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Ethical Pitfalls in Social Media Discovery

A Review of the Hazards Involved in Obtaining and Preserving Social Media Evidence

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SUMMARY

The social media revolution has redefined the way people communicate. Society utilizes social media to share, and businesses use it to connect with their customers. Social media content potentially is valuable evidence that presents opportunities as well as challenges. Attorneys have a responsibility to acquire a familiarity with this new technology, including the host of ethical hazards that accompany it.

The American Bar Association most recently amended the Model Rules of Professional Conduct in 2013. However, not a single revision provided specific guidance on social media. Given this decision, attorneys must apply traditional ethical principles to this new technology. Pertinent issues for social media discovery include the acceptable means of acquiring evidence from an opposing party's social media accounts, advising clients on their own Internet presence, and preserving relevant evidence.

Local bar associations have grappled with these issues in recent years. Their guidance is valuable but not always consistent. The common theme is that attorneys must balance carefully the duty to provide effective representation with the principles of truthfulness and fairness. The failure to adhere to ethical rules regarding social media discovery can have severe consequences, including sanctions and disciplinary action. Those who familiarize themselves with the rules and stay abreast of developments in technology can avoid the pitfalls of this new medium. Those who ignore them do so at their own peril.

Social media is a potential gold mine for litigators. Many people treat their various social media presences or accounts as private. In fact, social media content is far more public and more permanent than many users realize. A post on a co-worker's Facebook wall, a tweet to Twitter followers, a photo shared with friends on Instagram, or even a restaurant review posted on Yelp, allows onlookers to peer into the life and thoughts of the author.

Attorneys risk running afoul of ethical rules when they attempt to gather information from social media. As this breed of evidence floods into courtrooms across the nation, attorneys must educate themselves on their ethical responsibilities.

The ABA Model Rules

Social media evidence can frequently be obtained through traditional discovery procedures (even if the Stored Communications Act[1] can make things complicated). Many attorneys may prefer to acquire this information outside of formal discovery. There are several reasons for this. One is the need to gather facts as a part of an initial investigation into a case before a suit has commenced. If there is critical evidence on a social media profile, it is better to know about it early. Also, it is possible that the electronic nature of the evidence means that it might not exist when discovery begins. The Internet is in constant flux, with fresh content appearing and old content disappearing daily. Potential evidence might be deleted or altered either inadvertently or intentionally. Rather than wait and see, many attorneys may prefer to capture the data before it disappears.

Attorneys have an ethical duty to gather facts under the American Bar Association (ABA) Model Rules of Professional Conduct.[2] Rule 1.1 Competence requires a lawyer to provide competent representation to a client, which includes legal knowledge, skill, thoroughness, and preparation.[3] Comment 5 to Rule 1.1 notes that thoroughness and preparation includes an

[1] The Stored Communications Act, 18 U.S.C. §§ 2701-2712, is addressed by Robert M. Freedman and Tara Taghvay in an article appearing in this issue of the *Journal of American Law*.

[2] MODEL RULES OF PROF'L CONDUCT (2013).

[3] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013).

inquiry into the facts of the problem[4]. Moreover, under Comment 1 to Rule 1.3 Diligence, a lawyer must act with commitment to the interests of the client and with zeal in advocacy on the client's behalf.[5] These concepts extend to social media discovery. Lawyers cannot afford to ignore this technology simply because it appears novel or complicated. The requirement to provide competent representation compels lawyers to pursue this evidence just as they would any other kind of relevant evidence.

Attorneys must balance the responsibility to provide competent and zealous representation with ethical duties regarding fairness and truthfulness. Rule 4.1 Truthfulness in Statements to Others[6] forbids a lawyer from making a false statement of material fact to a third person during the course of representation. It also prohibits failing to disclose a material fact to a third person when that disclosure is necessary to avoid assisting in a criminal or fraudulent act by a client.

Rule 3.3 Candor Toward the Tribunal[7] prohibits a lawyer from making a false statement of fact or law to the court. It also commands lawyers to take remedial measures when a client engages or intends to engage in criminal or fraudulent conduct related to the proceeding.

