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February 15, 2015

Bar ethics opinion on 'cleaning up' social media pages before litigation

The Professional Ethics Committee has issued Proposed Advisory Opinion 14-1 reprinted below. Pursuant to Rule 4(c) and (d) of The Florida Bar Procedures for Ruling on Questions of Ethics, comments from Florida Bar members are solicited on the proposed opinion. The committee will consider any comments received at a meeting to be held at its next meeting, which is yet to be scheduled. Comments must contain the proposed advisory opinion number and clearly state the issues for the committee to consider. A written argument may be included explaining why the Florida Bar member believes the committee's opinion is either correct or incorrect and may contain citations to relevant authorities. Comments should be submitted to Elizabeth Clark Tarbert, Ethics Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee 32399-2300, and must be postmarked no later than 30 days from the date of this publication.

PROFESSIONAL ETHICS OF THE FLORIDA BAR
PROPOSED ADVISORY OPINION 14-1
January 23, 2015

A Florida Bar member has asked the committee regarding the ethical obligations on advising clients to "clean up" their social media pages before litigation is filed to remove embarrassing information that the lawyer believes is not material to the litigation matter. The inquirer asks the following 4 questions:

- 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 lawyer 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 related directly to the incident for which the lawyer is retained?
- 3) Pre-litigation, may a lawyer advise a client to change social media pages/accounts privacy settings to remove the pages/accounts from public view?
- 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?

Rule 4-3.4(a) is applicable and states as follows:

A lawyer must not:

(a) unlawfully obstruct another party's access to evidence or otherwise 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 any such act;

The comment to the rule provides further guidance:

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled 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 procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Subdivision (a) applies to evidentiary material generally, including computerized information.

The committee is of the opinion that the representation in this inquiry involves a "reasonably foreseeable proceeding" as the client has hired the lawyer, presumably to determine whether the client has a viable claim and pursue the claim if viable. However, under the rule, the proper inquiry is whether information on a client's social media page is relevant to that reasonably foreseeable proceeding, rather than whether information is "related directly" or "not related directly" to the client's matter. Information that is not "related directly" to the incident giving rise to the need for legal representation may still be relevant. However, what is relevant requires a factual, case-by-case determination. In Florida, the second District Court of Appeal has determined 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 Beatty Construction, Inc.*, 132 So.3d 867, 869-70 (Fla. 2nd DCA 2014).

What constitutes an "unlawful" obstruction, alteration, destruction, or concealment of evidence is a legal question, outside the scope of an ethics opinion. The committee is aware of cases addressing the issue of discovery or spoliation relating to social media, but in these cases, the issue arose in the course of discovery after litigation commenced. See, *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013) (Sanctions of \$542,000 imposed against lawyer and \$180,000 against the client for spoliation 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); *Gatto v. United Airlines*, 2013 WL 1285285, Case No. 10-cv-1090-ES-SCM (U.S. Dist. Ct. NJ March 25, 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); *Romano v. Steelcase, Inc.* 907 N.Y.S.2d 650 (NY 2010) (Court granted request for access to plaintiff's MySpace and Facebook pages, including private and deleted pages, when plaintiff's physical condition was at issue and information on the pages is inconsistent with her purported injuries based on information about plaintiff's activities available on the public pages of her MySpace and Facebook pages). In the disciplinary context, at least one lawyer has been suspended for 5 years for advising a client to clean up Facebook page, causing the removal of photographs and other material after a request for production had been made. *In the Matter of Matthew B. Murray*, 2013 WL 5630414, VSB Docket Nos. 11-070-088405 and 11-070-088422 (Virginia State Bar Disciplinary Board July 17, 2013).

The New York County Lawyers Association has issued NYCLA Ethics Opinion 745 (2013) addressing the issue. The opinion concludes that lawyers may advise their clients to use the highest level of privacy settings on their social media pages and may advise clients to remove information from social media pages unless the lawyer has a duty to preserve information under law and there is no violation of law relating to spoliation of evidence. Other states have since come to similar conclusions. See, e.g., North Carolina Formal Ethics Opinion 5 (attorney must advise client about information on social media if information is relevant and material to the client's representation and attorney may advise client to remove information on social media if not spoliation or otherwise illegal); Pennsylvania Bar Association Opinion 2014-300 (attorney may advise client to delete information from client's social media provided that this does not constitute spoliation or is otherwise illegal, but must take appropriate action to preserve the information); and Philadelphia Bar Association Professional Guidance Committee Opinion 2014-5 (attorney may advise a client to change the privacy settings on the client's social media page but may not instruct client to destroy any relevant content on the page). Subsequent to the publication of the opinion, the New York State Bar Association's Commercial and Federal Litigation Section adopted Social Media Ethics Guidelines. Guideline No. 4.A, citing to the opinion, states as follows:

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. 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. [Footnote omitted.]

The committee agrees with the NYCLA that a lawyer may advise a client to use the highest level of privacy setting on the client's social media pages.

The committee also agrees that a lawyer may advise the client pre-litigation to remove information from a social media page, regardless of its relevance to a reasonably foreseeable proceeding, as long as the removal does not violate any substantive law regarding preservation and/or spoliation of evidence. The committee is of the opinion that if the lawyer does so, an appropriate record of the social media information or data must be preserved if the information or data is known by the lawyer or reasonably should be known by the lawyer to be relevant to the reasonably foreseeable proceeding.

The committee is of the opinion that the general obligation of competence may require the inquirer to advise the client regarding removal of relevant information from the client's social media pages, including whether removal would violate any legal duties regarding preservation of evidence, regardless of the privacy settings. If a client specifically asks the inquirer regarding removal of information, the lawyer's advice must comply with Rule 4-3.4(a). What information on a social media page is relevant to reasonably foreseeable litigation is a factual question that must be determined on a case-by-case basis.

In summary, a lawyer may advise that a client change privacy settings on the client's social media pages so that they are not publicly accessible. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, a lawyer also may advise that a client remove information relevant to the foreseeable proceeding from social media pages as long as an appropriate record of the social media information or data is preserved.

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