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.⁹

And it's not just that potential "smoking gun" photograph or a damaging admission in a Facebook post that lawyers need to concern themselves with when it comes to clients' social media use. Something as basic and seemingly mundane as knowing whose one's clients have "friended" online can be important for lawyers to know. Proving that one should keep friends close and "Facebook friends" even closer, vital information once thought limited in circulation to a select group of "friends" can be shared by these same "friends" with

third parties. Two recent criminal cases illustrate this. In U.S. v. Meregildo, the government was investigating a defendant, Colon for involvement in illegal gang activity.¹⁰ As part of that investigation, the government wanted access to the contents of Colon's privacy-restricted Facebook account. To support its application for a search warrant, federal prosecutors established probable cause by pointing to posts made by Colon on his Facebook page about gang-related activity.¹¹ How did they obtain access to this privacy-restricted page? One of Colon's existing Facebook "friends" became a cooperating witness and provided the government with the access it needed. Colon challenged the judge's allowing this, arguing that the use of a cooperating witness to obtain his Facebook postings violated his Fourth Amendment rights.¹² In its opinion, the Southern District of New York found no Fourth Amendment violations, pointing out that once Colon shared his posts with his "friends," he "surrendered his expectation of privacy" much like someone who sends an email, or mails a letter, upon delivery of such correspondence.¹³ The court reasoned that Colon's "friends" were free to do as they wished with the information he shared, including providing it to law enforcement. The court concluded that:

"Where Facebook privacy settings allow viewership of postings by 'friends' the government may access them through a cooperating witness who is a 'friend' without violating the Fourth Amendment...While Colon undoubtedly believed that his Facebook profile would not be shared with law enforcement, he had no justifiable expectation, that his 'friends' would keep his profile private."¹⁴

A 2014 case U.S. v. Gatson, relied on Meregildo and took matters a step further. In Gatson, the criminal defendant willingly accepted a "friend" request with an Instagram account that was bogus – created by law enforcement for the express purpose of interacting with the defendant.¹⁵ Gatson's acceptance of the request meant that police were able to view photos and other incriminating content posted by Gatson to his Instagram account.¹⁶ In denying Gatson's Fourth Amendment challenge, the court held that "No search warrant is

⁸ Id.

⁹ Nucci v. Target Corp., Fla. 4th Dist. Ct. of App. (Jan. 7, 2015)

¹⁰ U.S. v. Meregildo, 2012 WL 3264501 (S.D. N.Y., Aug. 10, 2012)

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Id.

¹⁵ U.S. v. Gatson

¹⁶ Id.

required for the consensual sharing of this type of information.”¹⁷

Both Meregildo and Gatson illustrate the repercussions that can accompany an individual’s poor choices in “friends,” and they demonstrate the importance of a lawyer being aware of who his client’s online “friends” are. Lawyers need to be aware of a client’s past social media activities, and should assume an active role in consulting with clients about their social media habits after the inception of the attorney-client relationship. In fact, a growing number of attorneys are addressing these social media concerns in client engagement agreements or letters, with some even specifying that the client agrees to refrain from posting on social media sites while litigation is pending.¹⁸

However, the very real prospect of social media posts coming back to haunt a client or damage a case is just one reason for attorneys to become conversant in social media. Another reason is far more fundamental – 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.

Following 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), the ABA adopted certain changes to the Model Rules in August 2012.¹⁹ One of these 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.”²⁰

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.”²¹ As the revision to Rule 1.1 indicates, competence 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 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.”²²

And as to the former, an understanding of social networking sites such as Facebook is critical to accomplishing lawyerly tasks in the Digital Age. With the vast wealth of information about individuals just a few mouseclicks away and “digital digging” becoming the norm for attorneys, it becomes harder for an attorney to credibly maintain that she has met the standard of competence when 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% reported using evidence from social networking sites in their cases.²³ In a 2013 criminal case, the 9th circuit held that a lawyer’s failure to locate and use a purported social abuse victim’s recantation on her social networking profile constituted ineffective assistance of counsel.²⁴ In addition, a number of state courts nationwide considering due diligence issues have held that lawyers have a duty to make use of online resources. One Florida appellate court compared a lawyer’s failure to go beyond checking directory assistance to find an address for a missing defendant the equivalent of using “the horse and buggy and the eight track stereo” in an age of Google and social media.²⁵ The expectations for a lawyer to be technologically proficient also extend to jury selection. The ABA, in its Formal Opinion 766, 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.²⁶ In one state, Missouri, the Supreme Court has even created an

¹⁷ Id.

