# Florida's Take On Telling Clients To Scrub Social Media Pages

*By: Brian M. Karpf*

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Social media has become an integral part of our daily lives, affecting how we communicate with others and creating new ways to build relationships. While the rise of smartphones and tablets 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 an attorney finds and views them (from the perspective of pseudo-judge), only to gasp with a George Takei-esque “Oh my.”

This poses a conundrum for lawyers: What crosses the line of spoliation of evidence? Can lawyers advise clients to delete social media accounts? Change privacy settings to conceal prior posts? Clean up their postings in the future?

A slurry of courts have sanctioned lawyers for providing the wrong advice. By way of example:

- Fines of $542,000 imposed against attorney and $180,000.00 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. *Allied Concrete Co. v. Lester*, 736 S.E.2d699 (Va. 2013)

- Adverse inference instruction, but no monetary sanctions, against plaintiff who deactivated his social media accounts, which then became unavailable, after the defendants requested access. *Gatto v. United Airlines*, (D.N.J. Mar. 25, 2013)

- Attorney suspended for five years for counseling client to clean up their Facebook profile by removing pictures and postings following a request for production. *In the Matter of Matthew B. Murray*, VSB Docket Nos. 11-070-088405 and 11-070-088422 (Virginia State Bar Disciplinary Board July 17, 2013).

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.

Florida has now taken the issue head-on.

Last year, a Florida attorney who handles personal injury and wrongful death cases requested the Florida Bar's Professional Ethics Committee to advise on the following issues:

1. Pre-litigation, 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 lawyers is retained;
2. Pre-litigation, may a lawyer advise a client to remove posts, photos, videos, and information from social media pages/accounts that are not directly related to the incident for which the lawyer is retained;

3. Pre-litigation, may a lawyer advise a client to alter social media pages or change account privacy settings to conceal the pages/accounts from public view; and
4. Pre-litigation, must a lawyer advise a client not to remove posts, photos, videos and information whether or not directly related to the litigation if the lawyer has advised the client to set privacy settings to not allow public access.

In Proposed Advisory Opinion 14-1, the committee confirmed that the attorney could advise the client to increase privacy settings (so as to conceal content from public eye) and to remove information relevant to the foreseeable proceeding from social media accounts so long as an appropriate record was maintained (e.g., the data is preserved) and no rules or substantive laws regarding the preservation and/or spoliation of evidence were broken.

Finally, attorneys have a roadmap. 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. That is, information not directly related to the lawsuit may still be relevant. The relevancy determination is fact-intensive, with no bright-line rule. The committee cited to the Second District's holding that normal discovery principles 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." *Root v. Balfour Construction Inc.*, 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 consult other caselaw 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). Litigants in Federal Court have a duty to preserve relevant evidence that they know, or reasonably should know, will likely be requested in reasonably foreseeable litigation, and the Court may impose sanctions on an offending party that has breached this duty. See *Scott v. IBM, Corp.*, 196 F.R.D. 233, 248 (D.N.J. 2000). Potential sanctions for spoliation include: dismissal of a claim or granting judgment in favor of a prejudiced party; suppression of evidence; an adverse inference, referred to as the "spoliation inference;" fines; and attorneys' fees and costs. *Mosaid*, 348 F. Supp. 2d at 335.

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

As a result of the bar's opinion, Florida lawyers may now ethically advise their clients to increase privacy settings on their social media pages so that they are not publicly accessible. A lawyer may advise the client to use the highest level of privacy available on their social media accounts.

Further, a lawyer may advise their client, prior to litigation, to remove information from their social media pages, regardless of its relevancy to a reasonably foreseeable proceeding, so long as doing so does not violate rules regarding spoliation. However, if removed, the data must be preserved (e.g., a backup maintained) if it is known or reasonably should be known to be relevant to the reasonably foreseeable proceeding. An attorney's advice to a client must still comport with existing Ethics Rule 4-3.4(a).

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."

*Brian Karpf is a partner with Young Berman Karpf & Gonzalez, specializing in family law, appeals and international child (Hague Convention) abduction cases.*