Rule 3.4 Fairness to Opposing Party & Counsel[8] forbids attorneys from unlawfully obstructing another party's access to evidence. Attorneys may not alter, destroy, or conceal materials having potential evidentiary value.

Rule 8.4 Misconduct[9] bars lawyers from engaging in dishonest, fraudulent, or deceitful conduct. It is misconduct to knowingly assist or induce another to violate the rules. A lawyer must ensure that non-lawyer assistants comply with the professional obligations of the lawyer.[10]

When the ABA amended the Model Rules in 2013, none of the revisions specifically addressed social media. The most relevant change was the addition of a single comment that "a lawyer should always keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology…"[11] The ABA's decision not to significantly alter the rules constituted an affirmation of the ability of traditional principles to address modern questions. However, the choice left attorneys with little specific guidance regarding social media. A patchwork of local bar association opinions has arisen to fill the void. While the opinions are helpful, the results have been inconsistent.

False Friending

The most controversial is the debated practice of "false friending."[12] Generally, attorneys may access and review public portions of an opposing party's or witness' social media page. This follows the conventional rule articulated by the Supreme Court of West Virginia in *State ex rel. State Farm Fire & Casualty Co. v. Madden*.[13] There, the court held that lawfully observing a represented party's activity that occurred in the full view of the general public did not violate ethical rules.[14]

Not all portions of a social media page are visible to all members of the public. Some parts are accessible only by individuals to whom the author has granted permission. On Facebook, granting this permission is accomplished through a "friend request" or "friending."[15] One party sends an electronic message to another with the option to accept or decline. The message can include additional text or merely the sender's name. If the target accepts, then both parties may view each other's online content. The availability of personal information to online friends creates the potential for false friending. "False friending" refers to the practice of an attorney or agent surreptitiously gaining access to a witness' social media site by sending the witness a friend request. To increase the chances the target will accept, the sender might hide his true identity. Once the individual accepts the request, the investigator gains unfettered access to the author's content.

The New York State Bar Association's Committee on Professional Ethics addressed this practice in its Opinion 843.[16] The committee clarified that a lawyer representing a client in litigation may access the public pages of a witness' social networking site for the purpose of obtaining possible impeachment material. As long as the attorney does not friend the witness, or direct a third person to do so, accessing the social networking pages is not an ethical violation. On the other hand, gaining access to private pages using deception would violate ethical rules. In particular, false friending implicates Rule 4.1's bar against making false statements and Rule 8.4's prohibition against deceptive conduct.

The Philadelphia Bar Association Professional Guidance Committee also condemned false friending. Opinion 2009-02 addressed whether an attorney can friend an unrepresented adverse witness.[17] The committee declared that it would be deceptive for an investigator to friend such a witness, even if the investigator used his own name. A friend request with no ac-

[4] Model Rules of Prof'l Conduct R. 1.1 cmt. 5 (2013).

[5] Model Rules of Prof'l Conduct R. 1.3 cmt. 1 (2013).

[6] Model Rules of Prof'l Conduct R. 4.1 (2013).

[7] Model Rules of Prof'l Conduct R. 3.3 (2013).

[8] Model Rules of Prof'l Conduct R. 3.4 (2013).

[9] Model Rules of Prof'l Conduct R. 8.4 (2013).

[10] Model Rules of Prof'l Conduct R. 5.3(b) (2013).

[11] Model Rules of Prof'l Conduct R. 1.1 cmt. 8 (2013).

[12] "The Sedona Conference" refers to this concept as "pretexting," highlighting the fact that the attorney or investigator obtains access through deception. The Sedona Conference Primer on Social Media (Oct. 2012).

[13] *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 451 S.E.2d 721 (W. Va. 1994).

[14] *Id.* at 730.

[15] Other social media services use different terms to describe essentially the same function. For example, Google+ uses a "+1" feature, and LinkedIn allows users to "Connect" with other account holders. Although the information presented here is applicable to social networking generally, this article uses Facebook as an example throughout due to its status as a ubiquitous provider of social media services.

[16] N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 843 (2010).

