AMERICAN BANKRUPTCY INSTITUTE

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Ethics Roundtable

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PLENARY SESSION

2018

PLENARY SESSION: ETHICS ROUNDTABLE

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PRIMARY TOPICS:

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Client-Lawyer Relationship
Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

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Rule 1.15: Safekeeping Property

Client-Lawyer Relationship
Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

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Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

Law Firms And Associations
Rule 5.3 Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

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SOCIAL MEDIA AND THE DUTY TO PRESERVE EVIDENCE

A short summary of the rights and duties of social media users, and attorneys' ethical obligations in advising clients

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Introduction

The ability to gather relevant factual information is at the core of our civil discovery system. The duty to preserve relevant evidence is a core tenet of our judicial system that courts protect.[1] Modern technology often creates new challenges for courts to address with respect to the duty to preserve, and social media has undoubtedly been responsible for creating its fair share. Social media contains a wealth of personal information that can easily become relevant for litigation. In the bankruptcy context, Facebook photos may suggest a better lifestyle than the filings indicated by perhaps revealing a boat or car that supposedly did not exist. A party's LinkedIn status may indicate employment that was not disclosed, or a YouTube video showing a once-in-a-lifetime vacation might give a judge pause before discharging debts. Because social media data may become evidence, it is important for clients to be aware of their duty to preserve this information, if necessary; but clients should also know their rights and privileges. For this to happen, attorneys must know how to ethically advise clients about their social media content.[2]

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[1] "Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence. Our adversarial process is designed to tolerate human failings - erring judges can be reversed, uncooperative counsel can be shepherded, and recalcitrant witnesses compelled to testify. But, when critical documents go missing, judges and litigants alike descend into a world of ad hocery and half measures – and our civil justice system suffers." United Medical Supply Co. v. United States, 77 Fed. Cl. 257, 259 (Fed.Cl. 2007).

[2] Much of the existing case law concerns sanctions in connection with a lawyer's failure to satisfy discovery obligations and is not typically tied to consideration of whether the lawyer's conduct was ethical. However, it could certainly could be. See Annotation to Model Rule 3.4 (Fairness to Opposing Party and Counsel) (stating that "[a]lthough Rule 3.4 subjects a lawyer to professional discipline for abusive litigation tactics, it is normally the presiding judge who initially takes the corrective action, such as retrial, exclusion of evidence, disqualification and payment of monetary sanctions. A court is likely to consider Rule 3.4, as well as other ethics rules, when imposing these litigation sanctions.").

Despite its complexities and relative novelty, social media does not enjoy special discovery rules or expectations of privacy. Additionally, courts will sanction attorneys and clients alike for attempting to destroy social media evidence. However, making social media accounts more restrictive or removing relevant content does not necessarily violate discovery rules, so long as the relevant content is preserved.

I. Discovery Rules for Social Media

It is important to understand that social media does not enjoy special discovery rules. Root v. Balfour Beatty Constr. Inc., 132 So. 3d 867, 869 (citing E.E.O.C. v. Simply Storage Mgmt., LLC, 270 F.R.D. 430, 434 (S.D. Ind. 2010)). Even though social media is a fairly new technology, traditional rules for electronically stored information apply, just in a novel context. As a result, the duty to preserve social media data arises when a party reasonably foresees, or should see, that the information is relevant to litigation. Additionally, because the owner of a social media account has legal authority or practical ability to access their social media data, the data is in their "possession, custody, or control" and subject to the duty to preserve.

II. Privacy Privilege for Social Media

Despite the fact that traditional discovery rules apply, some clients argue that information posted on social media should be subject to an expectation of privacy, so long as it is not publicly available. Courts, however, do not subscribe to this reasoning and instead hold that making information "not public" is not the same as making it "private". Once a user shares information on social media, even if to a limited number of people, the user loses the right to privacy regarding that content, and discovery tools apply as normal. Sara A. Hooks & Katherine

Taht, *Social Media and Electronic Discovery: A Potential Source of Evidence in Bankruptcy Proceedings*, 27 NABTALK: J. NATIONAL ASS'N BANKR. TR., 24, 25-26 (2011).

