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Social Media Law & Policy Report™

Philadelphia Joins New York in Issuing Social Media Guidance for Lawyers

By Jeffrey N. Rosenthal

Introduction

We live in a digital age.[1] And at the center of it all is the explosion of social media. The numbers are astonishing.[2] Americans spend 16 minutes of every hour online on social networking sites. More Facebook profiles (5) are created every second than there are people born (4.5). If Facebook were a country, it would have the world's third-largest population (twice the population of the U.S.); Twitter would be the 12th-largest country. Incredibly, more than a billion tweets are sent every 48 hours, with over 293,000 status updates posted on Facebook every 60 seconds.

[1] *See* Jeffrey N. Rosenthal, *Three Things Every Lawyer Should Know About Social Media Ethics*, Georgia Institute For Continuing Legal Education (June 28, 2014).

[2] *See* International Association of Chiefs of Police, Center for Social Media—Fun Facts, *available at* http://www.iacpsocialmedia.org/Resources/FunFacts.aspx.

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With over a sixth of the planet posting content on Facebook alone, it was inevitable that some form of social media would one day find its way into a courtroom. Social media evidence has been seen in personal injury, securities, divorce, insurance, trade secret, medical malpractice, free speech and employment actions, to name a few.[3]

But even before setting foot in court, lawyers face various ethical constraints on the acceptable use of social media.[4] These considerations dictate, among other things, the means and manner by which social media-based evidence may be obtained, collected and utilized and the type of advice given to clients involved in social media.

Ethical quandaries in this context are numerous and varied.[5] Thankfully, guidance has recently come from two separate bar association ethics opinions—one from New York, one from Philadelphia—designed to educate attorneys about what their clients should and should not be doing with respect to social media at trial and before.

The New York Opinion

In 2013, the New York County Lawyers' Association (NYCLA) issued Ethics Opinion 745 to address the appropriate advice to give clients as to ''existing or proposed posting on social media sites.''[6] This opinion of-

[3] From Jan. 1, 2010, through Nov. 1, 2011, there were 674 state and federal court cases with written decisions involving social media evidence in some capacity available online. *See* Next Generation eDiscovery Law & Tech Blog, *available at* http://blog.x1discovery.com/2011/11/09/674-published-cases-involving-social-media-evidence/.

[4] As one commentator put it, ''the growth of social media sites obligates the legal system to set definitions and limits for lawyers as to the ethical use of postings, communications, and other related information.'' *See* Ann K. Wooster, *Expectation of Privacy in and Discovery of Social Networking Web Site Postings and Communications*, 88 A.L.R.6th 319 (2014).

[5] An article by Christina Vassiliou Harvey, Mac R. McCoy, & Brook Sneath, *10 Tips for Avoiding Ethical Lapses When Using Social Media*, ABA Business Law Today (Jan. 2014), *available at* http://www.americanbar.org/publications/blt/2014/01/03_harvey.html, discusses a broad swath of issues—including confidentiality and attorney advertising.

[6] *See* New York County Lawyers' Association Ethics Opinion 745 (July 2, 2013), *available at* https://www.nycla.org/siteFiles/Publications/Publications1630_0.pdf.

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fers the foremost insight into how bar associations (and courts) view the lawyer's role in counseling clients on online postings.[7]

The NYCLA observed how ethics opinions from the New York State Bar Association[8] and Oregon State Bar Legal Ethics Committee[9] concluded that accessing social media pages open to all members of a public network was ethically permissible. But using false or misleading representations to obtain evidence from a social network is still prohibited conduct under Rules of Professional Conduct 4.1 and 8.4(c).

As Opinion 745 explains, client activity on social media sites may implicate serious privacy concerns over the personal nature of online postings. One example includes how users may unintentionally expose sensitive information to the public at large with a single click. And even after the user removes said information, potential employers, adverse parties or even family members may still have access. Thus, the NYCLA opined that attorneys could advise clients about whether to post on social media sites; merely providing such advice does not violate any ethical oblations.

