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SPECIAL REPORT | FAMILY LAW

New Ethical Rules Proposed for Social Media Cleanup

Commentary by **Maria C. Gonzalez**

Social media has called into question our duties as lawyers and advocates for our clients as it relates to fairness to the opposing party and counsel under the rules regulating the Florida Bar.

On Feb. 15, the professional ethics committee of the Florida Bar issued proposed advisory opinion 14-1 regarding the "ethical obligations on advising clients to 'clean up' their social media pages before litigation is filed to remove embarrassing information that the lawyer believes is not material to the litigation matter."

Electronic communication and social media includes email, text, FaceTime, Facebook, LinkedIn, Twitter, Instagram, Snapchat, MySpace, blogs and phone apps. The expectation that you will be engaged in the production of discovery relating to electronic or social media is no longer an expectation, but has been a reality for quite some time in marital and family law cases. It was not until the 2014

amendments to the Statewide Uniform Guidelines for Taxation of Costs that we received formal guidance as to the impact and recoverability of the costs associated with electronic media.

The amendments now include the following additional litigation costs that may be taxed: electronic discovery expenses, the cost of producing copies of relevant electronic media in response to a discovery request, and the cost of converting electronically stored information to a reasonably usable format in response to a discovery request.

Although evidence associated with social media postings may arise in traditional business and civil litigation cases, there is no doubt such evidence is more prevalent in divorce or family law cases.

Lawyers.com reports that Facebook has more than 800 million active users and an estimated 20 percent of divorce cases in the United States "mentioned Facebook as one of the reasons for the divorce."

Chapter 4 of the rules regulating the Florida Bar relates to the



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Rules of Professional Conduct. The rules guide us on matters from identifying conflicts of interest, safekeeping of property, and termination of legal representation to candor towards the tribunal.

Rule 4-3.4(a) states: "A lawyer must not unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy or conceal a document or other material that the lawyer knows or reasonably should

know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act.

ETHICS RECOMMENDATIONS

The professional ethics committee has recommended that:

- If a client specifically asks their lawyer regarding removal of information from his social media, the lawyer's advice must comply with Rule 4-3.4(a).

- A lawyer may advise a client to change their privacy settings and use the highest level of privacy setting on her social media pages so that they are not publicly accessible. However, if the information or data is known by the lawyer or reasonably should be known by the lawyer to be relevant to the reasonably foreseeable proceeding, then an appropriate record of the social media information or data must be preserved.

- A lawyer 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. However, an appropriate record of the social media information or data must be preserved.

How we deal with social media and electronic communication in our practice will continue to develop and challenge our profession.

The professional ethics committee is presently considering comments from the Florida Bar membership to its advisory opinion, following which it will submit the final version of its advisory opinion to the state Supreme Court for approval.

Despite the pendency of the final version of the advisory opinion, if your firm has not yet implemented guidelines and awareness of social media issues with its clients, consider it at warp speed.

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