[17] Philadelphia Bar, Op. 2009-02 (2009).

companying message omits the critical fact that the individual seeking access to the pages is attempting to obtain information to share with a lawyer for use in litigation. If the witness were aware of the motive behind the request, it is unlikely that the witness would grant access. The committee advised that it would be permissible for the attorney to ask for access if he disclosed the purpose of the request to the witness.

The San Diego County Bar Legal Ethics Committee issued an opinion stressing that an attorney may not send a friend request to a represented party. When a party is represented in the matter at issue, the attorney is not allowed to attempt to elicit information about the subject matter of the representation regardless of the manner of communication.[18] An attorney cannot exploit a witness's lack of familiarity with the attorney's identity as a way to gain access to a social networking website. The Kentucky Bar cited the San Diego Bar's opinion in delivering similar guidance that attorneys cannot use social media to communicate with represented persons or imply disinterest in dealing with unrepresented persons.[19]

The Bar Association of the City of New York Committee on Professional Ethics offered a starkly different take.[20] The committee considered whether a lawyer, acting alone or through a private investigator, could use deceptive methods to gain access to a secure social networking page. While disapproving the use of a false identity, the committee concluded that an attorney or agent may use his or her real name to send a friend request to obtain information from an unrepresented person's social networking page without disclosing the reason for the request. The committee decided the conduct was not unethical because the attorney or investigator used truthful information only to obtain access.

The opinion considered the peculiarity of interactions on the Internet in comparison to the real world. If an unfamiliar person came to your door and asked for permission to enter your home, browse family photo albums, and read your diary, you would shut the door and perhaps call the police. On the other hand, Internet users seem willing to allow total strangers to do just that. The committee advised that individuals who allow unfamiliar persons to comb through their lives by granting access to private social media pages do so at their own peril. As long as attorneys or investigators do not misrepresent their identities, the committee saw no problem with friending unrepresented witnesses. Of course, sending a friend request to a represented party would violate the no-contact rule.

The Oregon State Bar Association arrived at a similar conclusion.[21] The Oregon State Bar took the stance that a lawyer may request access to nonpublic social media information if the target is unrepresented in that matter and the lawyer makes no actual representation of disinterest. The opinion reasoned that a request for access does not create the implication that the lawyer is disinterested but, rather, that the lawyer is interested in the person's social networking information for an unidentified purpose. The Oregon State Bar cautioned that, under Oregon rules, if the attorney knows that an unrepresented person misunderstands the lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding. However, the account holder's failure to inquire further about the purpose of the friend request is not the equivalent of a misunderstanding. If the target does ask for additional information to identify the lawyer or about the purpose of the request, then the lawyer must withdraw the request.

The New Hampshire Bar addressed these different approaches to false friending.[22] The New Hampshire Bar Ethics Committee acknowledged the New York City Bar's contention that it is not untruthful to make a request using one's genuine identity. However, the committee argued that the witness's predisposition to accept friend requests should not bear on the attorney's ethical obligations. The fact that a witness is naïve does not mean there is no deception. If the lawyer sends a friend request using his genuine name with the knowledge that the recipient still may not recognize the name, the attorney has engaged in dishonesty.

The New Hampshire committee asserted that failing to include information that the sender is involved in the litigation creates the implication that the person making the request is disinterested. The committee concluded that such an implication would be a false statement of material fact, violating Rule 4.1. The comment to Rule 4.1 states that misrepresentations include partially true but misleading statements or omissions that are the equivalent of affirmative false statements.[23] The committee argued that the reason an attorney would make a friend request using only his or her name without disclosing a connection to the litigation is that the attorney hopes that the target will fail to appreciate the sender's role in the litigation and accept the request. If the lawyer disclosed the purpose of the request, the recipient would be much more likely to reject it. Therefore, the committee found that omitting the purpose of the request was deceptive and unethical.

In light of the split of ethical authority, attorneys must be cautious when seeking social media evidence outside of discovery. It is not unethical to access and view content that is available to the general public. As Pennsylvania Bar Association Formal Opinion 2014-300 advised, this is true whether the social media account holder has representation or not.[24] Bar associations roundly condemn intentionally misrepresenting one's identity in order to gain access to a private profile page. Attempting to access a private page using one's actual identity is a closer question. Some would put the burden of disclosure on the attorney, while others feel that the responsibility for screening requests from strangers falls on the account holders. All of the opinions agree that a request is allowed if the attorney discloses his true identity and the

[18] San Diego Cnty. Bar Ass'n Legal Ethics, Op. 2011-02; MODEL RULES OF PROF'L CONDUCT R. 4.2 (2013).

