**Estate Planning Council of Long Island**

**OCTOBER 19, 2023**

What an Insta-Mess:

Ethical Issues With Social Media, Communications and Spoliation

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As of 2022, the average daily social media usage of internet users worldwide amounted to 151 minutes per day.[[1]](#footnote-1) Technology and social media are everywhere and it is an attorney’s ethical duty to understand and manage technology.

Rule 1.1 of the Model Rules of Professional Conduct states: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Comment 8 notes that for an attorney 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…”

It appears that lawyers “have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation.”[[2]](#footnote-2) **Social Media and Online (Re)search** (15 minutes)

1. Public Information: A lawyer may ethically view and access publicly available social media of a party other than the lawyer’s client in litigation. New York State Bar Association Eth. Op. 843 (2010). These opinions reason that accessing a public site is conceptually no different from reading a magazine article or purchasing a book written by that adverse party.[[3]](#footnote-3)
2. Access to Private Pages:
   1. Attorneys may not make misrepresentations to obtain information that would otherwise not be obtainable. When communicating with witnesses or others involved in a matter, attorneys should avoid misrepresentations, and if a party is represented, obtain the prior consent of the party’s counsel. New York Rules of Professional Conduct (RPC 4.2); NYCBA Eth. Op. 2010-2 (2012); NYSBA Eth. Op. 843.
   2. Using false or misleading representations to obtain evidence from a social network website is prohibited. see Model Rule 8.4(c) which prohibits a lawyer from engaging in conduct involving “dishonesty, fraud, deceit or misrepresentation.”[[4]](#footnote-4)
   3. Employees or others associated with a lawyer cannot access private pages using dishonesty, fraud, deceit or misrepresentation. Model Rule 5.3(c)(1); *see also* New York’s Rule 5.3(b)(1); Model Rule 4.1 which prohibits a lawyer from making a false statement of fact or law to a third person.
      1. Philadelphia Bar Op 2009-02 (March 2009) determined that the proposed “friending” of a litigant by a third party would constitute deception in violation of Rules 8.4 and 4.1, and would constitute a supervisory violation under Rule 5.3 because the third party would be omitting the material fact that the third party is seeking access to the witness’ social media to obtain information for use in a pending lawsuit.
3. Represented *versus* Unrepresented Party:
   1. If a lawyer attempts to contact or “friend” a represented party, the lawyer’s conduct is governed by Rule 4.2 (the no-contact rule).
   2. If the lawyer attempts to contact or “friend” an unrepresented party, the lawyer’s conduct is governed by Rule 4.3 which (i) prohibits a lawyer from stating or implying that they are disinterested; (ii) requires a lawyer to correct any misunderstanding as to the lawyer’s role; and (iii) prohibits the lawyer from giving legal advice other than the advice to secure counsel if the party’s interests are likely to conflict with those of the lawyer’s client.
4. **Cultivating An Online Persona** (20 minutes)
5. Is There An Obligation to Advise Clients Regarding Their Social Media? Pursuant to Model Rule 1.1, attorneys have an obligation to represent clients competently which could give rise to an obligation to advise clients about social media use.
   1. An attorney may review what a client plans to publish on a social media page in advance of publication but may not direct or facilitate the client’s publishing of false or misleading information that may be relevant to a claim. NYCLA Ethics Opinion 745, July 2, 2013.
   2. An attorney may discuss the significance and implications of social media posts including their content and advisability, how social media posts may be received and/or presented by legal adversaries, the possibility that the legal adversary may obtain access to “private” social media pages through court orders or the discovery process as well as possible lines of cross-examination.” NYCLA Ethics Opinion 745, July 2, 2013.
6. Advising A Client Regarding Privacy Controls: There is no ethical constraint on advising a client to use the highest level of privacy/security settings that is available. Such settings will prevent adverse counsel from having direct access to the contents of the client’s social media pages, requiring adverse counsel to request access through formal discovery channels. NYCLA Ethics Opinion 745, July 2, 2013.
7. Can You Advise A Client To Take Down Information?:
   1. While it depends on whether the removal violates the substantive law regarding destruction or spoliation of evidence, there is no ethical bar to “taking down” material from social media publications. See Point III below.
   2. However, a client must answer truthfully if asked whether changes were ever made to a social media site, and the client’s lawyer must take prompt remedial action in the case of any known material false testimony on this subject. Model Rule 3.3 (a)(3). Model Rule 3.3(a)(1); Model Rule 3.4(a).
8. Lawyer’s Obligations Concerning Information Learned: An attorney also has an ethical obligation not to “bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.” Model Rule 3.1(a). Frivolous conduct includes the knowing assertion of “material factual statements that are false.” 22 NYCRR 130-1.1(b)(3). If a client’s social media posting reveals to an attorney that the client’s lawsuit involves the assertion of material false factual statements, the attorney is ethically prohibited from proffering, supporting or using those false statements. Model Rule 3.3; 4.1.
9. **Social Media and Spoliation of Evidence** (15 minutes)
