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New York Ethics Opinion: Lawyers May Advise Clients to Delete Social Media Content

A recent ethics Opinion out of New York concludes that lawyers may ethically counsel civil clients about their use of social media, including, in some circumstances, advising them to "take down" harmful social media content. While news reports and decisions over the past few years have focused primarily on lawyers' social media use, the issue of client counseling has received less attention. Yet, with the exponential growth of social networking and its availability as a discovery and investigatory tool, it is increasingly important for lawyers to counsel clients about social media use.

The Opinion, issued by the New York County Lawyers Association (NYCLA) on July 2, 2013, addressed three questions:

1. May attorneys counsel clients about what they should or should not post on social media sites?
2. May lawyers instruct clients to "take down" certain materials from existing social media sites?
3. May lawyers counsel their clients about the legal implications of their social media activity?

Obviously, the second question raises the most significant ethical implications for lawyers, because removing materials from a social media site may, in some circumstances, constitute spoliation. If discovered, this could have severe consequences for both the client and the lawyer, as we have seen in a couple of recent cases. *See Gatto v. United Airlines* (jury instruction on negative inference for deleting Facebook content); *Lester v. Allied Concrete Co.* (monetary sanctions against lawyer and client for deleting Facebook content).

According to the NYCLA Opinion, the answer to each question is "yes," with certain caveats. First, lawyers can advise their clients about what they should and should not post on social media, as long as they don't participate in the creation of false evidence. Second (and perhaps most controversially), lawyers are not ethically barred from advising clients to take down social media content, as long as there is no duty to preserve the material under *substantive* law. Third, lawyers may counsel clients about the legal implications of their social media content, including how it might be used for or against them in a civil case.

While most of the Opinion is couched in terms of what a lawyer *may* do, it also notes that lawyers "could, in some circumstances" have "an *obligation* to advise clients" concerning their use of social media (emphasis added). This is an important point that the Opinion glosses over to some extent. Having concluded that lawyers may ethically advise clients to "take down" social media content, the Opinion should perhaps have noted that lawyers *do* have an ethical duty to instruct clients to preserve relevant social media content and that the mere act of deleting social media content, even innocuous or irrelevant content, could appear suspicious. In the *Gatto* case, for example, the court sanctioned the plaintiff with a negative inference because he deactivated his Facebook account, resulting in the loss of data. Therefore, if a decision is made to remove social media postings, a clear record should be made of what was removed, when, and why the decision was made. Copies of any deleted content should be saved in case a dispute arises later.

Other highlights from the NYCLA Opinion:

- Rule 3.4 prohibits lawyers from suppressing or concealing social media content that should be revealed;
- Rule 3.1(a), which prohibits lawyers from asserting frivolous claims or issues, extends to false factual statements that are contradicted by the client's social media postings;
- Rules 3.3(a)(1) and 3.4(a)(4) require lawyers to take remedial action if clients testify falsely about whether changes were made to their social media sites;
- Lawyers may counsel clients to publish truthful information on social media that is favorable to the clients' legal position;
- Rule 3.4(a)(4) prohibits a lawyer from participating in the publication of false information on social media.

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