¹⁸ J. Browning, The Social Media and Litigation Practice Guide, p. 241-243 (West Publishing 2014)

¹⁹ ABA Commission on Ethics 20/20, Report to the house of Delegates Resolution 105A (Aug. 2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2010/2012_hod_annual_meeting_105a_filed_may_2_012

²⁰ Id.

²¹ Id.

²² Id.

²³ John Browning, The Lawyer’s Guide to Social Networking: Understanding Social Media’s Impact on the Law (West 2010)

²⁴ Cannedy v. Adams, 706 F. 3d 1148 (9th Cir. 2013)

²⁵ Dubois v. Butler ex. rel. Butler, 901 So. 2d 1029 (Fla. Dist. App. 2005)

²⁶ John Browning, “Should Voir Dire Become Voir Google? Ethical Implications of Researching Jurors on Social Media,” SMU Science & Tech. L. Rev 4 (2014)

affirmative duty for lawyers to conduct online research of jurors during the voir dire process.²⁷

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. Just 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? A look at the various ethics opinions from around the country to examine this issue will shed some light.

II. ETHICS OPINIONS DISCUSSING ADVISING CLIENTS ON "CLEANING UP" THEIR SOCIAL MEDIA PAGES

A. 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% of Americans' online time being spent on social networking sites), but also the highly personal nature of the information being posted on these platforms.²⁸ 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”

and

“to guide the client appropriately, including formulating a corporate policy on social media usage.”²⁹

Such guidance, according to the Committee, 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.³⁰

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 material 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.”³¹

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 site.³²

But after reaffirming that an attorney may proactively counsel a client about keeping his social media privacy settings on or 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 is no violations of the rules or

²⁷ Johnson v. McCullough, 306 S.W. 3d 551 (Mo. 2010) (en banc)

²⁸ New York County Lawyers' Association Ethics Opinion 745 (July 2013), https://www.nycla.org/siteFiles/Publications/Publications1630_0.pdf

²⁹ Id.

³⁰ Id.

³¹ Id.

³² Id.

substantive law pertaining to the preservation and/or spoliation of evidence.”³³ 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 contact 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 Commercial and Federal Litigation Section issued a sweeping set of “Social Media Ethics Guidelines.”³⁴ 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 several governing counseling clients about their social media activities. Guideline No. 4.A makes it clear that advising a client on what privacy settings 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.”³⁵ Later on, as part of Guideline No. 4.B on “Adding New Social Media Content,” the Committee also indicate there is no problem in advising a client on posting new content on a social media profile.³⁶ 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 formalizing 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.”³⁷ 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.”³⁸

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.”³⁹ 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 material factual statements that are false. 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 material false factual statements or evidence supports such a conclusion.”⁴⁰

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, 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 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 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

³³ Id.

³⁴ Social Media Ethics Guidelines, The Commercial and Federal Litigation Section of the New York State Bar Association (March 18, 2014), at [https://www.nysba.org/Sections/Commercial_Federal_Litigation/ComFed\)PDFs/Social_Media_Ethics_Guidelines.html](https://www.nysba.org/Sections/Commercial_Federal_Litigation/ComFed)PDFs/Social_Media_Ethics_Guidelines.html)

³⁵ Id.

³⁶ Id.

³⁷ Id.

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

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 lawyers knows such a statement to be false. On the flip side, a plaintiff's attorney with access to her client's private Facebook page who views Facebook comments by the client making it clear that he 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 bring a frivolous claim.

But what about removing or deleting social media contact? 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.”⁴¹

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.”⁴²

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.”⁴³ 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.”⁴⁴ 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.”⁴⁵

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’.”⁴⁶ 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). This would be consistent with Guideline No. 4.A.

B. 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; and
- 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

⁴¹ Id.

⁴² Id.

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id.

the lawyer did not previously print or download.⁴⁷

As to the first question, Philadelphia’s Committee held that a lawyer can certainly counsel a client to restrict access to their 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 discovery channels.⁴⁸ 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 as well as advising clients about issues that might arise due to their use of such platforms.⁴⁹

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.⁵⁰ 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.”⁵¹ The Committee, citing the now-infamous Virginia social media spoliation case of *Lester v. Allied Concrete*, 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,”⁵² 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.”⁵³ 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.”⁵⁴

Furthermore, if a lawyers 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.”⁵⁵

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” 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 21st century, not an added value or special distinguishing trait for a lawyer.

