

## Ethical Obligations of Family Law Attorneys in Dealing with Social Media and Discovery

by  
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Just as drinking and driving are a dangerous combination, family law disputes and social media raise significant and precarious concerns — for both the parties involved as well as the attorneys representing them. As social media becomes more a part of the social fabric, more ubiquitous among the population,<sup>1</sup> and more common than non-written communications,<sup>2</sup> the greater are the possibilities that those communications will become an issue in the disputes between couples.<sup>3</sup> This risk becomes especially significant when highly charged emotions result in arguments over relationship breakups and disputes over child custody and parenting time during and after those breakups.

Family law attorneys need a good grasp of a wide range of topics regarding social media and other electronic communications in order to adequately advise, and ethically represent, their

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<sup>1</sup> A 2018 Pew Research Center Study on Social Media useage by Americans found that 69% of the general public uses some kind of social media, with the lowest usage among those older than 65 years of age (35%) and the highest usage among those between the ages of 18-29 (88%), with Americans aged between 30-49 close behind at 78% usage. *Social Media Factsheet 2018*, Pew Research Center, Washington, D.C. (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/social-media/>. The worldwide number of social media users has increased from approximately 1 billion users in 2010 to over 2.75 billion in 2018. *Number of Social Network Users Worldwide from 2010 to 2021*, STATISTICA.COM, <https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/> (last visited Jan. 5, 2019).

<sup>2</sup> Agathe Battestini et al., A Large Scale Study of Text-Messaging Use, *ACM INT'L CONF. PROC. SERIES* 229 (2010).

<sup>3</sup> Betül Aydın et al., *The Effect of Social Networking on the Divorce Process*, 6 *UNIVERSAL J. PSYCHOL.* 1 (2018); B.T. McDaniel et al., *Do You Have Anything to Hide? Infidelity-Related Behaviors on Social Media Sites and Marital Satisfaction*, 66 *COMPUTERS IN HUM. BEHAV.* 88 (Jan. 2017).

clients in high conflict family law matters. Increasingly, electronic communications are seen as a “gold mine” for evidence in family law cases – especially when the custody of children is involved.<sup>4</sup> There are many wide-ranging issues family law attorneys must be knowledgeable about when counseling their clients. These include advising clients about how their use of social media and electronic communications may affect ongoing interactions with their soon-to-be former partner. Attorneys also must be knowledgeable about ethical strategies when dealing with past social media and electronic communications by clients and adverse parties and about handling social media and electronic communications in anticipation of litigation, during litigation, and after the litigation – especially when there are ongoing relations between the parties.

## I. Initial Client Meetings

Initial meetings with family law clients require not only an assessment of client claims, but also inquiry and advice to the client about social media and other interactions.

There has always been fear of, resistance to, and avoidance of social media and other technological advances in society – all the more in the legal community. But when faced with volatile interpersonal situations with family law clients in which clients need good legal advice on how to handle the situation that has occurred as well as how to go forward, family lawyers must be aware of the various ways that clients may interact to help the client through the legal maze.

Rule 1.01 of the American Bar Association Model Rules of Professional Conduct<sup>5</sup> requires that “a lawyer shall provide competent representation to a client. Competent representation re-

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<sup>4</sup> See, e.g., *Bonds v. Bonds*, 529 S.W.3d 671, 674 (Ark. Ct. App. 2017) (the appellate court referred to and incorporated into its opinion photographs and social media posts trial exhibits depicting the father’s exemplifying the father’s “failings as an adult example to minors.”); *Brown, Jr. v. Brown*, No. E2017-01348-COA-R3-CV, 2018 WL 4182292 (Tenn. Ct. App. Apr. 30, 2018) (“The attitudes testified to by the parents are in stark contrast to the relationship revealed in emails, texts, and social media generally.”).

