

Technology

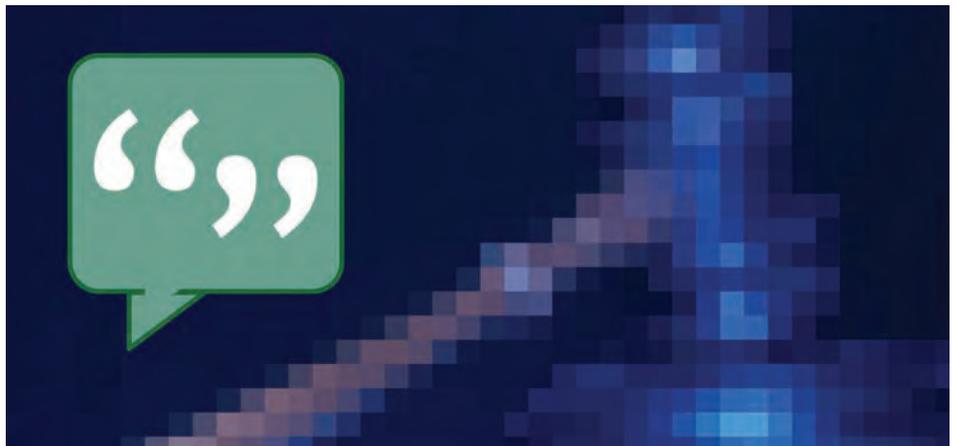
Pixel Perfect Practice

Professional Guidance Opinions Address Social Media Issues

BY DANIEL J. SIEGEL

When Bill Maher quipped, “Can we go back to using Facebook for what it was originally for – looking up exes to see how fat they got?” he had no idea how many lawyers would agree with him. Whether it is the story of a client admitting some wrongdoing on social media, or a client posting photos showing herself performing an activity wholly inconsistent with her claimed physical limitations, the result is the same: Their cases just became much harder to prosecute or defend.

Social media, the plethora of websites that permit users to join online communities where they can share information, ideas, messages and other content, is changing not only our clients’ lives, but also the way lawyers must practice. If there was any doubt, the Pennsylvania Supreme Court’s November 2013 adoption of a Comment to Pa. RPC Rule 1.1 (“Competency”) leaves no doubt. The comment states that “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.” For many lawyers, this change means that they no longer can claim ignorance when technological issues arise. And they do. Clients use social media. Boy, do they use social media. According to Pew Research Internet Project, as of September 2013, an estimated 73



percent of adults age 18 and over use these sites.

Fortunately, the Philadelphia Bar Association Professional Guidance Committee has authored Opinion No. 2014-5, addressing some of the obligations lawyers have relating to their clients’ use of social media. In this opinion, the Committee was asked to address four questions:

- (1) Whether a lawyer may advise a client to change the privacy settings on a Facebook page so that only the client or the client’s “friends” may access the content. This question assumes that all information relevant or discoverable in the client’s matter is retained.
- (2) Whether a lawyer may instruct a client to remove a photo, link or other content that the lawyer believes is damaging to the client’s

case from the client’s Facebook page.

- (3) Whether a lawyer who receives a request for production of documents must obtain and produce a copy of a photograph posted by the client, which the lawyer previously saw on the client’s Facebook page, but which the lawyer did not previously print or download. For the purposes of this inquiry, we will assume that the request is not overly broad.
- (4) Whether a lawyer who receives a request for production of documents must obtain and produce a copy of a photograph posted by someone other than the client on the client’s Facebook page, which the lawyer previously saw on the client’s Facebook page, but which the lawyer did not previously print or download. For

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The Committee answered the questions as follows:

- (1) A lawyer may advise a client to change the privacy settings on the client's Facebook Page.
- (2) A lawyer may instruct a client to make information on the social media website "private," but may not instruct or permit the client to delete/destroy a relevant photo, link, text or other content, so that it no longer exists.
- (3) A lawyer must obtain a copy of a photograph, link or other content posted by the client on the client's Facebook page in order to comply with a request for production or other discovery request.
- (4) A lawyer must make reasonable efforts to obtain a photograph, link or other content about which the lawyer is aware if the lawyer knows or reasonably believes it has not been produced by the client.

The opinion addresses many of the concerns lawyers and clients commonly confront, and provides a broad overview of the issues, with the strong recommendation attorneys examine the Rules carefully and understand that, as social media evolves, so will the ethical issues related to it.

But interestingly, as I have always said, dealing with clients and social media is similar to dealing with any other evidence regardless of form, i.e., discoverable information may not be concealed or destroyed regardless whether it is in paper, electronic or some other format.

The opinion notes that, "as a general rule, in order to provide competent

representation under Rule 1.1, a lawyer should advise clients about the content of their social media accounts, and their obligation to preserve information that may be relevant to specific proceedings." The Committee further explained that, although a lawyer may counsel a client to restrict access to their social media information, i.e., changing a client's profile to "private," which simply restricts access to the content of the page, it may not permit her to delete or permanently destroy the evidence.

