Social media websites such as Facebook, MySpace, and Twitter are the 21st century’s preferred method of interacting and communicating with people around the world. As of February 2012, Facebook had over 500 million users, and of those 500 million, 50% of active Facebook users logon every day. Further, another study found that there are approximately 140 million “Tweets” per day, or 750 “Tweets” per second. This phenomenon has lead to courtrooms across the country facing novel issues on the use of social media websites in litigation. As a result, the scope of an attorney’s duty to not only advise clients of the ramifications of maintaining social media websites, but also the duty to use it to obtain information about an adversary, has created a new challenge in competently representing clients.

A common theme found throughout recent decisions on the use of social media websites is that based upon many jurisdictions liberal discovery rules information posted on social media websites may be discoverable and used in the prosecution or defense of a case. A federal court in Colorado held that the content of social networking sites in the public areas, which contradicted the allegations as to the effect of the injuries on the plaintiffs’ daily lives, was discoverable.1 A New York trial court found that access to information contained on the plaintiff’s current and historical Facebook and MySpace pages and accounts to be both material and necessary.2 Further, a Florida federal court ordered a plaintiff to produce all photographs added to any social networking site since the date of the subject accident that depicted plaintiff, regardless of who posted the photographs.3 A recent study revealed that between January 1, 2010, and November 1, 2011, there were 674 reported state and federal court cases that involved social media evidence in some capacity. Thus, social media websites have replaced the use of surveillance and has become a less expensive and more useful source of information for attorneys seeking to find the “smoking gun” piece of evidence.

As new forms of social media websites continue to evolve and advance, so too must the profession of law to keep pace with the duty owed to clients. In fact, a Maryland court recently commented that “[i]t should now be a matter of professional competence for attorneys to take the time to investigate social networking sites.”4 Thus, the question becomes what duty does a lawyer owe to his own client to warn about the messages or photographs he posts to his social media website? Conversely, what duty does a lawyer owe to a client to obtain all relevant and material information about an adversary’s postings and photographs to a social media websites? While there is a dearth of case law on the subject, the sentiment appears to be that a lawyer who chooses to ignore social media does so at his own peril.

With regard to his own client, at the time of being retained, an attorney has a duty to explain to the client the effect his social media website can have on the case. Such a discussion is akin to warning a client that a former conviction may come to light during the course of discovery. However, this is not to say that an attorney should instruct clients to delete potentially damaging
content from their social media websites. This notion was clearly exemplified in *Lester v. Allied Concrete Company*, 2011 Va. Cir. LEXIS 132 (Va. Cir. Ct. 2011) where a plaintiff’s attorney instructed his client to remove damaging evidence from his Facebook page, which showed the plaintiff as anything but grieving, resulting in a severe court sanction of over $700,000. In addition, in *Qualcomm, Inc. v. Broadcom Corp.*, 2008 U.S. Dist. LEXIS 91 (S.D. Cal. Jan. 7, 2008), a Court ordered Qualcomm to pay $8,568,635 for failure to produce tens of thousands of documents requested in discovery. The Court also sanctioned six attorneys from an outside law firm for blindly accepting Qualcomm’s claim that their e-discovery searches were adequate, as well as intentionally hiding or recklessly ignoring relevant documents. Nevertheless, an attorney has a duty to warn a client that as the litigation proceeds, even non-public postings, or postings to their social media website by a third party may be discoverable.

The other main duty of an attorney arises out of the investigation of an adverse party through social media websites. For example, a defense attorney would not be acting competently and diligently in a personal injury case, if the attorney ignored pictures of a recent trip to Hawaii posted by a blissfully looking plaintiff who is claiming loss of enjoyment of life. However, an attorney does not have carte blanche to send “friend requests” to every opposing party he has an interest in, or his client. Further, the extent of an attorney’s duty to diligently obtain the location of a party for service purposes has been heightened by the availability of social media.

In a profession based upon tradition and legal precedent, it is apparent that attorneys cannot ignore the technological changes going on around them. Rule 1.1 of the ABA Model Rules requires lawyers to be competent in the representation of their clients. Further, Comment 6 of the aforementioned Rule advises that lawyers “should keep abreast of changes in the law and its practice.” Thus, early on in their representation attorneys should discuss the ramifications of a client’s social media on the matter. In addition, an attorney should perform a search, using a search engine such as Google, for any relevant, public information available not only for his client, but any parties or witnesses to the action. Lastly, an attorney should create a discovery plan that includes interrogatories and document requests that take into consideration potentially relevant information contained in a social media website. While a body of case law continues to develop as to the duty with regard to social media, the biggest takeaway for attorneys is that they must be cognizant of these websites and their potential use for better or worse in litigation.

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