C. Pennsylvania

Soon after the Philadelphia Committee’s opinion, the Pennsylvania Bar Association handed down its Formal Opinion 2014 – 300, an 18-page opinion that provided comprehensive guidance on a whole host of issues related to an attorney’s use of social media.⁵⁶ 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.⁵⁷ 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 *Gulliver Academy v. Snay* (in which a settling party’s daughter’s Facebook post breached a confidentiality provision, resulting in the forfeiture of the \$80,000 settlement), the Pennsylvania Bar reminded lawyers that:

“a competent lawyer should advise clients about the content that they post publicly

⁴⁷ Philadelphia Bar Association 2014-5 (July 2014), <http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion2014-5Final.pdf>

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Pennsylvania Bar Association Formal Opinion 2014-300 (October 2014)

⁵⁷ Id.

online and how it can affect a case or other legal dispute.”⁵⁸

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.”⁵⁹

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.”⁶⁰

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 information regardless of whether that information is in paper or digital form.”⁶¹ 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.”⁶²

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.⁶³ 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:

“It 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.”⁶⁴

D. North Carolina

In April 2014, the North Carolina Bar Association’s Ethics Committee weighed in with its Proposed 2014 Formal Ethics Opinion 5, on “Advising a Civil Litigation Client about Social Media.”⁶⁵ 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?⁶⁶ As to the first question, the North Carolina Committee answered in the affirmative, pointing at 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.”⁶⁷ As the proposed 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.”⁶⁸ 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 a user’s himself but the “likes,” “shares,” “comments,” 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

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

⁶³ Id.

⁶⁴ Id.

⁶⁵ North Carolina State Bar Proposed 2014 Formal Ethics Opinion 5, “Advising A Civil Litigation Client About Social Media” (April 24, 2014), <http://www.ncbar.com/ethics/propeth.asp>

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id.

legal fallout not from their own social media post, but from the comments and reactions by other parties.⁶⁹

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.⁷⁰ 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.”⁷¹ In addition, according to the Committee, a lawyer “may also take possession of the material for purposes of preserving the same.”⁷²

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 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.”⁷³

E. Florida

The most recent ethics body 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, 2015.⁷⁴ In this opinion, limiting itself to a pre-litigation timeframe, the Committee considered the following questions:

- 1) 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?
- 2) May a lawyer advise a client to change her social media privacy settings in order to remove the profile or account from public view?

- 3) Finally, 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.”⁷⁵

With respect to the most benign level of involvement with a client’s social media activities, the Florida Bar’s Ethics Committee opined 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.”⁷⁶

As far as actual removal of content is concerned, Florida’s Committee held that:

“Provided 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.”⁷⁷

But just what did Florida’s Committee mean by “relevant” to the reasonably foreseeable proceeding? As the Committee acknowledged, relevance may certainly lie in the eyes of the beholder, or at least require “a factual case-by-case determination.”⁷⁸ The Committee

⁶⁹ See, for example, Jake New “Suspended For Spouse’s Comments?” *Inside HigherEd* (Feb. 13, 2015) 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.

⁷⁰ *Supra* note 65

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Florida Bar Professional Ethics Committee, Proposed Advisory Opinion 14-1 (Jan. 23, 2015)

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

noted that social media content that may not be “related directly” to the incident made the basis for a lawsuit may nevertheless be deemed relevant to a case.⁷⁹ For example, social media mentions on a personal injury plaintiff’s Facebook page about her “personal best” times in local running events may on the surface not relate directly to her subsequent accident. However, if she asserts claims that she is unable to enjoy the same kind of success in post-accident competitive running as she did before her accident, then such content is certainly relevant to her damages claims.

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 herein. 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. But given the murkiness and lingering uncertainty for many attorneys surrounding the “clean up your Facebook page” issue, it is likely that Florida is not the last jurisdiction that will address this subject.