III. Court Responses to Discovery Violations in Social Media

Although social media content is subject to traditional discovery rules, including no expectations of privacy, courts are aware of the challenges that social media presents. Because of the quickly-changing nature of social media and clients' lack of sophistication, courts may be lenient to clients' unintentional deletion of information. However, if a client or attorney destroys social media information for the purpose of prejudicing the opposing party, harsh sanctions will likely apply.

A. Allied Concrete Co. v. Lester, 736 S.E.2d 699 (Va. 2013)

The Virginia Supreme Court affirmed stiff sanctions on both an attorney and his client after the attorney asked his paralegal to help the client "clean up" the client's Facebook account. The client deleted sixteen pictures and deactivated his account. As a result, the plaintiffs spent considerable money for experts to discover what had actually been deleted. The lower court had sanctioned the attorney $542,000 and the client $180,000.

B. Katiroll Co., Inc. v. Kati Roll and Platters, Inc., No. 10-3620 (GEB), 2011 WL 3583408, at *1 (D. N.J. 2011)

A federal court in New Jersey held that a defendant technically committed spoliation by changing his Facebook profile picture which allegedly showed trademark violations. Because the defendant had changed his profile picture, the relevant posts no longer showed the infringing picture that accompanied those posts. However, because people commonly change their profile picture, the court found that the spoliation was unintentional and therefore

declined to sanction the defendant. The court instead required the defendant to change the picture back to the original and give the plaintiff time to print off the posts showing the infringing picture.

C. Gulliver v. Snay, 137 So. 3d 1045 (Fla. Dist. Ct. App. 2014)

The Florida Supreme Court reversed an $80,000 settlement because the plaintiff's daughter revealed its existence on Facebook. The plaintiff agreed to settle an age-discrimination suit against the school district, but the settlement included a non-disclosure agreement. Before the school district had sent the settlement payments, the plaintiff's daughter posted: "[the school district] is officially paying for my vacation to Europe this summer. SUCK IT." (emphasis in original). The court therefore permitted the school district to revoke the agreement.

D. In re Baltrip, No. 15-41529, 2015 WL 6703287, at *1 (Bankr. E.D. Mich. Nov. 2, 2015)

A Michigan bankruptcy judge denied a defendant's motion to dismiss where the plaintiff relied solely on social media posts to allege that the defendant was concealing property interests by wrongfully transferring property to a friend. The defendant's friend posted pictures that allegedly showed ownership of three properties that the defendant previously owned. Although the defendant objected to the use of social media posts as speculative, the court was not fazed by the plaintiff's reliance on these posts to substantiate the complaint.

IV. Bar Association Opinions and Guidelines

Despite some case law demonstrating courts' disposition to social media evidence, there has been little-to-no guidance for attorneys to advise their clients. However, several bar

associations have submitted formal opinions and guidelines outlining attorneys' ethical responsibilities in advising clients regarding social media. These opinions address the extent that an attorney can advise a client to change their social media presence in anticipation of, or response to, litigation. All of the bar association opinions agree that an attorney can advise clients to change privacy settings or remove content, so long as the content is preserved or doesn't otherwise violate substantive law.

A. Pennsylvania Bar Association Opinion (2014)

The Pennsylvania Bar Association opinion was one of the earlier opinions to address the ethical issues surrounding attorneys' advice regarding social media. The opinion stated that a lawyer may advise clients to change their privacy settings on social media, but a client may not destroy any relevant content on the page. However, a client may delete information, provided it does not constitute spoliation, but the lawyer or client must preserve the information in the event it becomes discoverable.

B. Florida Bar Association Opinion (2015)

The Florida State Bar Association Committee on Professional Ethics issued its opinion on June 25, 2015. The opinion discusses ethical obligations involved in advising clients to "clean up" their social media pages before litigation. The opinion is primarily based on Florida Rule 4-3.4(a) (Fairness to Opposing Party and Counsel) regarding the preservation and/or spoliation of evidence and concludes that a lawyer "may advise a client to use the highest level of privacy setting on the client's social media pages" and "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 opinion explains, however, that "the social media information or data must be preserved if the information or data is known . . . or reasonably should be known . . . to be relevant to the reasonably foreseeable proceeding. Finally, the opinion explains that "the general obligation of [the lawyer's] competence may require the [lawyer] 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."