10. Model Rule 3.4 states that a lawyer shall not “(a)(1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce… [nor] (3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.”
11. Litigation Holds:
    1. Under principles of substantive law, there may be a duty to preserve “potential evidence” in advance of any request for its discovery. *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.,* 93 A.D.3d 33, 41, 939 N.Y.S. 2d 331, 328 (1st Dep’t 2012) (“Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data.”); *QK Healthcare, Inc. v. Forest Laboratories, Inc.,* 2013 N.Y. Misc. LEXIS 2008, 2013 N.Y. Slip Op. 31028(U) (Sup. Ct. N.Y. Cnty. May 8, 2013); RPC 3.4, Comment [2]. Under some circumstances, where litigation is anticipated, a duty to preserve evidence may arise under substantive law.
12. Examples of Spoliation of Social Media Evidence
    1. Deleting posts, comments, messages or profile information
    2. Removing published photos or videos
    3. Retroactively altering or deleting content created or shared on an account
       1. *Allied Concrete Company v. Lester*, 2011 Va. Cir. LEXIS 245 (Cir. Ct. City of Charlottesville Sep’t 6, 2011): Attorney instructed his client to “clean up” his Facebook page and delete certain photos that could “blow up” at trial. Client proceeded to delete 16 photos from his profile, and later on deactivated his account entirely and claimed to have no Facebook profile in court. In finding that the client and the attorney had violated Rule 3.4(a) of the Virginia Rules of Professional Conduct, the court granted sanctions against both client and his attorney for spoliation of evidence including an adverse-inference instruction to the jury, allowing them to conclude that the Facebook content that was deleted would have been damaging to the case, and directing them to pay the adverse party $722,000 in expenses and attorney fees. The attorney was also subsequently suspended from practicing law for 5 years.
    4. In some cases, deactivating an account
       1. In *Brown v. SSA Atlanta, LLC*, 2021 WL 1015891 (S.D. Ga. Mar. 16, 2021), a federal district court magistrate judge denied a defendant’s request for attorneys’ fees where a plaintiff had “deactivated” his Facebook account and instead ordered the plaintiff to produce account data for each Facebook account he maintained, whether “deactivated” or not. *Id*. at \*5. In so ruling, the magistrate judge noted a distinction between “deactivating” versus “deleting” social media accounts, finding that “deactivation” leaves open the possibility of “reactivation,” while deletion is a “much more permanent step.”*Id*. at \*3.
    5. Failing to preserve social media in native format
       1. In [*Edwards, Jr. v. Junior State of America Foundation,* 2021 U.S. Dist. LEXIS 126868 (E.D. Tex. Apr. 23, 2021)](https://law.justia.com/cases/federal/district-courts/texas/txedce/4:2019cv00140/188037/129/), the court cited to Federal Rule of Evidence 1002, the so-called Best Evidence Rule and determined that screenshots of messages were inadequate and the loss of the native files were deemed to be spoliation, resulting in the exclusion of all related evidence.
    6. Adjusting privacy settings?
       1. In *Thurmond v. Brown*, 2016 U.S. Dist. LEXIS 45296 (W.D.N.Y. Mar. 31, 2016), the court issued atemporary order restricting the plaintiff from making any “changes, alterations, or deletions to her social media accounts.” Subsequently, the plaintiff adjusted the privacy settings on her Facebook account. The court concluded that changing one’s social media privacy settings was not spoliation. In this particular case, however, the judge slapped the plaintiff’s wrist for violating a Court Order not to change her social media accounts.
    7. Allowing the client to handle the review:
       1. In *Doe v. Purdue,* 2021 U.S. Dist. LEXIS 124257, \*\*2-3 (N.D. Ind. July 2, 2021), the plaintiff represented to the Court that “Snapchat does not archive content files” or “retain user information past 30 days,” that “content is not what is available at [his] end,” and that he had conducted research to determine what content could be downloaded from Snapchat prior to making these representations. The court found plaintiff’s assertions believable that he deleted the files to free up space and memory on his phone and not as an attempt to hide their content. Thus, the spoliation claim ailed. However, the court also found that there needed to be repercussions and ordered the plaintiff to pay defendants’ attorneys’ fees and costs associated with litigating the motion for sanctions and any other work related to review of Snapchat data or litigation concerning the deleted files. The court also allowed the submission of a jury instruction related to plaintiff’s destruction of the data, and otherwise admonished plaintiff’s counsel for delegating the regarding how to retrieve Snapchat data to the client. A violation of Rule 1.6(a) is not avoided by describing public commentary as a “hypothetical” if there is a reasonable likelihood that a third party may ascertain the identity or situation of the client from the facts set forth in the hypothetical.12 Hence, if a lawyer uses a hypothetical when offering public commentary, the hypothetical should be constructed so that there is no such likelihood. The salient point is that when a lawyer participates in public commentary that includes client information, if the lawyer has not secured the client’s informed consent or the disclosure is

1. [Global daily social media usage 2023 | Statista](https://www.statista.com/statistics/433871/daily-social-media-usage-worldwide/) [↑](#footnote-ref-1)
2. New Hampshire Bar Association, Opinion 2012-13/05. [↑](#footnote-ref-2)
3. Oregon Op. 2005-164 at 453. [↑](#footnote-ref-3)
4. Philadelphia Bar Op. 2009-02 (March 2009) [↑](#footnote-ref-4)