III. CASE LAW IMPLICATIONS

A. Changing Privacy Settings

There is a growing body of case law construing not only the discoverability of social media content and its impact on all kinds of cases, but also the importance of taking care to preserve evidence as the previously discussed ethics opinions illustrate. For attorneys counseling clients who have already deleted potentially damaging posts, it is important to remember that thanks to cyberforensic tools, “deleted” doesn’t necessarily mean “destroyed,” and even deleted social media content is discoverable. For example, in the case of *Romano v Steelcase, Inc.*, a personal injury plaintiff tried unsuccessfully to resist a defense motion to compel access not only to her privacy restricted Facebook photos and posts, but those that she had already deleted as well.⁸⁰ The court granted a motion providing the defendant “access to Plaintiff’s current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information.”⁸¹

Lawyers must also be cognizant of the fact that even advice at the most benign end of the spectrum when it comes to a client’s social networking activities – advising a client on adapting more restrictive privacy settings—is not without its legal risks. Consider, for example, the 2013 trucking accident lawsuit against driver Jerry O’Reilly, his employer, Try Hours and National Interstate Insurance Company in DeKalb County, Georgia.⁸² Among the allegations made by Plaintiff Kristin Meredith was that the accident involving her sedan and the defendants’ tractor-trailer was caused by truck driver O’Reilly’s inattention. Although during his deposition O’Reilly initially denied using a camera, phone or computer while driving, plaintiffs’ counsel then confronted him with dozens of Facebook posts that helped establish a pattern of distracted and even aggressive driving.⁸³ One post consisted of a photo of his truck cab along with a caption that read:

“My new bumper. Now pull your ass out in front of me.”⁸⁴

Significantly, O’Reilly also admitted to changing his Facebook profile to “private” during the deposition and just before plaintiff’s counsel began his questioning – a fact that the attorney gleefully pointed out to portray O’Reilly as untrustworthy. The case resulted in a \$1 million settlement shortly thereafter.⁸⁵

Another case, In re Platt, also demonstrates the potential fallout from changing one’s social media privacy settings.⁸⁶ This was an adversary proceeding in bankruptcy court, following a state court personal injury suit arising out of a physical altercation between plaintiff Will Rhodes and defendant Justin Platt.⁸⁷ Platt filed bankruptcy, and Rhodes sought to have any debt from the civil suit classified as nondischargeable due to “willful and malicious” conduct by Platt.⁸⁸ To determine if his conduct met this standard, the court had to examine Platt’s behavior and credibility, including his conduct after the incident, to see if Platt had the intent to injure Rhodes.⁸⁹ The court observed that although the bar staff immediately after the incident “were initially able to identify Defendant by finding his Facebook account, Defendant made his Facebook

⁷⁹ *Id.*

⁸⁰ *Romano v Steelcase, Inc.*, 2010 WL 3703242 (N.Y. Sup. Ct., Sept. 21, 2010).

⁸¹ *Id.*

⁸² Kathleen Baydala Joyner, “Trucker’s Facebook Habit Settles Case for Injured Driver,” *Daily Report* (Sept. 25, 2014), <http://www.dailyreportonline.com/printerfriendly/1202671247938> (last visited 9/24/14).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *In re Pratt*, No. 11-12367-CAG, 2012 WL 5337197 (Bankr. W.D. Tex. Oct. 29, 2012).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

account private soon after the incident occurred.”⁹⁰ The court noted that this act in which “Defendant’s account was ‘made private’ such that an unknown third party searching for Defendant would no longer be able to find him on Facebook,” supported an adverse inference that the Defendant acted with the specific intent to injure the plaintiff, and therefore the debt was not dischargeable.⁹¹

While a case like Platt appears to be an outlier in its condemnation of the act of adopting a heightened privacy setting for a Facebook profile, there are those who raise the concern that lawyers advising clients to make their privacy settings more restrictive could be exposed to accusations of “obstructing access to evidence.” After all, under ABA Model Rule of Professional Conduct 3.4, a lawyer may not “obstruct” another party’s access to evidence or alter, destroy or “conceal” any material that may be of evidentiary value. Commentators have suggested that “moving material behind a privacy wall could be considered improper concealment.”⁹² Such concerns overlook the fact that a client may have perfectly legitimate, non-litigation oriented reasons to make their social media profiles non-public. Individuals may wish to change privacy settings to shield information from prospective employers (in fact, a growing number of jurisdictions have passed employee/applicant privacy legislation that prevents employers from demanding access to privacy-protected social media accounts). A student who is being cyberbullied or an individual being harassed or stalked online may also choose to change their privacy settings. Lawyers give clients advice on maintaining privacy all the time, from placing the designation “confidential” on correspondence to simply advising a client to close their window blinds to telling an individual not to publicly discuss a pending case. Advising a client to adopt more stringent privacy settings on her Facebook profile has no legal distinction from such counsel. As long as the relevant social media content is preserved, no ethical rule has been violated. A party is well within its rights to change privacy settings to limit future exposure of statements or photos – including those posted by others – that might be embarrassing, irrelevant, or even harmful.