Importantly, the NYCLA also opined that attorneys could even go so far as to instruct clients to ''take down'' material from existing social media sites. For instance, lawyers may properly advise clients to: (1) use the highest privacy and security levels on social media sites; and (2) move content from the public portion of such sites to the private portion. While the NYCLA observed adverse parties might be prevented from directly accessing such digital content, it would still be obtainable via formal discovery.[10]

The Philadelphia Opinion

Almost a year later, the Philadelphia Bar Association became the second bar association in the country to address an attorney's ethical obligations regarding clients' social media accounts in July 2014.[11] Opinion 2014-5 provides a broad overview of the issues surrounding how lawyers may instruct their clients on the use of social media. At its most basic, the inquiry centers on a party's and attorney's duty to preserve evidence. Notably, the Philadelphia Bar Association was careful to explain how this duty applies to *all information*, irrespective of its form—*i.e.*, discoverable information may not be concealed/destroyed regardless of whether it is in paper, electronic or another format.

Opinion 2014-5 reminds lawyers of their obligation under Rule 1.1 of the Rules of Professional Conduct to provide competent representation. 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, according to Opinion 2014-5, in order to provide competent representation, a lawyer should: (1) have a basic knowledge of how social media websites work; and (2) advise clients about issues that may arise as a result of their use of these websites.

With this backdrop in mind, the Philadelphia Bar Association's Professional Guidance Committee answered four discrete questions posed by the inquirer. First, a lawyer may advise a client to change the privacy settings on the client's Facebook page. Second, 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 or destroy a relevant photo, link, text or other content, so that it no longer exists. Third, 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. And fourth, 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.

The Philadelphia Bar Association also reminded lawyers to remain mindful of Rule 3.3(b), which requires reasonable remedial measures—including disclosure to the tribunal—if they learn a client has destroyed evidence.

Case Law Regarding Social Media Discovery Abuse.

Two recent cases offer a cautionary tale of ruinous consequences born of social media discovery abuse.

In 2011, Matthew B. Murray, Esq.—former vice president of the Virginia Trial Lawyers Association, and branch manager of the Charlottesville office of Allen, Allen, Allen & Allen, P.C.—represented plaintiff Isaiah Lester against defendant Allied Concrete in a personal injury and wrongful death action for the loss of Lester's wife after a cement truck crossed the center line and tipped over their car in 2009.[12] As would later be revealed, Murray instructed Lester, through his assistant,

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[7] *See* Jeffrey N. Rosenthal, *Ethics Of Advising Clients To 'Clean Up' Facebook Page*, THE LEGAL INTELLIGENCER (Feb. 25, 2014).

[8] *See* New York County Lawyers' Association Ethics Opinion 843 (Sept. 10, 2013), *available at* http://www.nysba.org/CustomTemplates/Content.aspx?id=5162.

[9] *See* Oregon State Bar Legal Ethics Committee Opinion No. 2005-164 (Aug. 2005), *available at* http://www.osbar.org/_docs/ethics/2005-164.pdf.

[10] On March 18, 2014, the Commercial and Federal Litigation Section of the New York State Bar Association issued its own Social Media Ethics Guidelines. Borrowing heavily from—and citing to—Opinion 745, the Commercial and Federal Litigation Section said a lawyer may advise clients as to what content may be maintained or made private on their social media account, as well as what content may be ''taken down'' or removed, whether posted by their client or someone else. Similarly, 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.'' *See* Social Media Ethics Guidelines, The Commercial And Federal Litigation Section of the New York State Bar Association'' (March 18, 2014) at 11, *available at* https://www.nysba.org/Sections/Commercial_Federal_Litigation/Com_Fed_PDFs/Social_Media_Ethics_Guidelines.html. The Commercial and Federal Litigation Section was careful to note, however, that the opinions expressed therein did not represent the NYSBA's ''unless and until'' the report is adopted by the association's House of Delegates or Executive Committee.