<sup>5</sup> MODEL RULES OF PROFESSIONAL CONDUCT R. 1.01. Referred to as “ABA Rules of Professional Conduct.”

quires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Certainly, in family law, being competent and properly advising a client requires that the lawyer know the applicable law. The lawyer must know the statutory and case law that may be applicable in order to properly advise the client on the particulars of the matter about which the client is seeking advice. So, if the client is seeking advice on how to establish parentage, whether to file for a divorce or annulment, whether the parties are married, or what to do when there is a dispute about the custody of a child, the lawyer must have at least basic knowledge of the laws that apply in order to advise the client about what can be done.<sup>6</sup> But properly advising clients about family law matters is about so much more than the law itself – because family law matters in particular are fraught with emotion and usually arise from some kind of breakdown of an intimate relationship. So even the initial meeting with a client about what to do in the most basic of family law matters will involve some advice on how to deal with those interpersonal relations. And because Americans increasingly rely upon electronic communications to communicate even with their intimate partners – especially when there is a breakdown in their relationships – family lawyers should address the issue of appropriate communications and of what the client should do with their social media communications even in the very first meeting. And this too requires a level of competence that many lawyers never think about.

Facebook launched on February 4, 2004, opening its interface to general users over the age of 13 years with a valid email address on September 26, 2006.<sup>7</sup> By the second quarter of 2018 (September 2018), Facebook claimed 2.96 billion registered users and 1.49 billion daily active users on average for September 2018.<sup>8</sup> Twitter, created in March 2006 and launched to the public

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<sup>6</sup> JAN L. JACOBOWITZ & JOHN G. BROWNING, *LEGAL ETHICS AND SOCIAL MEDIA: A PRACTITIONER'S HANDBOOK* 27 (2017).

<sup>7</sup> Sabrina Barr, *When Did Facebook Start? The Story Behind a Company that Took over the World*, *INDEPENDENT* (Aug. 23, 2018), <https://www.independent.co.uk/life-style/gadgets-and-tech/facebook-when-started-how-mark-zuckerberg-history-harvard-eduardo-saverin-a8505151.html>.

<sup>8</sup> *Stats*, FACEBOOK NEWSROOM, <https://newsroom.fb.com/company-info/> (last visited Jan. 3, 2018).

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in July of that year, rapidly grew its user base from 400,000 tweets posted per quarter in 2007 to over 100 million tweets posted per quarter in 2008, and over 500 million tweets per day in late-2018.<sup>9</sup>

When the Pew Research Center began tracking public social media usage in 2005, just 5% of American adults used at least one of these platforms.<sup>10</sup> By 2011 that share had risen to half of all Americans. In the first quarter of 2018, that share had risen to nearly 70% worldwide. According to Pew Research Center, although only 34% of Americans aged 65-and-over used social media in the first quarter of 2018, a whopping 88% of adults aged 18-29 used at least one social media site. And while many people express dismay and consternation with the increasing hostility and politicization blamed on the use of social media – especially these two major sites – social media has become ubiquitous.

Because most people now rely more on their smartphone than on a stand-alone computer,<sup>11</sup> social networking technology is ever-growing and changing to meet the needs, wants, and desires of the increasingly mobile population and to address converging technologies and content. At the same time, electronic communications have become so easy and people so free with their written comments, in both social media and other electronic communications, people often send out messages before thinking about the consequences and without considering that those written comments can be later considered against them in highly

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<sup>9</sup> Claudine Beaumont, *Twitter Users Send 50 Million Tweets Per Day – Almost 600 Tweets Are Sent Every Second Through the Microblogging Site, According to Its Own Metrics*, DAILY TELEGRAPH (London) (Feb. 23, 2010), <https://www.telegraph.co.uk/technology/twitter/7297541/Twitter-users-send-50-million-tweets-per-day.html>; *Measuring Tweets*, TWITTER.COM, [https://blog.twitter.com/official/en\\_us/a/2010/measuring-tweets.html](https://blog.twitter.com/official/en_us/a/2010/measuring-tweets.html) (last visited Jan. 3, 2018); *Twitter Revenue and Usage Statistics*, BUSINESSOFAPPS.COM (2018), <http://www.businessofapps.com/data/twitter-statistics/>.

<sup>10</sup> *Mobile Factsheet*, PEW RESEARCH CENTER (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/social-media/>.