Yet another reason for not imposing ethical prohibitions on a lawyer advising a client about her privacy settings is to protect the ignorant client. A number of studies have looked at user utilization of and attitudes toward privacy settings on social networking profiles. According to one *Consumer Reports* study in

2012, only about 37% of Facebook users had used the site’s privacy tools to customize how much information could be shared with third parties. The same study revealed that nearly 13 million Facebook users had never set or were ignorant of these privacy settings themselves. For a number of clients, therefore, a lawyer’s advice on privacy settings may not only be timely but may save the client from himself.

B. Deactivating an Account

An area that poses considerably more concern for lawyers advising clients about their social media presence involves deactivating social networking accounts. Clients and lawyers alike may be unaware of not only the consequences of account deactivation, but also the fact that sites vary in terms of their deactivation policies; consequently, content may still be viewable for a period of time afterward. For example, after deactivating one’s Twitter account, some content may be viewable for at least several days afterward. And while Twitter purportedly retains data for 30 days from the date of deactivation, Twitter retains its license to use content that was posted and a Twitter profile may still appear in public search engine results.⁹³ Facebook accounts disappear 30 days after deactivation, although some information may remain on backup copies for as long as 90 days. In addition, certain content not stored in a Facebook account (such as messages, or postings to a group) will remain even after deactivation.⁹⁴ With a site like Linked In, on the other hand, while information is generally removed within 24 hours, LinkedIn doesn’t delete a closed account for up to 30 days, and termination requires an official notification letter to the site. Moreover, terminating a Linked In account may bar the user from future use of the site.⁹⁵

Because of the fact that information will become irretrievable after some period of time, an attorney concerned about evidence preservation obligations should never counsel a client to deactivate her social networking account, because it is likely to result in a spoliation finding. In Chapman v. Hiland Operating, LLC, Plaintiff Tracy Chapman had to respond to a motion to compel the production of, among other things, Facebook postings relevant to the allegations in the lawsuit.⁹⁶ Chapman responded that she had a Facebook account until spring of 2013, when it was deactivated; during her deposition, she testified that she deactivated it at that time “on the advice of her attorney.”⁹⁷ As a result, when she attempted to reactivate her request to

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² (Nov. 24, 2014 Law 360 article).

⁹³ Marlisse Silver Sweeney, “How to Purge Social Media from the Web,” *Law Technology News* (June 19, 2014).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ 2014 WL 2434775, D. North Dakota (May 29, 2014).

⁹⁷ *Id.*

respond to discovery requests, she could not remember her password and was unable to do so. She and her attorney also claimed that the account was not likely to include relevant information, since “she rarely used the account, and when she did it was primarily to communicate with her nieces and nephews.”⁹⁸ In addition to compelling the reactivation of the account, defense counsel sought to “be present when the account is reactivated and to examine the entire contents of the account to prevent spoliation of relevant evidence.”⁹⁹ The Court, while skeptical that the Facebook account would yield any relevant noncumulative information, did order Chapman and her attorney to “make a reasonably good faith attempt to reactive Tracy Chapman’s Facebook account,” although it declined to order that defense counsel be present.¹⁰⁰ And to the considerable relief of the plaintiffs and their counsel, no spoliation sanctions were imposed.

Another Facebook deactivation case resulted in less lenient treatment by the presiding judge. In Crowe v. Marquette Transportation Company Gulf-Inland, LLC, plaintiff Brandon Crowe allegedly injured his knee at work, and sued his employer.¹⁰¹ Based on a Facebook message Crowe supposedly sent a friend, the employer believed the injury had occurred on a personal fishing trip and so denied the claim. Marquette, acting on its suspicions, sought “an unredacted, unedited digital copy of [Crowe’s] entire Facebook page from the onset of [his] employment with Marquette until present.”¹⁰² Crowe disingenuously replied that he “does not presently have a Facebook account” – an answer that was technically correct only because Crowe had deactivated his account four days after Marquette’s document request.¹⁰³ Soon thereafter, pursuant to a court order, Crowe reactivated his Facebook account and submitted over 4,000 pages of content to the court for an *in camera* review.