[19] Kentucky Bar Ass'n Ethics Op. KBA E-434 (2012).

[20] N.Y. City Comm. on Prof'l & Judicial Ethics, Formal Op. 2010-2.

[21] Oregon State Bar Ass'n, Formal Op. 2013-189 (2013).

[22] New Hampshire Bar Ass'n Ethics Comm., Advisory Op. 2012-13/05.

[23] MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 1 (2013).

[24] Pennsylvania Bar Ass'n, Formal Op. 2014-300.

reason for the request. As a practical matter, such a disclosure would likely result in the individual rejecting the request. Under Model Rule 4.2, an attorney representing a client shall not communicate about the subject of representation with a person the lawyer knows has representation.[25] The attorney must seek the consent of the party's attorney first.

Clients as Investigators

If ethical rules bar a lawyer from engaging in certain conduct, the lawyer cannot circumvent the rules by using an investigator. The question of whether a client may friend witnesses or opposing parties is more difficult. If a client's behavior falls outside the purview of ethical rules, attorneys might exploit that loophole by using their clients as investigators.

The issue is more complicated in light of the ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 11-461, "Advising Clients Regarding Direct Contacts with Represented Persons."[26] The committee explained that the reason for the no-contact rule is to prevent lawyers from overreaching and interfering with the attorney-client relationship. However, Comment 4 to Model Rule 4.2 affirms that "[p]arties to matter may communicate directly with each another, and a lawyer is not prohibited from advising a client concerning a communication the client is legally entitled to make."[27]

The committee asserted that a lawyer may give substantial assistance to a client, including topics to be addressed and strategies to be used. The advice may be given regardless of whether the lawyer or the client conceived of the idea of having the communication. The committee cautioned that the line between permissible advice and impermissible assistance must be drawn on the basis of whether the lawyer is attempting "to circumvent the basic purpose of Rule 4.2, to prevent a client from making uninformed or otherwise irrational decisions as a result of undue pressure from opposing counsel."

The opinion proved controversial. Some critics argued that it essentially gave lawyers permission to "script" conversations between the client and the represented opposing party.[28] This potentially could include preparing documents for the client to deliver to the opposing party directly, which the opposing party might sign before consulting with counsel.

Bearing this opinion in mind, the New Hampshire Bar Association Ethics Committee determined that the answer to the question on whether a client may friend a represented party depends on the extent to which the lawyer directed the client's actions.[29] The New Hampshire Bar reasoned that ethical rules prohibit a lawyer from accomplishing through an intermediary what would otherwise be unethical and a client falls under ethical rules to the extent that the client acts as an agent of the attorney. The lawyer must advise the client to avoid conduct on the lawyer's behalf that would be unethical. Without directly weighing in on the controversy surrounding Opinion 11-461, the New Hampshire Bar cited the opinion to illustrate that a client may independently contact the opposing party and share information with the lawyer. If the client has a Facebook account, the account reveals the client's identity to the target, and the target accepts the friend request, then no rule prohibits the client from divulging to the lawyer any information gained in that way.

Privacy Settings

A corresponding issue concerns the advice a lawyer may give to a client about protecting the content on the client's social media pages. It is not debated that an attorney ethically may advise a client not to make new posts to social media in anticipation of or during litigation. Dealing with information the client has posted already is a closer question. Many social networking services allow for users to limit access to certain posted content to individuals selected by the user. Services also generally allow for users to remove their own content after it has been posted. These features raise questions concerning Model Rule 3.4 Fairness to Opposing Counsel,[30] which forbids lawyers from unlawfully obstructing an opposing party's access to evidence.

The Philadelphia Bar Association Advisory Opinion 2014-05 addressed the question of adjusting security settings on Facebook.[31] Facebook allows users to regulate what content from the user's profile is visible to the general public and what is visible only to friends. The committee suggested that a lawyer may advise a client to change the privacy settings on a client's Facebook page to limit public access. However, it is not permissible to delete previously posted information or photographs.