<sup>11</sup> *Use of Mobile Devices for News Continues to Grow, Outpacing Desktops and Laptops*, PEW RESEARCH CENTER (July 17, 2018), <http://www.pewresearch.org/fact-tank/2018/07/17/use-of-mobile-devices-for-news-continues-to-grow-outpacing-desktops-and-laptops/>.

charged interpersonal matters.<sup>12</sup> And with that ubiquity, comes contempt, avoidance, and ignorance.

Because of the importance of social media and other electronic communications for clients in the law, in 2012 the ABA amended the comments to Rule 1.01 to specifically place upon lawyers the ethical obligation to keep updated not only regarding the changes in the law and its practice, but also to keep themselves updated and aware of “the benefits and risks associated with relevant technology.”<sup>13</sup> And while the ABA Rules of Professional Conduct are only model rules and not themselves enforceable against attorneys in any state, as of late-summer 2018, thirty-one states had specifically adopted revised ABA 1.01 comment 8 as part of the state’s ethics rules, with California imposing the duty on lawyers licensed there without specially adopting the comment.<sup>14</sup> In addition, ethics decisions in at least five states have specifically opined that competence in the law requires that lawyers understand social media in order to properly advise clients.<sup>15</sup>

Family lawyers especially cannot ignore the implications of social media or electronic communications use by themselves or by clients. So, family lawyers must keep up-to-date on current trends in how clients use — and abuse — those resources. It has come to a point that a critical part of the first meeting with a client is a discussion of their social media and electronic communications habits as well as a discussion with them of the applicable law and the different remedies available them for the particular problems as revealed by the client’s individual circum-

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<sup>12</sup> See Jennifer Golbeck, *Why We Overshare Online*, PSYCHOL. TODAY (Oct. 15, 2014), <https://www.psychologytoday.com/us/blog/your-online-secrets/201410/why-we-overshare-online>.

<sup>13</sup> MODEL RULES OF PROF’L CONDUCT R. 1.01 cmt. 8.

<sup>14</sup> See *Tech Competence*, LAWSITESBLOG.COM, <https://www.lawsitesblog.com/tech-competence/> (last visited Sept. 17, 2018).

<sup>15</sup> See D.C. Ethics Op. 371 (2016); Fla. Bar Ethics Op. 14-1 (2015, <https://www.floridabar.org/wp-content/uploads/2018/04/FL-Bar-Ethics-Op-14-1.pdf>); N.Y. Cnty. Law. Ass’n Ethics Op. 745 (2013), [https://www.nycla.org/siteFiles/Publications/Publications1630\\_0.pdf](https://www.nycla.org/siteFiles/Publications/Publications1630_0.pdf); N.C. Bar Ass’n Formal Ethics Op. 2014-5 (2015), <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-5/?opinionSearchTerm=social%20media>; Pennsylvania Bar Association Formal Op. 2014-300 (2015); W. Va. Legal Ethics Counsel Legal Ethics Op. 2015-2 (2015), <http://www.wvdc.org/pdf/LEO%202015%20-%2002.pdf>.

stances.<sup>16</sup> No matter whether the client is trying to find out information about divorce or parentage, no matter whether the client wants to establish a parentage or child custody arrangement with the other parent, no matter whether the client wants to modify an already established parenting plan post-decree, or determine, divide, and distribute jointly held property, each situation involves a discussion with the client about the benefits and risks of communicating with the other party *and* communicating with others through social media about the considered action. Each one of these situations involves finding out about the clients' electronic communications profile so that the attorney can advise that client about the benefits and risks of electronic communications when involved in those various disputes. As the Maryland Court of Special Appeals said in a 2010 case when commenting about the need for attorneys to knowledgeably deal with social media in their client's cases, "it should now be a matter of professional competence for attorneys to take the time to investigate social networking sites."<sup>17</sup>

A particular problem that lawyers often encounter with their clients when the client is advised that past communications are problematic is the question, "so what should I do?" The question is fraught with problems. The question also highlights why it is so very important that lawyers know about social media and the different other electronic communications methods that clients may use.

Although not all courts recognize a separate cause of action for it,<sup>18</sup> for more than two hundred years, common law courts have recognized that there exists a duty to preserve documents and other things when there is the potential for litigation between parties and when that item may constitute important evidence.<sup>19</sup> Today, most states base their rules of civil procedure on the federal rules of civil procedure, with the others adopting

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<sup>16</sup> See, e.g., Pa. Ethics Op. 2014-300, at 4-6 <https://www.pabar.org/members/catalogs/Ethics%20Opinions/formal/F2014-300.pdf>.