[11] *See* Philadelphia Bar Association Opinion 2014-5 (July 2014), *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion2014-5Final.pdf.

[12] *Lester v. Allied Concrete Co.*, No. CL08-150, 2011 BL 339514 (Va. Cir. Ct. Sept. 1, 2011).

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to ''clean up'' his Facebook account during discovery, cautioning Lester that ''we do NOT want blow ups of other pics at trial so please, please clean up your facebook and myspace!'' As a result, Lester deleted 16 photos from his Facebook account—all of which were later obtained by Allied's attorneys using forensic techniques. Notably, the recovered material included a picture of Lester holding a beer can and wearing a T-shirt that read: ''I ♥ hot moms.''

At trial, jurors were told about the scrubbed photos. But the e-mails between Murray, the paralegal and Lester were not provided to the court until after the trial. When confronted, Murray attributed the error to his paralegal. But he later confessed that he actually concealed the e-mails for fear that a continuance would have been granted.

In response, the judge ordered Murray and Lester to pay $722,000 (Murray's share was $542,000) for Allied's legal fees and slashed millions off of Lester's jury award.[13] (The Virginia Supreme Court reinstated the full verdict two years later.[14]) Murray also agreed to a five-year suspension for violating ethics rules governing candor toward the tribunal, fairness to opposing party and counsel and misconduct.[15] He resigned from his firm on July 25, 2011.[16]

Gatto v. United Air Lines[17] provides another example In *Gatto*, Frank Gatto, a baggage handler at John F. Kennedy Airport, claimed he suffered serious injuries when a set of stairs used for aircraft refueling crashed into him in 2008. During discovery Gatto agreed to grant defense counsel access to his Facebook page. But before defense counsel was able to gain access, Gatto deactivated the profile for fear unknown individuals were trying to access his page (not realizing it was defense counsel). Facebook automatically—and irreparably—deleted Gatto's account 14 days later.

Based on the foregoing, Gatto was sanctioned for spoliation of evidence. Notably, Magistrate Judge Steven C. Mannion rejected the argument that deletion was ''accidental'':

> Even if Plaintiff did not intend to permanently deprive the defendants of the information associated with his Facebook account, there is no dispute that Plaintiff intentionally deactivated the account. In doing so, and then failing to reactivate the account within the necessary time period, Plaintiff effectively caused the account to be permanently deleted. Neither defense counsel's allegedly inappropriate access of the Facebook account, nor Plaintiff's belated efforts to reactivate the account, negate the fact that Plaintiff failed to preserve relevant evidence.

Defendants were granted an adverse inference instruction. But the court declined to award fees as the destruction was not ''motivated by fraudulent purposes or diversionary tactics,'' and the loss of evidence did not ''cause unnecessary delay.''

Implications: Traditional Rules for a Modern Age?

As lawyers, we live by a set of rules. These rules are designed to ensure that everyone, litigants and lawyers alike, is playing fairly in pursuit of the truth. These traditional concepts have now squarely found their way into our modern, digital lives.

As shown, Opinion 745 and Opinion 2014-5 state that attorneys may ethically review what clients plan to publish on social media sites *in advance of publication*. This includes how posts may be received by legal adversaries, as well as how factual context may affect perceptions.[18] While ethical guidance exists about acceptable forms of advice to give clients about what to post (and not post) online, lawyers should tread carefully whenever their actions could result in the deletion of relevant information. That same guidance states that if privacy filters are available, there is nothing unethical about advising clients to use them.

As for the question of whether attorneys may instruct clients to ''clean up'' their Facebook page, the answer depends on exactly what cleaning up means. If it means deletion, as in *Lester*, or conduct that could potentially result in deletion, as in *Gatto*, then the answer is ''no.'' But if cleaning up simply means advising clients on whether or not to post, or moving content from the public to the private portion of a site, then the answer seems to be a qualified ''yes.'' This is especially true where the substance of the posting is also preserved in cyberspace or on the user's computer.