C. North Carolina Bar Association Opinion (2015)

The North Carolina Bar Association issued its formal opinion on July 17, 2015. This opinion also agreed that a lawyer may advise the client to change the privacy settings if doing so does not violate substantive law or a court order. It further stated: "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."

D. New York State Bar Association Opinion (2017)

The New York State Bar Association issued its first opinion on this topic in 2014 and updated it on May 11, 2017. This opinion agrees that a lawyer may advise a client as to what content the client may maintain or make private, including all privacy settings. Even after litigation has commenced, the attorney can advise the client to change privacy and security settings. However, these privacy changes must not violate any substantive law or court order. However, "unless an appropriate record of the social media content is preserved, a party or nonparty may not delete" social media information that is subject to the duty to preserve.

E. New York State Bar Association – Social Media Ethics Guidelines (2015)

The New York State Bar Association (Commercial and Federal Litigation Section) released updated Social Media Ethics Guideline in 2015. The first guideline concerns the ethical duty of competence and provides that "[a] lawyer has a duty to understand the benefits and risks and ethical implications associated with social media, including its use as a mode of communication, an advertising tool and a means to research and investigate matters." The guideline also explains that "[a] lawyer must understand the functionality of any social media service she intends to use for research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site." Guideline 5.A provides that "[a] lawyer may advise a client as to what content may be maintained or made private on her social media account, including advising on changing her privacy and/or security settings . . . [and also] as to what content may be "taken down" or removed . . . as long as there is no violation . . . of law . . . relating to the preservation of information, including legal hold obligations."

Conclusion

Despite its relative newness, social media is subject to the same discovery rules as other electronically stored information, and despite users' desire for privacy, social media users lose any reasonable expectation of privacy by posting their information, regardless of how restrictive their settings. Although courts may show leniency for inadvertent destruction of social media information, courts may impose stiff sanctions for attempting to destroy evidence by deactivating social media accounts or otherwise deleting relevant information. However, several bar association opinions agree that attorneys may advise their clients to change their privacy settings or remove information from their social media accounts, so long as the

information is preserved and removing the information does not violate substantive laws against spoliation or violate a court order.

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DISCOVERY AND USES OF SOCIAL MEDIA

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Overview

Social media has the potential to offer vast repositories of pre-litigation intelligence, as well as providing useful evidence that can be used during the litigation itself. In fact, some jurisdictions around the country have already begun to hold attorneys to a higher standard when it comes to using online resources for purposes of conducting due diligence of their clients, opponents, witnesses and even prospective jurors. *See, e.g., Johnson v. McCullough*, 306 S.W. 3d 551 (Mo. 2010) (Missouri Supreme Court imposed affirmative duty on lawyers to conduct certain internet background searches of potential jurors if lawyer plans to argue juror bias related to their litigation history); *Cannedy v. Adams*, 706 F.3d 1148 (9th Cir. 2013) (holding that lawyer's failure to locate sexual abuse victim's recantation on her social media profile could constitute ineffective assistance of counsel).

Federal Rule of Civil Procedure 26(b)(1) provides that "any matter, not privileged, that is relevant to the claim or defense of any party" is discoverable, and that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1). Information on social networking sites is not entitled to special protection as its content is neither privileged nor protected by any right of privacy. *Davenport v. State Farm Mut. Auto. Inc. Co.*, 2012 WL 555759, at *1 (M.D. Fla. Feb. 21, 2012). However, a discovery request seeking social media data must meet Rule 26's requirement that it be tailored so that it appears reasonably calculated to lead to the discovery of admissible evidence. *Farley v. Callais & Sons LLC*, 2015 WL 4730279, at *3 (E.D. La. Aug. 10, 2015). Without such a requirement, any party seeking the discovery of social media data would be allowed to engage in a proverbial "fishing expedition" in the hope that there might be something of relevance in another party's social media accounts. *Tompkins v. Detroit Metropolitan Airport*, 2012 WL 179320, at *2 (E.D. Mich. Jan. 18, 2012).

