



Take-down: altering your social media content during litigation

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By Brian Karpf

Social media now permeates our daily lives. Yet, because most of us don't anticipate being involved in litigation, we don't consider how our status updates, photographs or tweets could affect us in a lawsuit.

Clients typically don't consider the impact of their social media posts until their attorneys see them from the perspective of pseudo-judge, only to gasp out with a George Takei-esque "Oh my."

Out comes the opposing party's formal discovery request for that social media content and in comes the lawyer's dilemma: Can lawyers advise clients to delete damning content? Conceal it from public view? Clean up future posts? Court sanctions in this regard have been severe:

An attorney was fined \$542,000 and client \$180,000 for spoliation of evidence when the lawyer directed the client to delete social media photographs. (Virginia)

Adverse inference instruction was levied against a plaintiff who deactivated social media accounts after defendants requested access. (New Jersey)

An attorney was suspended for five years for counseling a client to delete Facebook posts and photographs following a request for production. (Virginia)
But not every court has followed suit.

Such scathing rulings — and 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 his or her attorney what to do with 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 recently tackled this very issue.

Florida Advisory Opinion 14-1 confirmed that attorneys could advise clients to increase privacy settings (to conceal social media content from public eye) and to remove information relevant to the foreseeable proceeding from social media accounts so long as the data was preserved and no preservation and/or spoliation of evidence rules were broken.

Finally, attorneys got 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 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. That is, information not directly related to the lawsuit may still be relevant. But, the relevancy determination is fact-intensive, with no bright-line rule.

The Committee also declined to define unlawful obstruction or destruction of evidence, although spoliation has been found 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.

Likewise, 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.

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

What does this mean?

Florida lawyers may now ethically advise their clients to increase social media privacy settings to hide their content from public view. A lawyer may advise the client to use the highest available privacy setting.

Further, a lawyer may advise his or her client, prior to litigation, to remove information from the client's 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, a backup must be preserved if it is known or reasonably should be known to be relevant to the reasonably foreseeable proceeding. An attorney's advice must still comport with ethics rules.

Litigants, take caution: don't count on your posts never reaching the eyes of your judges as such material may still be obtained by able 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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