The North Carolina State Bar is in agreement.[32] The North Carolina State Bar recommended that attorneys advise clients of the legal ramifications of existing social media postings. While a lawyer cannot instruct a client to delete postings, the lawyer can advise the client to adjust the security and privacy settings on a social media account both before and after a suit has commenced.

While restricting access through privacy settings could make it more cumbersome for an opposing party to obtain the desired information, it does not violate Rule 3.4 Fairness to Opposing Party and Counsel.[33] Engaging privacy protections does not place content beyond reach forever.[34] The opposing

[25] Model Rules of Prof'l Conduct R. 4.2 (2013).

[26] ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-461 (2011).

[27] Model Rules of Prof'l Conduct R. 4.2 cmt. 4 (2013).

[28] James Podgers, *On Second Thought: Changes Mulled Re ABA Opinion on Client Communications Issue*, ABA Journal (Jan. 1, 2012).

[29] New Hampshire Bar Ass'n Ethics Comm., Advisory Op. 2012-13/05.

[30] Model Rules of Prof'l Conduct R. 3.4 (2013).

[31] Philadelphia Bar Ass'n Comm. on Prof'l Guidance, Op. 2014-5 (2014).

[32] The North Carolina State Bar Ass'n, Formal Ethics Op. 5 (2014)

[33] Model Rules of Prof'l Conduct R. 3.4 (2013).

[34] *Patterson v. Turner Const. Co.*, 931 N.Y.S.2d 311, 312 (N.Y. App.

party still may obtain the evidence through the formal discovery process. In *McMillen v. Hummingbird Speedway Inc.*,[35] the court approved a motion to compel discovery of the private portions of a party's Facebook profile after the opposing counsel produced evidence that the party might have misrepresented the extent of his injuries.

Making a party's social networking account private decreases the likelihood that the court will approve a request for discovery targeting the account. Courts are reluctant to grant discovery requests for social media content based on a mere suspicion that relevant evidence is present. Typically, the party making the request must make a threshold showing that public portions contain relevant information.[36] Courts may reject requests for being overly broad.[37] In *Caraballo v. City of New York*,[38] the court refused to allow a party to access the other side's private social media content because the request was not tailored narrowly to uncover evidence relevant to the case. The court noted that "digital 'fishing expeditions' are no less objectionable than their analog antecedents."[39]

Cleaning Up: Spoliation and Preservation

Although an attorney may advise a client to adjust privacy settings, an attorney cannot allow a client to engage in spoliation of evidence. The fear of spoliation is particularly strong in cases involving electronic evidence. With the click of a mouse, evidence can change or vanish. Lawyers must advise clients not to delete or destroy relevant photos, text, or other content. In a 2014 opinion, the North Carolina State Bar reminded attorneys that they cannot counsel a client to engage in unlawful conduct and spoliation of evidence is unlawful.[40] A lawyer may instruct the client to remove postings only if the information is not relevant to the case.

If an attorney knows of relevant social media content tha would be responsive to a formal discovery request, the attorne must take reasonable steps to obtain and preserve that informa tion. This applies both before and after litigation has commence For most social media sites, it is possible for users to make post on a profile other than their own. Under Philadelphia Bar Opin ion 2014-5, attorneys must take action to preserve posts with rel evant content on their clients' Facebook pages, even if the clier did not create that content. Unless an appropriate record of th social media data is preserved, a party or nonparty may not delet information subject to a duty to preserve.[41]

The failure to preserve relevant social media evidence ca result in penalties. Federal Rule of Civil Procedure 37 prohibit spoliation of evidence.[42] It also is a violation of ABA Model Rul 3.4 Fairness to Opposing Party and Counsel.[43] Section (a) of tha rule states that a lawyer shall not unlawfully obstruct anothe party's access to evidence or unlawfully alter, destroy, or conceа evidence. Failing to preserve evidence can lead to a spoliatio instruction. The instruction allows the jury to take an advers inference from the failure to preserve. The number of sanction involving e-discovery is skyrocketing.[44] The most common caus of sanctions is failure to preserve evidence.[45]