Accordingly, social media content is subject to discovery, in most cases, despite certain privacy settings that may be imposed by the account user. *See Tompkins*, 2012 WL 179320, at *2.

Preservation of Social Media Data

Preservation of social media evidence is important, both for parties and their attorneys. Data located on social media sites such as Facebook, LinkedIn and Twitter, is subject to the same duty to preserve as other types of electronically stored information. *See Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013); *Painter v. Atwood*, 2014 US Dist. LEXIS 35060 (D. Nev. March 18, 2014); *Hosch v. Bae Sys. Info. Solutions, Inc.*, 2014 US Dist. LEXIS 57398 (E.D. Va. April 28, 2014). This duty to preserve is triggered when a party reasonably foresees that evidence may be relevant to issues in litigation. At that point, all evidence in a party's possession, custody or control is subject to the duty to preserve. *Id.*

- Attorneys beware, as they can also be held liable for their client's spoliation of social media data. In *Allied Concrete*, a court awarded significant damages against both the defendant and his attorney for spoliation of evidence due to the deletion of certain Facebook posts/pictures. 736 S.E. 2d 699. In addition, the attorney also had his license to practice law in the State of Virginia suspended for 5 years. *Id.*

There is No Reasonable Expectation of Privacy on Social Media

Courts have consistently rejected the argument that Facebook posts that are made available to only a limited number of "friends" are private and should not be subject to discovery during litigation. Instead, courts have generally found that "private" is not necessarily the same of "not public." *See, e.g., Tompkins*, 2012 WL 179320, at *2. By sharing the content with others, even if only to "friends," a litigant had no expectation of privacy with respect to the shared content on social media networks. *Id.*

To Be Successful in Obtaining Discovery of Social Media Data, It Must be Relevant

Relevancy, as is the case with all other types of discovery, is key. Courts are wary of allowing discovery of social media data when the requesting party has not identified some specific evidence to show why relevant information exists in social media that justifies discovery. This is a fact-specific inquiry, as shown by the cases below.

- Defendant in accident case sought discovery of, among other things, all social media postings taking place after plaintiff's accident, which was the basis for the lawsuit, showing any type of physical or athletic activities. Defendant presented to the court two pictures posted by the plaintiff to Facebook after her accident showing her skiing, which the Defendant alleged were inconsistent with her claims of series and disabling injuries. While the court found the request for all social media postings related to any type of physical or athletic activities since plaintiff's accident to be overly broad, it did allow discovery of all social media postings since her accident that (1) relate to physical injuries that plaintiff alleged as a result of the accident, and (2) reflect physical capabilities that are inconsistent with injuries the plaintiff alleged to have suffered as a result of the accident. *Scott v. U.S. Postal Service*, 2016 WL 7440468 (M.D. La. Dec. 27, 2016).
- Defendant in slip and fall case sought discovery of the plaintiff's entire Facebook account, including those sections designated as private (and not available for viewing by the general public). The defendant pointed to several public Facebook postings, as well as surveillance photos, which show certain activities that make any private photos relevant. The court disagreed finding that public photos showing the plaintiff holding a small dog and standing with others at a birthday party were not inconsistent with the injuries claimed by the plaintiff in her lawsuit. Accordingly, the court found that the defendant failed to make a sufficient showing that the material it sought was reasonably calculated to lead to the discovery of admissible evidence and denied the request to access plaintiff's Facebook account. *Tompkins v. Detroit Metropolitan Airport*, 2012 WL 179320, at *2 (E.D. Mich. Jan. 18, 2012).
- Defendant in ADA violation case sought all social media activity of the plaintiff (including a download of the plaintiff's entire Facebook account), as well as all postings, messages, photos, videos, etc. placed on social media that related to the pending lawsuit, including those that related to the plaintiff's mental state. The court found a basis to allow the production of all social media and a download of the entire Facebook account. However, it denied any discovery which required the plaintiff to "scour the world wide web" to find any social media data concerning the case "no matter who posted,

tweeted, blogged" about it as being extremely vague and overly broad. *Appler v. Mead Johnson & Co.*, LLC, 2015 WL 5615038 (S.D. Ind. Sept. 24, 2015).

