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Take Down: Attorneys Advising Clients to Clean Up Social Media Pages

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In response to the cloud of uncertainty surrounding the extent to which attorneys may counsel clients regarding their social media accounts, the Florida Bar's professional ethics committee recently opined on the issue.

Proposed Advisory Opinion 14-1 confirms that attorneys may advise clients to increase privacy settings to the highest level (concealing content from public eye), and prelitigation to remove content relevant to the foreseeable proceeding so long as an appropriate record was maintained (e.g., data preservation) and no rules regarding preservation and-or spoliation of evidence were broken.

The attorney's advice must still comport with existing Ethics Rule 4-3.4(a).

Social media has become an integral part of our daily lives. While mobile devices makes it easy to constantly check in and catch up on your news feeds throughout the day, most individuals fail to recognize how their status update, photographs or tweets could be used against them in the legal arena when

they click the "post" button. Of course, most don't expect to be involved in litigation, period.

Quite often, a client's social media posts aren't given a second thought until their attorney finds and views them (from the perspective of pseudo-judge), only to gasp out with a George Takei-esque "Oh, my."

This poses a conundrum for lawyers: What crosses the line of spoliation of evidence? A slurry of courts has sanctioned lawyers for providing the wrong advice.

By way of example:

• Fines imposed of $542,000 against attorney and $180,000 against client for spoliation of evidence when client, at lawyer's direction, deleted photographs from client's social media page, the client deleted the accounts, and the lawyer signed discovery requests that the client did not have the accounts.

• Adverse inference instruction but no monetary sanctions,against plaintiff who deactivated his social media accounts, which then became unavailable, after the defendants requested access.

• Attorney suspended for five years for counseling client to clean up their Facebook profile by removing pictures and postings following a request for production.

Such scathing rulings — combined with a lack of consistent authority — have created a chilling effect in the legal community, and in some situations, a "deer in headlights" look when a client asks their attorney what to do with their Instagram photos showing them intoxicated in a bar wearing moose antlers at 3 a.m., on a Tuesday ... with a custody case on the horizon.

What Would Mom Say?

Florida has now taken the issue head on. Finally, attorneys have a road map. Sort of.

The inquiry commenced with Florida Rule of Professional Conduct 4-3.4(a), which dictates that a lawyer must not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or 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 such act.

The comment to that rule indicates that the proper inquiry is whether a client's social media account is relevant to a "reasonably foreseeable proceeding," not whether the information is directly related to the matter at hand. The relevancy determination is fact-intensive, with no bright-line rule. The committee cited to the Second District Court of Appeal holding that normal discovery principles apply to social media, and that information sought to be discovered from social media must be "relevant to the case's subject matter and admissible in court or reasonably calculated to lead to evidence that is admissible in court." Root v. Balfour Construction, 132 So.3d 867, 869-70 (Fla. 2nd DCA 2014).

The committee declined to define what constitutes an unlawful obstruction, alteration, destruction or concealment of evidence, noting that the decision was better left to the trier of fact. Attorneys were advised to research case law on the issue.

"Spoliation occurs where evidence is destroyed or significantly altered or where a party fails to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." Mosaid Technologies v. Samsung Electronics, 348 F.Supp.2d 332, 335 (D.N.J. 2004). Potential sanctions for spoliation can be severe.

Florida's decision follows a nationwide trend and comes on the heels of similar decisions by New York, North Carolina and Pennsylvania.

Litigants should take caution. If they now take solace in believing that what they have posted online will not reach the eyes of their judge, they are experiencing a false sense of security as such material may still be obtained by an able and thoughtful opposing counsel.

The moral of the story is, "Don't post anything online that you would be embarrassed for your mother to see."

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