The court was not amused. It ordered the production of all of the documents to the employer, and directed Crowe to permit Marquette access to his Facebook account. The Court also found that Marquette was entitled to explore the timing of the deactivation, Crowe’s claim of his iPhone being “hacked,” and was entitled to have Crowe execute an authorization for his

employer to obtain records from Facebook independent of what Crowe had already produced.¹⁰⁴ Noting that:

“Crowe’s efforts to avoid producing this material have unnecessarily delayed these proceedings and have wasted the time of his opponent and this Court.”

the court made it clear that Crowe’s credibility was shot. The judge was “troubled by Crowe’s refusal to produce any responsive documents on the basis of the statement that he did not presently have a Facebook account. The records indicate that Crowe did not delete his account but deactivated it. It is readily apparent to any user who navigates to the page instructing how to reactivate an account that the two actions are different and have different consequences.”¹⁰⁵ While the record is silent as to any role played by Crowe’s counsel, one would hope that the deactivation was instigated solely by the client himself. Even so, the case serves as a cautionary tale for lawyers who should visit with their clients and verify that independent “clean-up” actions or account deactivation have not occurred.

In at least one instance, Facebook account deactivation has resulted in a spoliation finding.¹⁰⁶ Gatto v. United Airlines, Inc. also serves as a cautionary tale for lawyers to communicate with their clients about their social media activities and to counsel them appropriately; in fact, the Gatto case is referenced in several of the ethics opinions addressing the topic of advising a client on “cleaning up” a social media profile. In Gatto, airport baggage handler Frank Gatto brought a personal injury suit after being struck by a set of stairs used for aircraft refueling on January 21, 2008.¹⁰⁷ He sued Allied Aviation Services (which owned the stairs) and United Airlines (which owned the plane), claiming to be permanently disabled.¹⁰⁸

In July 2011, the defendants sought discovery pertaining to Gatto’s social media activities, asking for Facebook “posts, comments, status updates, and other information posted [by the defendant before the accident.]”¹⁰⁹ Other discovery requests inquired more specifically into Gatto’s mentions of the accident on social media and, also, any eBay business operated by Gatto.¹¹⁰ Gatto agreed to change his Facebook

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Crowe v. Marquette Transportation Company Gulf-Inland, LLC*, Civil Action 14-430 (E.D. La., Jan. 20, 2015)

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Gatto v. United Airlines, Inc.*, 2013 WL 1285285 (D.N.J. March 25, 2013).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 3.

¹¹⁰ *Id.*

password to “alliedunited” for the purpose of defense counsel accessing documents and information from his Facebook account.¹¹¹

From this point, the case sharply diverges. Gatto claimed that he thought there would not be “unauthorized access to the Facebook account online,” and his attorney claimed he understood that defense counsel would use the changed password to obtain information from Facebook’s corporate offices rather than through online access.¹¹² In any event, as of December 5, 2011, Gatto had not yet changed the password, prompting United’s attorney to contact plaintiff’s counsel and request that it be done that day.¹¹³ It was, and defense counsel was able to access Gatto’s Facebook account and print off certain materials that day.¹¹⁴

On December 6, Gatto was notified by Facebook that his account had been accessed by an unknown IP address in New Jersey. Gatto, claiming that he had been through contentious divorce proceedings and was worried about his account being “hacked into,” deactivated his Facebook account on December 16, 2011, because “unknown people were apparently accessing my account without my permission.”¹¹⁵ Facebook automatically deleted the data on December 30, 2011.¹¹⁶ Gatto maintained that he was unaware that United’s counsel was the one accessing his account until later.¹¹⁷

Meanwhile, the attorneys were oblivious to these developments. Facebook advised United’s counsel that it would not disclose Gatto’s data, but Gatto himself could download the account contents through a “download my profile” button. It was agreed that Gatto would download the contents of his Facebook profile, and then provide a copy to the defense along with a certification that he had not made any changes to it.¹¹⁸ Two weeks later, Plaintiff’s counsel had to inform the defense of Gatto’s account deactivation and the sad fact that once an account is deleted or deactivated, it cannot be reactivated.¹¹⁹

As one would expect, the defendants moved for sanctions based on spoliation, claiming not only that the deactivation was intentional, but also that, had all the

lost postings been recovered, they would have refuted Gatto’s damages claims.¹²⁰ Gatto maintained that there was no intentional destruction or suppression of evidence.¹²¹ The court disagreed with Gatto, pointing out that:

Even if plaintiff did not intend to permanently deprive the defendants of the information associated with his Facebook account, there is no dispute that Plaintiff intentionally deactivated the account. In doing so, and then failing to reactivate the account within the necessary time period, plaintiff effectively caused the account to be permanently deleted. Neither defense counsel’s allegedly inappropriate access of the Facebook account, nor Plaintiff’s belated efforts to reactivate the account, negate the fact that plaintiff failed to preserve the relevant evidence.¹²²

In weighing the appropriate sanction, U.S. District Judge Mannion ultimately declined to assess monetary sanctions. However, he did grant the defense’s request for an adverse inference instruction for failing to preserve his Facebook account.

