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# North Carolina State Bar Issues Proposed Formal Ethics Opinion Concerning Social Media in Civil Litigation

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On April 24, 2014, the North Carolina State Bar issued Proposed 2014 Formal Ethics Opinion 5, “Advising a Civil Litigation Client about Social Media.” This proposed opinion explores an attorney’s ethical obligations when advising a client in a civil litigation case about issues related to social media and reinforces what many litigators already know: social media is a powerful tool and litigation attorneys should be paying particular attention to what it is, how it works, and the special considerations that should be accounted for when advising a client about his or her social media information.

The proposed opinion begins by noting that competent and diligent representation includes “knowledge of social media and an understanding of how it will impact the client’s case including the client’s credibility.” This is an important statement by the State Bar as it is directly communicating to all attorneys that in order to provide competent and diligent representation, which are fundamental requirements of attorneys pursuant to Rules of Professional Conduct 1.1 and 1.3, attorneys must educate themselves on what social media is, how it works, and the various ways that social media can impact a client’s case. The proposed opinion notes “[i]f a client’s postings on social media might impact the client’s legal matter, the lawyer must advise the client of the legal ramifications of existing postings, future postings, and third party comments. Advice should be given before and after the lawsuit is filed.” This may be an implicit requirement that attorneys obtain and review clients’ social media postings to determine relevancy to, and impact on, the litigation.

Another hot topic addressed by the proposed opinion is whether an attorney may instruct a client to remove existing postings on social media. The opinion suggests that relevant social media postings must be preserved and that attorneys should examine the law on spoliation of evidence and obstruction of justice in order to determine whether removing existing postings would be a violation of the law. If there is any potential that removal of the postings would constitute spoliation, the attorney must advise the client to preserve the postings by appropriate means and may also take possession of the materials for purposes of preserving it. The proposed opinion notes that advice on this issue should be given before and after the lawsuit is filed.

Although this guidance from the State Bar is only in the proposed opinion stage, it is an important step in clarifying what obligations attorneys and litigants have with respect to the use and preservation of social media evidence in civil litigation. As an increasing number of individuals join social media sites, and as our population as a whole continues to

become more connected through technology and social media, these issues will continue to arise with increasing frequency in civil cases.

**About the author:** Michael Rainey is a member of the firm's civil litigation team who focuses his practice on the defense of trucking and transportation, product liability, premises liability, and insurance defense cases. He has been listed as a Rising Star in Transportation/Maritime Law by *North Carolina Super Lawyers*®, 2014, and recently spoke on a panel discussing the ethical use of social media in the trucking litigation context at the American Conference Institute's 4<sup>th</sup> National Forum on Defending and Managing Trucking Litigation in Chicago, IL.

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