"Cleaning Up" Social Media Before or During Litigation

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In this digital age where social media is playing an ever increasing role in litigation, attorneys are turning to Facebook, Twitter, Instagram, Message Boards, and blog sites in order to obtain evidence for litigation. There is a treasure trove of information available on the web as people constantly update their followers about their daily lives, share personal comments, messages, photographs, and relationship status. This information is especially fruitful for the family attorney looking to locate hidden assets, unreported income, or gather information in a time sharing dispute. All too often, attorneys are instructing their staff and even their own clients to gather evidence regarding the opposition's social media available to the public. There are also companies such as onlinebloodhounds.com that are dedicated to the investigation of social media in order to provide litigation support.

Given the exponential increase in the use of evidence collected from social media in recent years, it is becoming increasingly common for the family law attorney to inquire either at the time they are retained or more frequently in the midst of litigation, about his or her client's postings on social media in order to determine if the posts will negatively impact their litigation position. The question becomes, can the attorney "clean up" a client's online presence or does this constitute spoliation of evidence? The uncertainty of the answer to that question has left attorneys in an ethical quandary.

In July of 2013, the Virginia State Bar suspended an attorney's license for five years after it was discovered that the attorney had instructed his client, in the midst of his representation in a wrongful death action, to sign sworn answers to interrogatories stating that his client, the surviving Husband, did not have a Facebook account.[1] After receiving the interrogatories from opposing counsel, the attorney had instructed his paralegal to contact the client and instruct him to remove certain photographs from his Facebook page, including a photograph of the client drinking, surrounded by women and wearing a t-shirt that read "I [heart] hot moms." The client thereafter deactivated his Facebook account. The attorney and his client were also sanctioned by the court for his actions in the wrongful death matter totaling $772,000 ($542,000 against the attorney and $180,000 against the client).[2]

In an adversary proceeding in a Texas bankruptcy action, a Federal Judge held that the Defendant's changing of his Facebook settings to private following an incident that gave rise to an underlying personal injury suit, supported the Court's adverse inference regarding Defendant's intent to injure the Plaintiff, thereby making the judgement debt non-dischargeable in bankruptcy.[3] In a New York action, after finding that the Plaintiff's postings on her Facebook and Myspace accounts were inconsistent with her claimed injuries, the Court granted the Defendant's request for access to the Plaintiff's private and deleted social media pages.[4]

The question of an attorney's ethical obligations in advising a client to "clean up" their social media prior to the commencement of litigation was recently posed by a Florida Bar member. Proposed Advisory Opinion 14-1 was issued of January 23, 2015. In rendering its opinion, the Committee refers to Rule 4-3.4(a) of the Rules of Professional Conduct, which states:

> "A lawyer must not (a) unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act;"

Rule 4-3.4(a) applies to evidentiary material generally, which includes computerized ma¬terial.

The question is not whether the client's social media is directly or not directly related to the proceeding, but whether the information is relevant to the proceeding. The Committee refers to a recent Second District Court of Appeal case ruling, which stated "normal discovery principals apply to social media and that information sought to be discovered from social media must be "(1) relevant to the case's subject matter, and (2) admissible in court or reasonably calculated to lead to evidence that is admissible in court."[5] The committee has stated that pre-litigation, a lawyer may advise a client to change the privacy settings on the client's social media pages to the highest level of privacy setting so that they are not accessible by the public.

The committee has also advised that pre-litigation, an attorney may counsel a client to remove information from the client's social media page, regardless of its relevance to the potential proceeding, provided (1) the removal does not "violate any substantive law regarding the preservation and/or spoliation of evidence" and (2) the lawyer must then take

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affirmative steps to preserve an appropriate record of the social media information or data if the attorney knows or should reasonably know that the information may be relevant to the reasonably foreseeable proceeding. Whether information on a social media page may be relevant to the anticipated litigation must be determined on a case-by-case basis.

This opinion makes it clear that while an attorney may advise a client on managing their privacy settings, the issue of "cleaning up" social media postings is still an ethical minefield. Attorneys must now understand how to counsel clients on the consequences of their postings, as well as the ramifications of "cleaning up" their social media accounts. Given the bountiful information readily available to the public, attorneys need to provide their clients with guidance about their online presence at the outset of litigation. Furthermore, attorneys need to remain current in the law regarding preservation and spoliation of evidence and gain competence regarding preservation of clients' social media information or data or engage information technology professionals to assist with preserving clients' social media information or data.

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Endnotes

1 *In the Matter of Matthew B. Murray*, 2013 WL 5630414, VSB Docket Nos. 11-070-088405 and 11-070-088422. (Virginia State Bar Disciplinary Board July 17, 2013).

2 *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013).

3 *In re Justin Allen Platt, Debtor*, 2012 WL 5337197, Bankruptcy No. 11-12367-CAG (Tx. 2012).

4 *Romano v. Steelcase, Inc.* 907 N.Y.S. 2d 650 (NY 2010).

5 *Root v. Balfour Beatty Construction, Inc.*, 132 So.3d 867, 869-870 (Fla.2nd DCA, 2014).