

Don't Delete That Photo

The Ethical Issues Posed by Client Use of Social Media

Imagine this scenario. Your client was injured in an accident, and claims that because of the herniated discs in his lower back he can no longer perform his job as a construction worker. You are preparing for trial when defense counsel serves a set of interrogatories and a request for production of documents requesting a complete copy of the client's Facebook page, including photographs, etc. You then go online and take a look at the client's Facebook page and discover that there are some great photos of the client parasailing while on vacation. There are also some photos of your client shoveling out his house during last winter's storms, accompanied by boasting captions like, "Snow can't stop me," and "I may be 50, but I can still shovel like I'm 18." Now what do you do?

- Can you tell the client to change his privacy settings because his Facebook posts are available for "everyone" to see?
- Can you instruct the client to remove the photos and other content that you know will damage his case?
- Do you have to produce the Facebook page and the photos?

Of course, your real concern is what will disclosure of this information do to the value of the case – and to your fee? After all, this was going to be a million dollar case.

The Philadelphia Bar Association Professional Guidance Committee recently addressed these issues in Opinion 2014-5. Its advice applies to all social media websites, such as Twitter and Instagram, concluding that, subject to the limitations described below:

- A lawyer may advise a client to change the privacy settings on the client's Facebook page.
- A lawyer may instruct a client to make information on the social media website "private," but may not instruct or permit the client to delete/destroy a relevant photo, link or other content,



so that it no longer exists.

- 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.
- 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.

Although the opinion focused primarily on Facebook, it notes that clients' use of social media websites, such as Facebook, raises ethical concerns. 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.

The issue of the discovery of social media implicates various Rules of Professional Conduct, including Rule 1.1 ("Competence"), Rule 3.3 ("Candor Toward the Tribunal"), Rule 3.4 ("Fairness to Opposing Party and Counsel"), Rule 4.1 ("Truthfulness in Statements to Others") and Rule 8.4 ("Misconduct"). In particular, the Opinion concluded "in order to provide competent representation under Rule 1.1, a lawyer should advise

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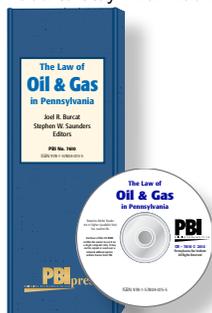
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Turning to the meat of the inquiry, the Committee emphasizes that although a lawyer may advise a client to change the privacy settings on the client's Facebook page, including making the page "private," the lawyer may not instruct a client to delete/destroy a relevant photo.

clients about the content of their social media accounts, and their obligation to preserve information that may be relevant to specific proceedings." Thus, "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."

Turning to the meat of the inquiry, the Committee emphasizes that although a lawyer may advise a client to change the privacy settings on the client's Facebook page, including making the page "private," the lawyer may not instruct a client to delete/destroy a relevant photo. In

addition, the 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 any photographs, links or other content about which the lawyer is aware if the lawyer knows or reasonably believes it has not been produced by the client.

Social media – which seems to be evolving daily, is a critical area about which attorneys must be aware. Clients use social media without regard for its implications in their legal disputes, and there are many reported cases when courts

have ordered that information on these sites is discoverable, and lawyers who instruct clients to permanently destroy information on these sites have lost their licenses and been subject to significant sanctions. Consequently, lawyers must be mindful that the Rules of Civil Procedure and the Rules of Professional Conduct apply to electronic information in the same way that they have always applied to other forms of information. ■

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