THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2014-5
(July 2014)

I. Introduction

The inquirer requests an opinion concerning the following issues relating to a client’s Facebook account:

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. This question assumes that all information relevant or discoverable in the client’s matter is retained.

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. For the purposes of this inquiry, we will assume that the request is not overly broad.

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 the lawyer did not previously print or download. For the purposes of this inquiry, we will assume that the request is not overly broad.

It is this Committee’s opinion that, subject to the limitations described below:

1. A lawyer may advise a client to change the privacy settings on the client’s Facebook Page.

2. A lawyer may instruct a client to make information on the social media website “private,” but may not not instruct or permit the client to delete/destroy a relevant photo, link, text or other content, so that it no longer exists.

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1 Although the inquiry focuses on Facebook (www.facebook.com), the response applies to all social media or other websites on which individuals or businesses post or otherwise disseminate information to friends, the public and others. The questions raised have been minimally reframed to address social media websites generally.

2 The analyses for questions 1 and 2, and for questions 3 and 4, are merged into two discussions below.
(3) A lawyer must obtain a copy of a photograph, link or other content posted by the client on the client’s Facebook page in order to comply with a Request for Production or other discovery request.

(4) A lawyer must make reasonable efforts to obtain a photograph, link or other content about which the lawyer is aware if the lawyer knows or reasonably believes it has not been produced by the client.

II. Analysis

A. Introduction

“Social media” websites permit users to join online communities where they can share information, ideas, messages, and other content. There are thousands of these websites, which vary in form and content. Most of these sites, such as Facebook, MySpace and others, are designed to permit users to share information about personal and professional activities and interest. As of September 2013, an estimated 73 percent of adults age 18 and over use these sites.³

The issues raised by clients’ use of social media websites, such as Facebook, raise ethical concerns. This opinion attempts to provide a broad overview of the issues, with the strong recommendation that you examine the Rules carefully and understand that, as social media evolves, so will the ethical issues related to it.

Moreover, the Committee reminds the inquirer that, at its most basic, this inquiry focuses on a party’s and an attorney’s duty to preserve evidence, and that this duty applies to information regardless of form, i.e., discoverable information may not be concealed or destroyed regardless whether it is in paper, electronic or some other format. As noted by this Committee in Opinion 2000-5, “The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedures, and the like.”

B. Relevant Pennsylvania Rules of Professional Conduct

Your inquiry implicates numerous Rules of Professional Conduct, including:

Rule 1.1. Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

³ http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/
Rule 3.3. Candor Toward the Tribunal

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:
(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act

Rule 4.1. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation

C. Discussion

As a general rule, in order to provide competent representation under Rule 1.1, a lawyer should advise clients about the content of their social media accounts, and their obligation to preserve information that may be relevant to specific proceedings. Comment (8) to Rule 1.1 further explains that, “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…” Thus, in order to provide competent representation in accordance with Rule 1.1, a lawyer should (1) have a basic knowledge of how social media websites work, and, (2) advise clients about the issues that may arise as a result of their use of these websites.

(1.) A lawyer may advise a client to change the privacy settings on the client’s Facebook page, but may not instruct or knowingly allow a client to delete/destroy a relevant photo, link, text or other content;

A lawyer may advise a client about the privacy settings of the client’s social media website, i.e., a lawyer may counsel a client to restrict access to their social media information. Changing a client’s profile to “private” simply restricts access to the content
of the page. While it may be more cumbersome for an opposing party to access the information, changing a client’s settings does not violate the Rules of Professional Conduct.

Even though an opposing party may not be able to gain unrestricted access to a client’s information after the privacy settings are changed, the opposing party may still obtain the information through discovery or subpoena. For example, in *McMillen v. Hummingbird Speedway, Inc.*⁴, the Court of Common Pleas of Jefferson County, Pennsylvania approved a motion to compel discovery of the private portions of a litigant’s Facebook profile after the opposing party produced evidence that the litigant may have misrepresented the extent of his injuries. In a New York case, *Romano v. Steelcase Inc.*⁵, the Court similarly granted a defendant’s request for access to a plaintiff’s social media accounts because the Court believed, based on the public portions of plaintiff’s account, that information therein might be inconsistent with plaintiff’s claims of loss of enjoyment of life and physical injuries, thus making the social media accounts relevant.

Conversely, in *McCann v. Harleysville Insurance Co.*⁶, a New York court refused to permit a defendant access to a plaintiff’s social media account because there was no evidence on the public portion of the profile to suggest that there was relevant evidence on the private portion. The court characterized this request as a “fishing expedition” that was too broad to be granted. Similarly, in *Trail v. Lesko*⁷, Judge Wettick of the Court of Common Pleas of Allegheny County denied a party access to a plaintiff’s social media accounts, concluding that, under Pa. R.Civ.P. 4011(b), the defendant had not produced any relevant evidence to support its request; therefore, granting access to the plaintiff’s Facebook profile would merely cause embarrassment, which is prohibited by the rule.