- Defendant in personal injury case sought discovery of all plaintiff's Facebook activity from the date of his accident to the present, including the plaintiff's password and log-in information to allow the defendant unsupervised and ongoing entry into the plaintiff's Facebook account. The court found the discovery request to be entirely too broad and limited the discovery to postings and photographs related to (1) the accident, (2) emotional distress caused by the accident and by other events unrelated to the accident, (3) physical injuries sustained from the accident and any other unrelated injuries, and (4) any physical capabilities that are inconsistent with the injuries alleged to have occurred as a result of the accident. The court specifically declined to require the plaintiff to share his log-on and password information with the defendant, noting that the limits placed in this case "protect both the rights of the [p]laintiff to be shielded from overly intrusive and overbroad discovery as well as the rights of [d]efendant to discover relevant information germane to [p]laintiff's claims and its defenses against those claims." *Farley v. Callais & Sons LLC*, 2015 WL 4730279, at *3 (E.D. La. Aug. 10, 2015).
- Defendant in employment discrimination case in which plaintiff is seeking both emotional and physical damages sought discovery of all records from the plaintiff's social media accounts. The court reviewed cases regarding the relevance of social network postings in cases involving claims for emotional distress damages. It noted that while some courts have held that social media information is relevant, others have questioned the probative value of material placed on social media. The court, agreeing with the latter approach, stated that the "fact that an individual may express some degree of joy, happiness, or sociability on certain occasions sheds little light on the issue of whether he or she is actually suffering emotional distress" and found that such postings were not relevant to the issue of emotional damages. With respect to the plaintiff's claim for physical damages, the court stated that postings or photographs on social networking sites that reflect physical capabilities inconsistent with the plaintiff's claimed injury are relevant and allowed discovery for that purpose. *Giacchetto v. Patchogue-Medford Union Free School District*, 293 F.R.D. 112 (E.D.N.Y. May 6, 2013).

Ways to Access Social Media

Assuming you can meet the burden to establish the relevancy of social media content – how do you obtain full access? One way is to request login and password information through a discovery request. This was allowed in *Largent v. Reed*, No. 2009-1823 (Pa. C.P. Nov. 8, 2011) (court ordered turnover of password and timeframe to inspect the profile), and *Gatto v. United Airlines, Inc.*, No. 10-1090 (D.N.J. Mar. 25, 2013) (plaintiff voluntarily gave password over, but later accidentally deleted account which the court deemed to be a failure to preserve relevant evidence and granted defendant's request for an adverse inference). However, in *Trail v. Lesko*, No. 10-017249 (Pa. C.P. July 3, 2012), the court found a blanket request for login information to be per se unreasonable, stating that "To enable a party to roam around in an adversary's Facebook account would result in the party to gain access to a great deal of information that has nothing to do with the litigation and [] cause embarrassment if viewed by persons who are not 'friends.'" Moreover, in *Chauvin v. State Farm Mut. Auto. Ins. Co.*, No.

10-11735, 2011 U.S. Dist. Lexis 121600 (S.D. Mich. Oct. 20, 2011), the court upheld an award of sanctions against the defendant who filed a motion to compel the production of the plaintiff's Facebook password stating that the content the defendant sought was available "through less intrusive, less annoying and less speculative means."

Is it okay for an attorney to "friend" a witness, party or juror through Facebook to collect personal information? Model Rule 8.4 prohibits attorneys from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Therefore, the act of friending someone to obtain information that could be used against them, even if it benefits their client, could be seen as engaging in unethical behavior. Several bar associations have found this activity to be unethical:

- The Pennsylvania Bar Association found that the act of friending a party or witness without disclosing the attorney's identification was an ethical violation. *See* Penn. Bar Ass'n Ethics Comm., Formal Op. 2014-300.
- The San Diego Bar Association found that friending a potential witness could not be done with the intention to deceive the witness and could be considered an improper *ex parte* communication. *See* San Diego Cty. Bar Ass'n Legal Ethics Comm., Formal Op. 2011-2.
- The New York Bar Association found that friending an individual under false pretenses to obtain evidence was an unethical deception. *See* N.Y. St. Bar Ass'n Comm., Formal Op. 2010-843.