Despite Opinion 745 and 2014-5's leeway, certain concerns persist. For instance, as persuasive guidance from bar associations interpreting existing ethical rules, there is no guarantee a judge would not find content removal tantamount to hiding evidence, or, at the very least, an effort to delay the discovery process.[19] Consid-

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[13] *Lester v. Allied Concrete Co.*, No. CL08-150, 83 Va. Cir. 308 (2011).

[14] *Allied Concrete Co. v. Lester*, 736 S.E.2d 699, 709 (Va. 2013).

[15] *In the Matter of Matthew B. Murray*, VSB Nos. 11-070-088405 and 11-070-088422 (June 9, 2013); *see also* Debra Cassens Weiss, *Lawyer Agrees To Five-Year Suspension For Advising Client to Clean Up His Facebook Photos*, ABA JOURNAL, *available at* http://www.abajournal.com/news/article/lawyer_agrees_to_five-year_suspension_for_advising_client_to_clean_up_his_f/.

[16] *See* http://www.allenandallen.com/matthew-b-murray-resigns.html.

[17] No. 2:10-cv-01090, 2013 BL 80118 (D.N.J. Mar. 25, 2013).

[18] The implications of attorneys being permitted to advise clients on privacy settings is particularly significant given that 25 percent of all Facebook users do not employ any privacy control, according to an Oct. 30, 2012, GO-Globe.com post titled *Social Media Statistics And Facts 2012*, *available at* http://www.go-globe.com/blog/social-media-facts/.

[19] Opinion 2014-5 explicitly recognized that changing a client's settings to private will restrict access to the content and may ''make it more cumbersome for an opposing party to access the information.'' To counter this concern, the Philadelphia Bar Association cited two cases where the opposing party was nevertheless able to obtain the desired information through discovery or subpoena. *See McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 BL 318557 (Ct. Com. Pl. Sept. 9, 2010) (Jefferson County) (court approved motion to compel discovery of private portions of litigant's Facebook profile after opposing party produced evidence litigant may have misrepresented extent of injuries) and *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. Sept. 21, 2010) (public portions of social media account lead court to grant access to private sections that may contain information inconsistent with plaintiff's damages). Conversely, courts in both New York and Pennsylvania have also denied such requests where there was no evidence on the public portion of the account to permit intrusion into the private space. See, e.g., *McCann v. Harleysville Ins. Co. of N.Y.*, 78 A.D.3d 1524 (N.Y. App. Div. 2010); *see also Trail v. Lesko*, 2012 Pa. Dist. & Cnty. Dec. LEXIS 194, at *19 (Ct. Com. Pl. July 3, 2012) (Allegheny

ering the stiff penalties in *Lester* and *Gatto*, attorneys should be mindful when advising clients on cleaning up online content. Indeed, Murray's entire legal career was brought down by a single discovery misstep (compounded by lying to the court, of course) over an unflattering photo of his client. Had he addressed it directly—*i.e.*, by seeking a protective order or motion in limine ruling—the evidence may have been precluded.

There are literally thousands of social media sites, which vary in form and content. These sites are also are widely used.[20] And with every new site come new preservation obligations for attorneys and clients. Courts will inevitably struggle to weigh individual privacy concerns against the need for relevant evidence on such sites. But one constant is the perception that deletion and destruction are serious matters.

It is telling that the two bar associations to address this issue have both come out exactly the same with respect to the ethical implications of social media. With such a trend developing, it is more critical than ever that attorneys examine the rules carefully and understand that, as social media evolves, so will the related ethical issues. But at least with the aforementioned guidance, lawyers may be better prepared to navigate the wide world of social media.

County) (Wettick, J.) (''courts have relied on information contained in the publicly available portions of a user's profile to form a basis for further discovery'').

[20] As of January 2014, three out of four adults older than 18 were on social media sites. *See* PewResearch Internet Project, Social Networking Fact Sheet, http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/.

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