Recently, the Commercial and Federal Litigation Section of the New York State Bar Association released its “Social Media Guidelines,” which concluded that a lawyer may advise a client about the content of the client’s social media page, to wit:

- A lawyer may advise a client as to what content may be maintained or made private on her social media account, as well 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.

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⁵ *Romano v. Steelcase Inc.* (2010 NY Slip Op 20388)
• Unless an appropriate record of the social media information or data is preserved, a party or nonparty may not delete information from a social media profile that is subject to a duty to preserve.\textsuperscript{8}

This Committee agrees with and adopts these recommendations, which are consistent with Rule 3.4(a)’s prohibition against “unlawfully alter[ing], destroy[ing] or conceal[ing] a document or other material having potential evidentiary value.” Thus, a lawyer may not instruct a client to alter, destroy, or conceal any relevant information regardless whether that information is in paper or digital form. A lawyer may, however, instruct a client to delete information that may be damaging from the client’s page, but must take appropriate action to preserve the information in the event it should prove to be relevant and discoverable.

A lawyer must also be mindful of Rule 3.3(b), which requires the lawyer to take reasonable remedial measures, “including, if necessary, disclosure to the tribunal” if the lawyer learns that a client has destroyed evidence.

In 2013, the Virginia State Bar Disciplinary Board\textsuperscript{9} suspended an attorney for five years for (1) instructing his client to delete certain damaging photographs from his Facebook account, (2) withholding the photographs from opposing counsel, and (3) withholding from the trial court the emails discussing the plan to delete the information from the client’s Facebook page. The Virginia State Bar Disciplinary Board based the suspension upon the attorney’s violations of Virginia’s rules on candor toward the tribunal (see Rule. 3.3), fairness to opposing counsel (see Rule. 3.4), and misconduct (see Rule. 8.4). In addition, the trial court imposed $722,000 in sanctions ($542,000 upon the lawyer and $180,000 upon his client) to compensate opposing counsel for their legal fees.\textsuperscript{10}

(2) A lawyer must obtain a copy of a photograph, link or other content posted by the client on the client’s Facebook page in order to comply with a Request for Production, and must make reasonable efforts to obtain a photograph, link or other content about which the lawyer is aware if the lawyer knows or reasonably believes it has not been produced by the client.

In order to comply with a Request for Production of Documents, 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. Rule 4.1(a) provides that a lawyer shall not knowingly “make a false statement of material fact or law to a third person” while representing a client. When a lawyer provides another party

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\textsuperscript{8} Social Media Ethics Guidelines, The Commercial and Federal Litigation Section of the New York State Bar Association, March 18, 2014 at 11 (footnote omitted)
\textsuperscript{9} In the Matter of Matthew B. Murray, VSB Nos. 11-070-088405 and 11-070-088422 (June 9, 2013)
\textsuperscript{10} Lester v. Allied Concrete Co., Nos. CL08-150 and CL09-223 (Charlotte, Virginia Circuit Court, October 21, 2011)
with requested material, the lawyer is affirmatively representing that the information is full and complete to the best of his knowledge. If a lawyer purposefully omits information, or directs or countenances a client's destruction or omission of evidence, the lawyer has violated the Rules of Professional Conduct.

Consistent with this conclusion, under Rule 4.1, "a lawyer is required to be truthful when dealing with others on a client’s behalf," which includes the obligation to produce relevant information in counsel’s possession and to make good faith efforts to obtain any other relevant information from the client. Thus, if a lawyer knows or has a reasonable belief that a client possesses relevant information, the lawyer must make reasonable efforts to obtain it. The lawyer is not obligated, however, to obtain information that was neither in counsel’s possession nor in the client’s possession.

In addition, Rule 8.4(c) states that “[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Providing an opposing party with incomplete information, without so noting, violates the Rules of Professional Conduct and the lawyer’s obligations under various Rules of Procedure. Under the facts presented, the lawyer must produce all of the requested photographs and other information from Facebook, regardless whether it was favorable to the client.

Finally, a lawyer must make reasonable efforts to obtain a photograph, link or other content about which the lawyer is aware if the lawyer knows or reasonably believes it has not been produced by the client. If the items were never in the possession of either the client or counsel, and were instead under the control of a third party, then the Rules do not require the attorney to take affirmative steps to obtain the requested information. Once, and if, the information comes into counsel’s possession, then the obligation to preserve and produce arises.

III. Conclusion

When dealing with a client’s use of social media, the Rules apply to electronic information in the same way that they apply to other forms of information. However, because social media websites change frequently, certain unique situations arise. A lawyer may advise a client about how to manage the content of the client’s social media account, including the account’s privacy settings. However, a lawyer may not advise a client to delete or destroy any information that has potential evidentiary value. Finally, in order to comply with a Request for Production of Documents, a lawyer must provide all information that the client has posted if the lawyer is aware that the information exists.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.