In Camera Review Prior to Production

Some courts have allowed an in camera review in advance of production to guard against overly broad disclosure of a party's social media data. See *Offenback v. Bowman*, No. 1:10-cv-1789, 2011 U.S. Dist. Lexis 66432 (M.D. Pa. June 22, 2011), and *Douglas v. Riverwalk Grill, LLC*, No. 11-15230, 2012 U.S. Dist. Lexis 120538 (E.D. Mich. Aug. 24, 2012). However, other courts have declined such requests. *See Tompkins*, 2012 WL 179320, at *2.

It is Always Important for Attorneys to Caution Clients On Social Media Usage Once a Case is Pending

Revealing information through social media during a pending case could result in an unknowing and unintentional waiver of attorney-client privilege, thus opening up such information for discovery. In *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2010), a client discussed attorney-client conversations in emails, blog posts and instant messages with family and friends. The court found that the client waived his attorney-client privilege, entitling the opposition to discovery of the information disclosed online, which included his motivation for pursuing the litigation, the litigation strategy, and other facts surrounding the case. Therefore, it is always important to counsel clients on their usage of social media during a pending case.

ETHICAL PITFALLS FOR ATTORNEYS WHEN USING SOCIAL MEDIA

In addition to educating and counseling your clients about the pitfalls of social media before, during and after a pending case, it is also important for attorneys to be aware of the ethical issues that can arise from their own social media usage.

1) Social media profiles may constitute legal advertising.

   In many jurisdictions, lawyer and law firm websites are deemed to be advertisements. Social media profiles like blogs, Facebook pages and LinkedIn profiles, which are also websites, could also constitute advertisements. Both the Florida Supreme Court and a California Ethics Opinion have concluded that lawyer advertising rules apply to social media posts based on the nature of the posted statement or content. *See* Supreme Court of Florida, No. SC11-1327, dated January 31, 2013; California Ethics Opinion 2012-186.

2) Avoid making false or misleading statements on social media sites.

   The ABA Model Rules, as well as analogous state ethics rules, prohibit making false or misleading statements. This prohibition extends not only to lawyer websites, but also to social media websites. A South Carolina Ethics Opinion concluded that lawyers may not participate in websites designed to allow non-lawyer users to post legal questions where the website describes the attorneys answering the questions as "experts." A New York Ethical Opinion concluded that a lawyer cannot list their practice areas under the heading "specialties" on a social media site unless the lawyer is appropriately certified as a specialist. Be especially cautious of the "specialty" and "expert" designations on sites such as LinkedIn and Avvo. *See* South Carolina Ethics Opinion 12-03; New York State Ethics Opinion 972.

3) Avoid making solicitations through social media.

   Solicitations by a lawyer or law firm offering to provide legal services that are motivated by pecuniary gain are restricted under the Rules of Professional Conduct 7.3 and most state ethical rules. Therefore, attorneys should closely evaluate who social media communications are sent to and why. A Facebook friend request or LinkedIn invitation that offers to provide legal services to a non-lawyer with whom the sending lawyer does not have an existing relationship could be seen as a prohibited solicitation.

4) Be careful not be disclose privileged or confidential information.

   The Rules of Professional Conduct require attorneys to protect privileged and confidential information for current clients, former clients and prospective clients. It is important to

avoid posting any information on social media platforms that could potentially violation these confidentiality obligations. This is especially true today where there are attorney blogs on almost every subject where "real life" stories may be shared with blog readers that could inadvertently lead to sharing protected information. *See In re Skinner*, 740 S.E.2d 171 (Ga. 2013) (attorney disciplined for disclosing information about a client in response to negative reviews on a consumer website); *In re Peshek*, M.R. 23794 (Ill. May 18, 2010) (assistant public defender suspended from practice for 60 days for blogging about clients and implying in at least 1 post that a client may have committed perjury).

5) Be careful when "friending" judges and/or commenting on judges.