C. Deleting Content

Beyond adopting heightened privacy settings and the deactivation – temporary or otherwise – of a social networking account, few actions arouse as much ire as deleting social media content from a profile. While there have been a number of cases involving spoliation of social media content, two in particular stand out because of the role played by the spoliating party’s counsel. In a recent sexual harassment case, the defendant employer (a dentist named Aaron Atwood), maintained that his relationship with plaintiff Heather Painter was consensual.¹²³ Specifically Atwood argued that Painter had posted comments and pictures on Facebook detailing how much she enjoyed her job, what a great boss Atwood was, and how Urgent Dental was a great place to work.¹²⁴ After discovery closed, Atwood filed a Motion for Sanctions, alleging that Painter and

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at *2.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Gatto*, 2013 WL 1285285, at *1.

¹¹⁷ *Id.* at *2.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at *4. The limited materials printed out by defense counsel purportedly showed Gatto taking vacations, participating in social activities, and running an eBay business.

¹²¹ *Id.*

¹²² *Gatto*, 2013 WL 1285285, at *24.

¹²³ *Painter v. Atwood*, 2014 BL 74567 (D. Nev. March 18, 2014).

¹²⁴ *Id.*

two of her witnesses intentionally destroyed these Facebook posts, as well as text messages that supported the defense's claims and contradicted the plaintiff's allegations and deposition testimony.¹²⁵ Defendants were aware of these posts because Dr. Atwood's wife Kelly was a Facebook "friend" of the plaintiff for an extended period of time before being "unfriended."

Painter's explanation was that she removed the social media content – even after she retained counsel – because it was her habit to routinely delete comments and photos from her Facebook page.¹²⁶ Her attorney argued that Painter was just "a 22 year old girl who would not have known better than to delete her Facebook comments."¹²⁷ The court was not sympathetic. The court observed that:

"it is of no consequence that Plaintiff is young or that she is female and, therefore, according to her counsel, would not have known better than to delete her Facebook comments."

¹²⁸ Nor did the federal judge spare Painter's lawyer for his failure to affirmatively advise her regarding her social media activities. He noted that:

"once Plaintiff retained counsel, her counsel should have informed her of her duty to preserve evidence and, further, explained to Plaintiff the full extent of that obligation."¹²⁹

Since the plaintiff knew or should have known that the Facebook comments at issue were relevant to the defendant's case at the time she deleted them, the court held, the requisite culpability standard for spoliation was satisfied and "an adverse inference regarding Plaintiff's deleted Facebook comments...is appropriate."¹³⁰

A lawyer's failure to properly and timely counsel a client about her social media activities and her evidence preservation obligations is a serious ethical concern. However, of even greater concern is an attorney who takes an active role in advising his client to delete damaging social media content. That is the focal point of probably the best known case of social media

spoliation, *Allied Concrete Co. v. Lester*.¹³¹ In this Virginia wrongful death case, the defense learned of a number of photos on plaintiff Isaiah Lester's Facebook page that could be damaging to the surviving widower's case.

On March 25, 2009, the defense counsel issued a discovery request to the plaintiff, seeking:

"screen print copies on the day this request is signed of all pages from Isaiah Lester's Facebook page including, but not limited to, all pictures, his profile, his message board, status updates, and all messages sent or received."¹³²

Attached to the discovery request was a copy of one of the photographs the defense lawyer had downloaded off of Lester's Facebook page.¹³³ It depicted Lester surrounded by women, holding a beer can, and wearing a T-shirt that reads "I [heart] hot moms"—not quite the portrait of a grieving widower!¹³⁴ That evening, Mr. Murray sent an email to his client about the discovery request and the attached photo.¹³⁵ The following day, Murray instructed his paralegal to have Lester "clean up" his Facebook page because: "[w]e do not want any blow-ups of this stuff at trial."¹³⁶ The paralegal emailed Lester (as part of a thread that would later be referred to as "the stink bomb email") directing him to "clean up" his Facebook page because "[w]e do NOT want blow ups of other pics at trial so please, please clean up your [F]acebook and [M]yspace!"¹³⁷

On April 14, 2009, Lester informed the paralegal that he had deleted his Facebook page.¹³⁸ The next day, plaintiff's counsel served an answer to the discovery request, with Lester's statement that, "I do not have a Facebook page on the date this is signed, April 15, 2009."¹³⁹ Allied Concrete's lawyers filed a motion to compel, and plaintiff's counsel contacted Lester.¹⁴⁰ He reactivated his Facebook page, and his lawyers were able to print off copies of what was then on the profile; however, consistent with the advice to "clean up" his Facebook page, Lester had already deleted at least

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ 736 S.E.2d 699 (Va. 2013).

