When Cleaning Up Facebook is Dirty Discovery

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In a recent spoliation sanction that created buzz all over the "blawgosphere," a Virginia attorney has agreed to a five-year suspension of his license for instructing his client to "clean up" his Facebook page. After he received a discovery request for his client's Facebook account, Matthew Murray advised his client, a widower plaintiff in a wrongful death suit, to delete photos and then to deactivate the account. According to The Hook, Murray wrote to the client: "Don't worry about sanctions…. If we get sanctioned, after the trial, you'll have plenty of money to pay it." These statements were also read at trial – surely a cringe-worthy moment.

Several questions come to mind:

- Did Murray think social media was not in the same class of discoverable evidence as emails, spreadsheets, or letters? If so, why?
- Did Murray think they would not get caught, and that opposing counsel had not already taken screen shots of the Facebook account in question? Indeed, in one account, an offending Facebook photo of the client wearing an "I (heart) hot moms" T-shirt was *attached* to the discovery request.
- Did Murray believe he and his client were risking only minor monetary sanctions and not an adverse inference or a more serious ethics violation? How could he have concluded that deleting a few photos of a man in a T-shirt drinking beer was worth compromising his ethics?
- Would the penalties have been as harsh if Murray had instructed his client to "clean up your Facebook and MySpace accounts" prior to filing the case against Allied Concrete Company?
- Could Murray ethically have told his client "Don't post to your social media accounts from this point forward" *prior* to filing the lawsuit? Surely that would have fallen within a constructive attorney-client recommendation, rather than obstruction. However, the Virginia State Bar rules do not fully address preservation or production of social media.

The website for the Virginia State Bar has little to say about social media as discoverable evidence and much more to say about how the *lawyer* should or should not use social media. As for clients, only the following appears at the top of the webpage:

> Diligence and competence require the lawyer to:
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> - Understand if/how clients are using social networking;
> - Advise clients as to their further use of social networking to their best advantage; and
> - Use social networking sites as investigative tools (opposing party, witnesses, jurors).

Clearly, the Virginia State Bar did not intend that an attorney advising a client to delete certain photos from Facebook is "advising the client to use social networking to their best advantage." While the second bullet could cover an attorney recommending that a client not post anything for the next year, none of the suggestions are intended to protect an order to destroy discoverable evidence. Prima facie, Murray understood the implications of his actions when he counseled his client not to worry about sanctions. Had he believed he was acting ethically/appropriately, he would never have written that sentence.

One blogger suggested that older-generation partners may be less equipped to handle the novelties of electronic discovery and data in the cloud, but experience in discovery should have trumped the "older" card in this case. Murray practiced law for more than 30 years and had been Vice President of the Virginia Trial Lawyers Association. He knew what he was asking his client to do; he knew it involved deleting information after a discovery request, and he knew it was potentially sanctionable. More importantly, with Murray's experience he should have understood that the responsibility for compliance always rest with counsel.

FRCP Rule 34 defines discoverable information as: "any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained…." Arguing that photographs on Facebook or posts to Twitter are exempt is absurd.

With or without new rules, this case makes it plain that all attorneys need to stay informed regarding the impact of new technologies on discovery. Step 1 is to issue a legal hold that includes all data in a custodian's/client's social media accounts, as well as email, edocs, and physical media. That notice should include a request to not discuss the case in any forum, and can include a recommendation to limit all *future* social media posts. Step 2 is to take reasonable measures to preserve that data. In some cases reasonable measures might mean collecting to preserve; in a few social media cases it might mean issuing a subpoena or legal hold directly to Facebook, MySpace, Twitter, etc. If the data is not collected immediately, a system to verify that the client/custodian understands his hold obligations and reminders to preserve are necessary. A lawyer diligently protecting his client can *then* argue about relevancy and undue burden to collect, but by issuing a hold and preserving the data, that lawyer has avoided the taint of spoliation and demonstrated common sense application of discovery rules. Foresight at the inception of litigation can prevent the hindsight regret.