Of note, the opinion highlights some recent decisions, all of which have a common thread: if the requesting party can demonstrate that the social media pages contain potentially relevant information, the requesting party will be able to access it. Conversely, most courts have not permitted a party to go on a fishing expedition.

For lawyers who don't think this applies to them or their clients, think again. In March 2014, the Commercial and Federal Litigation Section of the New York State Bar Association released its "Social Media Guidelines," which concluded that a lawyer may advise a client about the content of the client's social media page, to wit:

- 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

Smartwatch Wars Escalating



The next battle in Apple vs. Everyone Else is taking shape in the form of smartwatches. Apple unveiled its Apple Watch in September (above) and plans to begin selling it in early 2015. There are several Android compatible smartwatches out there, and there's talk that Microsoft will enter the market sometime soon.

The rectangular Apple Watch is available in three models – Watch, Watch Sport and Watch Edition. The differences are with the bands and cases. The device's crown (the thing on the side that you use to adjust the time on a regular watch) allows users to scroll and zoom. Apple uses multiple technologies to keep time within 50 milliseconds of the definitive global time standard. And it can automatically adjust to the local time when traveling. Sensors on the back of the watch deliver a gentle tap when you get a text message or email. The activity app measures how long you've been moving, how long you've been sitting still and can keep track of how many steps you take. And there are range of watch faces to choose from along with functions you can add on. The Apple Watch starts at \$349.



One of the best looking Android watches out there has to be Motorola's Moto 360 (right). This beautiful round watch just looks like an expensive timepiece. The crystal is made from Gorilla Glass to prevent scratching and damage.

And talk about smart. Moto 360 sends you notifications based on what you're doing and where you are. You can get Android-wear powered traffic reports, weather forecasts and flight information. The device's voice control allows you to send text messages, ask for directions and check the weather. The 360 also features a built-in heart rate monitor and pedometer. And Moto 360 has a growing number of apps it works with, including Facebook Messenger. You can customize your Moto with one of six digital watch faces. The \$249 price tag includes a wireless charging dock. ■

One of the highest-profile cases arose in Virginia, which suspended an attorney for five years for instructing his client to delete certain damaging photographs from his Facebook account.

to preserve.

The Philadelphia Bar Committee agreed with this conclusion, which is consistent with Rule 3.4(a)'s prohibition against "unlawfully alter[ing], destroy[ing] or conceal[ing] a document or other material having potential evidentiary value." Consequently, a lawyer is not permitted to instruct a client to alter, destroy or conceal any relevant information regardless whether that information is in paper or digital form. A lawyer may, however, instruct a client to delete information that may be damaging from the client's page, but must take appropriate action to preserve the information in the event it should prove to be relevant and discoverable.

One of the highest-profile cases arose in Virginia, which suspended an attorney for five years for instructing his client to delete certain damaging photographs from his Facebook account; withholding

the photographs from opposing counsel; and withholding from the trial court the emails discussing the plan to delete the information from the client's Facebook page. The Virginia State Bar Disciplinary Board based the suspension upon the attorney's violations of Virginia's rules on candor toward the tribunal, fairness to opposing counsel and misconduct. In addition, the trial court imposed \$722,000 in sanctions (\$542,000 upon the lawyer and \$180,000 upon his client) to compensate opposing counsel for their legal fees.

Opinion 2014-5 highlights the fact that the days of ignoring social media are gone. No matter what form the evidence is in, the Rules of Professional Conduct apply in the same way that they apply to other forms of information. Thus, and as the Committee concluded, "A lawyer may advise a client about how to manage the content of the client's social

media account, including the account's privacy settings. However, a lawyer may not advise a client to delete or destroy any information that has potential evidentiary value. Finally, in order to comply with a request for production of documents, a lawyer must provide all information that the client has posted if the lawyer is aware that the information exists."

Sorry Bill. The days when we went online and searched merely to gloat about how much better our lives are compared with our exes' are over. ■

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Apple iPhone 6



Samsung Galaxy S5

APPLE HAS FINALLY RELEASED ITS LONG-AWAITED IPHONE 6, ALONG WITH BIGGER SIBLING 6 PLUS. The biggest difference over iPhones past is screen size, with 4.7-inch and 5.5-inch models available. They're also thinner than ever. Samsung's Galaxy S5, at 5.1 inches, has a beautiful display, screaming fast processor and a terrific camera. It boils down to operating systems – are you a Mac or an Android?

FEATURES	APPLE IPHONE 6	SAMSUNG GALAXY S5
SCREEN SIZE (DIAGONAL)	4.7 INCHES	5.1 INCHES
RESOLUTION	1334 X 750 PIXELS	1920 X 1080 PIXELS
DIGITAL ZOOM	3X	4X
VIDEO RECORDING RESOLUTION	1080P HD VIDEO RECORDING	3840 X 2160 PIXELS
DIMENSIONS	2.64" X 0.27" X 5.44"	2.9" X 0.3" X 5.6"
WEIGHT	4.55 OUNCES	5.1 OUNCES
BATTERY LIFE	UP TO 11 HOURS (WIFI)	UP TO 13 HOURS (WIFI)
PRICE	\$199 (16GB MODEL)	\$199