

The Potential Risks of Social Media During Litigation

By Molly DiBianca, Esquire

Let's set the scene. Lawyer is considering representing an individual in a personal-injury suit resulting from an auto accident. The potential client sustained significant physical injuries in the accident and is seeking to recover monetary damages to compensate for the harm.

Lawyer is savvy about the potential risks of social-media use by clients during litigation, so he addresses the subject during their initial meeting. Client says that, yes, she does have a Facebook page and that, yes, she does post to it fairly regularly. Client also says that her Facebook profile is public.

Lawyer takes a look at the page and sees recent photos of the client at dinner with friends, at a local museum, and hugging her niece and nephew. None of the photos appear to contradict the client's claims regarding her physical injuries. Nevertheless, Lawyer is concerned that his adversary will make more out of the photos and attempt to use them against the client.

So what is the lawyer to do? And, more important, what must the lawyer do to comply with his ethical obligations in accordance with the Delaware Lawyers' Rules of Professional Conduct (the "Rules")? As with most interesting legal issues, the answer is, "it depends."

1. Can the lawyer advise the client to change her profile settings from "public" to "private"?

Yes. There is no ethical obligation to advertise the client's online activities to the world at large. In the analog world, there is no obligation to publish the docu-

ments in your client's filing cabinet in the local newspaper.

2. Can the lawyer advise the client to deactivate her profile until the conclusion of the litigation?

Yes . . . but with a word of caution. Deactivating a Facebook account is the equivalent of shutting and locking the door to the room where the filing cabinet is stored. When others search for the account, it is as if it does not exist. However, when the user (client) is ready to reactivate the account, all she needs to do is unlock the door. The filing cabinet and all of the documents contained therein are still there, just as she left them.

Now for the word of caution. Deactivating the account does not mean that the account has magically disappeared. If relevant evidence exists in the account, they must be disclosed during discovery in the same way you would be obligated to disclose the relevant documents stored in the filing cabinet in the locked room.

3. Can the lawyer advise the client to remove photos from the account?

Here is where the answers get more complicated. The safest answer to ensure compliance with Rule 3.4(a), of course, is that a lawyer should never advise a client to delete evidence. Indeed, Delaware lawyers have an ethical duty to ensure that clients preserve potentially relevant evidence. But, do these two principles, when combined, actually answer the question? Not necessarily.

A recent proposed advisory opinion from the Professional Ethics Committee of the Florida Bar offers some guidance. (Prop. Op. 14-1, Jan. 23, 2015). In the

proposed opinion, the Committee suggests that a lawyer may advise or assist a client to remove even potentially relevant evidence from a social-media account provided that the evidence has already been preserved. In other words, if there are multiple copies of the documents in the filing cabinets and the lawyer has ensured that he is in possession of a complete set of the documents, there is likely no need to keep all of the duplicate copies.

Assuming that's true, how can the lawyer ensure that the Facebook evidence is preserved before it is removed or deleted? Facebook has a tool for this, called "Download Your Information." The client can log into her account right from the lawyer's office. She clicks "Download Your Information" and the contents of the account, as well as significant amounts of metadata are downloaded as a zip file. The lawyer can save the zip file on his system to ensure that a copy of the potentially relevant evidence has been preserved and complying with his ethical duties in doing so.

Now, that said, deleting potentially relevant evidence should not be done without serious thought. For example, what if the download did not work? The simple step of checking the file after it has been downloaded to confirm it was successful is critical, but often overlooked. Even with a back-up copy preserved, lawyers should give serious consideration to the potential risks involved and always act to prevent spoliation of evidence. 📁

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