¹³² *Lester*, 736 S.E.2d at 702.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Lester*, 736 S.E.2d at 702.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

sixteen photos from his profile.”¹⁴¹ However, according to David Tafuri, (a member of the defense team) there was evidence to suggest that considerably more than sixteen photos had been deleted, but the defense forensics expert was only able to definitively show spoliation of sixteen photos.¹⁴²

In May and October 2009, plaintiff’s counsel provided additional, “updated” copies of Lester’s Facebook page.¹⁴³ At a December 2009 deposition, Lester denied deactivating his Facebook page, but Allied Concrete would later subpoena Facebook and obtain testimony that contradicted Lester.¹⁴⁴

As a sanction for the spoliation, the trial court gave two adverse inference instructions to the jury (one while Lester was testifying, the other before closing arguments), instructing them to presume “that the photograph or photographs [Lester] deleted from his Facebook account were harmful to his case.”¹⁴⁵ The court also sanctioned Lester and his attorney \$722,000 for their misconduct (\$542,000 against Murray and \$180,000 against Lester) and to cover Allied Concrete’s attorney’s fees and costs in addressing the Facebook spoliation.¹⁴⁶ The court, in response to a motion for new trial, also sharply reduced the plaintiff’s \$8.58 million verdict by \$4.127 million, but ostensibly for reasons unrelated to the spoliation. In his order, Charlottesville Circuit Judge Edward Hogshire was appalled at the spoliation and misconduct by plaintiff and his counsel, referring to “the extensive pattern of deceptive and obstructionist conduct of Murray and Lester,” but he denied the request for a new trial.¹⁴⁷

In January 2013, the Virginia Supreme Court vacated the remittitur and reinstated the original verdict; it did, however, let stand the sanctions levied against Murray and Lester.¹⁴⁸ Later that year, facing disciplinary action from the Virginia State Bar, Murray entered into an agreed disposition of the charges against him for engaging in “dishonesty, fraud, deceit, or misrepresentation,” and his law license was suspended for five years – effectively ending his legal career.¹⁴⁹

IV. CONCLUSION

Dealing with clients’ activities on social networking sites will continue to present dilemmas for

attorneys on both ethical and practical levels for quite some time to come. Part of the reason is the current knowledge gap for attorneys when it comes to technology. A survey of judges conducted by Exterra, Inc. recently found that while social media was considered to be the area that will have the greatest impact on e-discovery, a majority of the jurists believed that the attorneys typically appearing before them all too often “have not gained the knowledge they need to effectively represent their clients.”¹⁵⁰ Another study, the 2015 Edelman Trust Barometer, posits that lawyers’ general distrust of and slowness to adopt technology – an area in which they lag behind counterparts in finance or marketing – is “hindering acceptance of technological advancements.”¹⁵¹

More pragmatic questions also 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. Give 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 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?

¹⁴¹ *Id.*

¹⁴² *Id.* at 702-703.

¹⁴³ Interview with David Tafuri, *supra* note 190.

¹⁴⁴ *Lester*, 736 S.E.2d at 703. The Virginia Supreme Court would later note that Lester made a number of false statements during discovery, including lying about supposed volunteer work, his use of antidepressants, and his history of depression.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Disciplinary System Actions, Virginia State Bar, <http://www.vsb.org/disciplinary.html> (last visited Nov. 4, 2013).

¹⁵⁰ Ed Silverstein: “Survey: Attorneys Don’t Know Enough E-Discovery,” *Law Technology News* (Feb. 17, 2015).

¹⁵¹ Ed Silverstein: “Do Lawyers Distrust Many Technological Innovations?,” *Law Technology News* Feb. 13, 2015).

As a matter of providing competent representation in a world of seemingly endless amounts of data being shared and in which digital intimacy has become the new norm, lawyers in the digital age must embrace new responsibilities insofar as counseling clients on their social media activities is concerned. An attorney must be aware of what his client has done, is doing, and plans to do in terms of the client's online presence. In other words, when it comes to advising clients on "cleaning up" their Facebook profiles and other social media musings, a lawyer must be less of a dinosaur and more of an avatar.