A Clean SLATE

HOW FAR CAN ATTORNEYS GO IN "CLEANING UP" A CLIENT'S FACEBOOK PAGE?

WRITTEN BY **JOHN G. BROWNING**

IT IS THE SORT OF SCENARIO BOUND TO RAISE THE BLOOD PRESSURE or bring the heartburn to any litigator. Your client's Facebook page features statements or photos that undermine or even outright contradict his claims or defenses in the litigation. Other postings may not even be particularly relevant to the case, but they certainly don't portray the client in a flattering light. But just how far can a lawyer go in advising a client about "cleaning up" his or her Facebook page or other online presence?

The uncertainties surrounding the answer to that question have left some attorneys stumbling in an ethical minefield. In one Virginia wrongful death case, the plaintiff's attorney learned of photos on the surviving husband's Facebook page that depicted him drinking, surrounded by women, and wearing a T-shirt that read "I [heart] hot moms"—hardly the portrait of a grieving widower! The attorney emailed his paralegal instructing her to have the client "clean up" his Facebook page because "[w]e do NOT want any blow ups of other pics at trial..." In addition to deleting the photos, the lawyer had his client (after deactivating his social networking account) sign sworn answers to interrogatories that he did not have a Facebook account. When the spoliation was brought to light, the court gave two adverse inference instructions to the jury and sanctioned the plaintiff's attorney and his client a total of $722,000 ($542,000 against the lawyer and $180,000 against the client). In July 2013, a Virginia State Bar disciplinary proceeding against the attorney resulted in a five-year suspension of his law license.[1]

There can be consequences even under somewhat more benign circumstances. In a federal court case in North Dakota, the plaintiff testified that she had deactivated her Facebook account "on the advice of her attorney," since she rarely used it for anything other than communicating with nieces and nephews. Nevertheless, the court granted the defense's motion to compel and ordered the plaintiff and her counsel to make "a reasonable, good faith attempt to reactivate" the Facebook account.[2] And in an adversary proceeding litigated in a Texas bankruptcy court, the judge's decision suggested that the defendant's mere act of taking his Facebook account private (after the incident that spawned the underlying personal injury suit) was one of multiple acts that showed the defendant acted with the specific intent to injure the plaintiff, making the debt non-dischargeable.[3]

So just what can a lawyer advise a client regarding social media postings? Several ethics bodies have provided some guidance on this issue. In New York County Lawyers Association Ethics Opinion 745 in 2013, for example, that group concluded that given the realities of litigation in the digital age—in which opposing counsel and others regularly scour social networking platforms for information—"[t]here is no ethical constraint on advising a client to use the highest level of privacy/security settings that is available." Basically, advice akin to telling the client to keep the shades down at his or her house or to avoid discussing the case with outsiders. Similarly, Ethics Opinion 745 holds that a lawyer can review what a client plans to post on social media and "guide the client appropriately" on social media usage; it even provides a checklist of tasks that a lawyer can do in counseling his or her client, including discussing how the posts might be perceived by third parties. The opinion does give an answer to the question of whether lawyers may instruct clients to "take down" existing content from social media sites, concluding that "provided that such removal does not violate the substantive law regarding destruction or spoliation of evidence, there is no ethical bar to 'taking down' such material . . . particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user's computer."

Other ethics authorities have echoed this position while taking care to

explicitly caution against spoliating evidence. The Philadelphia Bar Association Professional Guidance Committee concluded that while a lawyer may advise a client to change the privacy settings on the client's Facebook page, a lawyer "may not not [sic] instruct or permit the client to delete/destroy a relevant photo, link, text, or other content, so that it no longer exists." Furthermore, the opinion directs the lawyer to take affirmative steps to preserve social networking evidence, including obtaining "a copy of a photograph, link or other content posted by the client on the client's Facebook page" about which the lawyer is aware "if the lawyer knows or reasonably believes it has not been produced by the client." In North Carolina, an ethics opinion adopted on July 17, 2015, provides that "If removing postings does not constitute spoliation and is not otherwise illegal, or the removal is done in compliance with the rules and law on preservation and spoliation of evidence, the lawyer may instruct the client to remove existing postings on social media." And in Florida, an advisory opinion on "cleaning up" social media likewise concludes that while a lawyer may advise a client to adopt stricter privacy settings, he or she may not advise the client to remove relevant information from a social media page unless a copy of the removed information is maintained and as long as the removal does not violate substantive law.

While these opinions make it clear that an attorney certainly can advise clients on managing their privacy settings and even the content that they post, the issue of "cleaning up" or removing Facebook postings remains somewhat murky. Attorneys are best advised not only to take appropriate measures to preserve potentially relevant social media evidence, but also to remember that the duty of competence now includes an obligation to be aware of the benefits and risks associated with technology. This includes counseling clients not only on the consequences of what they post, but also on the ramifications of deleting such posts. As the judge in one recent case of Facebook spoliation admonished, removal of posts that "exceeds inadvertence or mistake" can demonstrate "disrespect for the Court and an intentional abuse of the discovery process," warranting sanctions.[4] **TBJ**

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NOTES

1. *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013).
2. *Chapman v. Hiland Operating, LLC* (D. N.D. 2014).
3. *Rhodes v. Platt (In re Platt)* (Bankr. W.D. Tex. 2012).
4. *Torgersen v. Siemens Building Technology, Inc.* (N.D. Ill. 2021) (in a case where personal injury plaintiff deleted his Facebook account even though plaintiff's counsel told him not to do so; plaintiff claimed he didn't remember the instruction).

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