Allied Concrete Co. v. Lester demonstrates the danger.[46] I that case, the defendant's counsel issued a discovery request t the plaintiff's attorney requesting screenshots of all of the plain tiff's Facebook content on the day the answer to the request wa signed. Defense counsel attached to the request a copy of a po tentially damaging photograph downloaded from the plaintiff' Facebook page.[47]

The next day, the plaintiff's attorney instructed the firm' paralegal to tell the plaintiff to "clean up" his Facebook page t prevent additional damaging content from coming to light. Th paralegal emailed the plaintiff and told him to delete photos fron his Facebook page. The plaintiff responded by deactivating hi Facebook account. The plaintiff's attorney then served an answe to the discovery request, stating that the plaintiff did not have Facebook page as of that date.[48]

The plaintiff eventually reactivated his account and tool screenshots of the requested information before deleting 16 pho tos from the profile. The plaintiff testified at a deposition that h

Div. 2011). The court held that postings on Facebook "are not shielded from discovery merely because plaintiff used the service's privacy settings to restrict access, just as relevant matter from a personal diary is discoverable." (Internal citations omitted).

[35] *McMillen v. Hummingbird Speedway Inc.*, No. 113-2010 CD (Pa. Ct. C. P. Jefferson County 2010).

[36] *McCann v. Harleysville Ins. Co.*, 910 N.Y.S.2d 614, 615 (N.Y. App. Div. 2010). The court upheld the lower court's ruling denying the defendant's motion seeking photos and an authorization for the plaintiff's Facebook account because "Although the defendant specified the type of evidence sought, it failed to establish a factual predicate with respect to the relevancy of the evidence." The mere hope that relevant evidence might be discovered was insufficient.

[37] *See Root v. Balfour Beatty Const. LLC*, 132 So. 3d 867, 870 (Fla. Dist. Ct. App. 2014). The appellate court quashed a magistrate's order permitting the discovery of certain broad categories of information from the plaintiff's Facebook account. The court noted that categories relating to mental health history, substance use history, and litigation history were "the type of carte blanche discovery the Supreme Court told us to be on guard against."

[38] *Caraballo v. City of New York*, No. 103477/08 2001 N.Y. Slip Op. 30605LU, 2011 WL 972547 (N.Y. Sup. Ct. Mar. 4, 2011).

39 *Id.* at *3.

[40] North Carolina State Bar Ass'n, Formal Ethics Op. 5 (2014).

[41] *Social Media Ethics Guidelines*, The Commercial and Federal Litigation Section of the New York State Bar Association, March 18, 2014 at 11, *available at* http://www.nysba.org/Sections/Commercial_Federal_Litigation/Com_Fed_PDFs/Social_Media_Ethics_Guidelines.html.

[42] Fed. R. Civ. P. 37.

[43] Model Rules of Prof'l Conduct R. 3.4(a) (2013).

[44] Gregory R. Antine, Rose Hunter Jones, and Dan H. Willoughby, Jr., *Sanctions for E-Discovery Violations: By the Numbers*, 60 Duke L.J.789, 794 (2010).

[45] *Id.* at 803.

[46] *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013).

[47] *Id.* at 702.

[48] *Id.*

never deactivated his account. The defendant hired a computer expert, who determined that the plaintiff indeed had deleted 16 photos from the account. The defendant's counsel served a subpoena *duces tecum* on the plaintiff's paralegal seeking all emails between her and the plaintiff. The court ordered plaintiff's counsel to produce a privilege log. The plaintiff's counsel intentionally omitted from the log any reference to the email instructing the plaintiff to clean up his Facebook page.[49]

Upon learning about the plaintiff's counsel's conduct, the trial court decided that the defendant was entitled to sanctions against the plaintiff's attorney and his paralegal to cover the defendant's costs in defending against the misconduct. The sanctions against the attorney and paralegal were $542,000 and $180,000, respectively.[50] The plaintiff's attorney, once the vice president of the Virginia Trial Lawyers Association, also agreed to a five-year suspension for violating rules of candor to the tribunal, fairness to opposing counsel, and misconduct.[51]