Know your jurisdiction's standards for "friending" judges on social media. Connecticut, Kentucky, Maryland, New York, South Carolina and Tennessee are more liberal and allow judges to participate in social media but must consider their ethical obligations on a case-by-case basis. *See* Connecticut Committee of Judicial Ethics Op. 2013-06; Kentucky Judicial Ethics Opinion JE-119; Maryland Judicial Ethics Committee Op. 2012-07; New York Judicial Ethics Committee Op. 13-39 and 08-176; Ohio Judicial Ethics Committee Op. 2010-7; South Carolina Judicial Ethics Committee Op. 17-2009; and Tennessee Judicial Ethics Committee Op. 12-01. In stark contrast, at least one Florida court has held that a trial judge presiding over a criminal case had to recuse himself because he was Facebook friends with the prosecutor. *See Domville v. State*, 103 So. 3d 184 (Fla. 4th DCA 2012). In addition, lawyers should use caution with posting thoughts on social media related to judges and their views on pending cases, rulings, etc. *See, e.g., In re Joyce McKool*, No. 2015-B-0284 (Louisiana Supreme Court disbarred attorney for "social media blitz" to influence judges in adoption and child custody cases pending in Louisiana and Mississippi which included, among other things, creating and posting online petitions urging judges to make specific rulings in her clients' favor).

6) Avoid communicating with represented parties via social media.

Rules of Profession Conduct 4.2 and related state ethics rules prohibit a lawyer from communicating with a person known to be represented by counsel without first obtaining consent from that person's attorney. This would appear to then limit lawyers from engaging in social media communications – e.g., Facebook friend requests or LinkedIn invitations – with that person in order to gain access to private social media data.

7) Be careful when communicating on social media with unrepresented parties.

Lawyers must be cautious when communicating online with unrepresented third parties. Issues can arise when lawyers use social media to obtain information from third-party witnesses for litigation purposes. While publicly viewable information is generally fair game, ethical constraints could limit a lawyer's options for obtaining information kept behind a third party's privacy settings. Several jurisdictions have ethics opinions which agree that a lawyer may not attempt to gain access to non-public social media content by using trickery,

dishonesty, false pretenses, or an alias. *See* Oregon Ethics Op. 2013-189; Kentucky Ethics Op. KBA E-434; New York State Ethics Op. 843. Additionally, delegating these tasks to another non-lawyer in your office will not circumvent the ethical rules. Rules 5.1, 5.2 and 5.3 of the ABA Model Rules of Professional Conduct provide that a lawyer having direct supervisory authority over subordinate lawyers and non-lawyer staff shall make reasonable efforts to ensure that their conduct conforms to the rules of professional conduct. Moreover, those rules provide that if the supervising or managing lawyer has knowledge of such conduct that could have been avoided or mitigated, but fails to take such remedial action, that lawyer can be held responsible for the violation.

8) Be careful not be inadvertently create an attorney-client relationship through social media.

Attorney-client relationships can be formed through electronic communications, such as social media. Appropriate disclaimers should be used in a lawyer/law firm's social media profile on in connection with certain posts to help avoid inadvertently creating attorney-client relationships. It is important that, notwithstanding the disclaimer, the lawyer/law firm's conduct is not inconsistent with such disclaimer. *See* South Carolina Ethics Opinion 12-03 (concluded that buried disclaimer language to advise against reliance on advice provided was unfair and misleading to a layperson).

9) Be careful not to engage in the unauthorized practice of law on social media.

Public social media posts can be viewed anywhere – even in jurisdictions beyond which you may be licensed to practice law. Pursuant to Rules of Professional Conduct 5.5, lawyers are not permitted to practice outside of those jurisdictions where they have been admitted to practice. Therefore, lawyers should avoid online activities that could be viewed as an unauthorized practice of law in any jurisdiction in which the lawyer is not admitted to practice.

10) Think twice before posting testimonials, endorsements or ratings.

LinkedIn and Avvo are two social media platforms that allow and even, in some cases, promote the use of testimonials, endorsements and ratings. Lawyers should be aware of the ethical rules in the jurisdiction(s) where they are licensed to be sure that they do not run afoul of those rules by using or allowing such endorsements, testimonials and ratings to remain on their social media accounts. *See, e.g.*, South Carolina Ethics Opinion 09-10 (provides that lawyers cannot (1) solicit or allow the publication of testimonials on websites, and (2) solicit or allow the publication of endorsements unless presented in a way that would not be misleading or likely to create unjustified expectations).