The conduct in *Allied Concrete* is an example of egregious behavior, but parties also face penalties for failure to preserve even when spoliation is unintentional. *Gatto v. United Air Lines Inc.* is one example.[52] In that case, the plaintiff airport worker brought suit against the defendant commercial airline for injuries stemming from an alleged workplace accident. The defendant sought discovery related to the plaintiff's Facebook account, believing it contained photos that contradicted the plaintiff's claims about the seriousness of his injury. The court ordered the plaintiff to execute an authorization for the release of documents and information from the Facebook account. The plaintiff agreed to share his password with the defendant's counsel.[53]

The defendant's counsel used the password to access the account. Soon afterwards, the plaintiff deactivated his account because he received a notice from Facebook that someone had accessed his account from an unknown location. Facebook subsequently deleted the account automatically two weeks after the deactivation. Both the plaintiff's counsel and defendant's counsel apparently were unaware of the deactivation until it was too late to recover the account.[54]

The defendant brought a motion for a spoliation instruction regarding the social media evidence. The plaintiff argued that the destruction was unintentional and that his conduct fell short of actual suppression. The court granted the defendant's motion.[55] The court reasoned that as long as the evidence was relevant, the offending party's culpability was irrelevant.[56] Even if the plaintiff had not intended to deprive the defendant of the information, the court reasoned that the defendant was still prejudiced because it had lost access to evidence that was potentially relevant to the plaintiff's damages and credibility.[57] Therefore, the court granted the defendant's request that the court provide an adverse inference instruction to the jury at trial.

These e-discovery perils are avoidable with proper planning. Lawyers have a responsibility to see that clients preserve relevant evidence. However, as the court noted in *Zubulake v. UBS Warburg LLC*,[58] "A lawyer cannot be obliged to monitor her client like a parent watching a child." At some point, the client is responsible for a failure to preserve evidence. Nevertheless, counsel must play an active and ongoing role in preservation. Once there is an anticipation of litigation, counsel must issue a litigation hold. The lawyer should send preservation letters to inform individuals of their responsibility to preserve information that might be relevant to the anticipated litigation. The attorney should reissue litigation holds over time to remind document custodians of their responsibility. This does not mean that the client must preserve absolutely everything. The rules of discovery include concepts of reasonableness and proportionality.[59]

Sending preservation letters to the opposing party or third parties also may prove useful. The party or witness may not be particularly tech savvy and might be unaware of the possibility that electronic evidence could be lost through inaction. Sending a letter helps to educate others on electronically stored information (ESI) and their responsibilities. It makes it more likely that the evidence will be preserved for formal discovery. If the opposing side does fail to preserve relevant evidence, a preservation letter may be a helpful exhibit when moving for a spoliation instruction.

Striking the Right Balance

Attorneys must vigorously represent their clients' interests. However, lawyers must temper their zeal with restraint. Lawyers must balance their duty to provide effective representation with principles of truthfulness and fairness. In a sense, the ethical challenges of social media evidence are nothing new. Attorneys always have faced ethical quandaries involving evidence. Technology makes many things in life easier and more convenient. It also makes it easier and more tempting to violate ethical rules. Attorneys cannot overlook the opportunities and dangers this class of evidence presents. Those who arm themselves with knowledge of the rules and follow developments in technology will benefit from this medium. Those who sl their eyes to it do so at their own risk.

[49] *Id.* at 702-03

[50] *Id.* at 703.

[51] Virginia State Bar, In the Matter of Matthew B. Murray, VSB Docket Nos. 11-070-088405 and 11-070-088422.

[52] *Gatto v. United Airlines, Inc.*, No. 10-cv-1090-ES-SCM, 2013 WL 1285285 (D. N.J. Mar. 25, 2013).

[53] *Id.* at *1.

[54] *Id.* at *2.

[55] *Id.* at *5.

[56] *Id.* at *4.

[57] *Id.*

[58] *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 433-34 (S.D.N.Y. 200

[59] *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 192 (S.D.N 2012). The court explained that Federal Rule of Civil Procedure 26(b)(2)(C) contains a proportionality principle. The court mu limit discovery if the "burden or expense of the proposed disco ery outweighs the likely benefit."