<sup>17</sup> Griffin v. Maryland, 995 A.2d 791 (Md. Ct. Spec. App. 2010).

<sup>18</sup> See, e.g., Ballai v. Kiewit Power Constructors, No. 110, 166, 2015 WL 423795 (Kan. Ct. App. Jan. 23, 2015); Koplín v. Rosel Well Perforators, Inc., 734 P.2d 1177 (Kan. 1987).

<sup>19</sup> See Jason A. Pill & Derek E. Larsen-Chaney, *Litigating Litigation Holds: A Survey of Common Law Preservation Duty Triggers*, 17 J. TECH. L. & POL'Y 193 (2012).

rules that are very similar. So, whenever a lawsuit is filed, the rules of procedure anticipate that “prior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person unless the information is privileged.”<sup>20</sup> As a result, many courts recognize that an adverse inference may be made when a person had possession of documents, but cannot (or will not) produce them even if the failure is not intentional.<sup>21</sup>

When a party knows that a significant dispute has arisen between parties – and that some kind of litigation may occur – and it then becomes clear that certain documents may be important, preservation of the information and documents may be critical – and destruction of those communications may cause more problems than it resolves. But, “the preservation duty is not intuitive to most litigants, and documentary discovery works because of lawyers.”<sup>22</sup>

So, when a client comes into an attorney’s office seeking a divorce, to establish or modify existing child custody or other orders, a client will often disclose communications they have had with the other person. Sometimes they provide copies of the communications to the lawyer to back up the story, and at other

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<sup>20</sup> CHARLES WRIGHT, FEDERAL COURTS 398 (3d ed. 1976).

<sup>21</sup> “Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation. *See generally* BLACK’S LAW DICTIONARY 1401 (6th ed. 1990). It has long been the rule that spoliators should not benefit from their wrongdoing, as illustrated by “that favourite maxim of the law, *omnia presumuntur contra spoliatores* [all things are presumed against the individual who destroys evidence].” 1 T. WILLES CHITTY, ET AL., SMITH’S LEADING CASES 404 (13th ed. 1929); *see* CAL. EVID. CODE § 413; *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998); *West v. Goodyear Tire & Rubber Co.*, 167 F. 3d 776 (2d Cir. 1999). *See, e.g.*, *McCleery v. McCleery*, 75 So. 316 (Ala. 1917); *Souza v. Fred Carriers Contracts, Inc.*, 955 P.2d 3 (Ariz. App. 1997); *Superior Federal Bank v. Mackey*, 129 S.W.3d 324 (Ark. 2003); *Pfantz v. K-Mart Corp.*, 85 P.3d 564 (Colo. App. 2003); *Beers v. Bayliner Marine Corp.*, 675 A.2d 829 (Conn. 1996)(only if intentional); *Martino v. Wal-Mart Stores, Inc.*, 908 So.2d 342 (Fla. 2005); *Dardeen v. Kuehling*, 821 N.E.2d 227 (Ill. 2004); *Lynch v. Saddler*, 656 N.W.2d 104 (Iowa 2003)(only if intentional); *Guillory v. Dillard’s Department Store, Inc.*, 777 So.2d 1 (La. App. 2000); *Anderson v. Litzenberg*, 694 A.2d 150, 155 (Md. App. 1997); *Lagalo v. Allied Corp.*, 592 N.W.2d 786 (Mich. Ct. App. 1999)

<sup>22</sup> Pill & Larsen-Chaney, *supra* note 19, at 194.

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times they discuss documents or things they have done, said, or written that may have some effect on their case. This is where it becomes critical for family lawyers to know their ethical responsibilities and to know how to advise the client about what to do and what not to do about those things.

Clients ask lawyers for their advice so that they can know how their actions intersect with the law and about the requirements law imposes on them. In giving that advice, the Rules of Professional Conduct require the lawyer to “exercise independent professional judgment and render candid advice.”<sup>23</sup> This obligation does not mean that the lawyer only discusses the applicable law with the client. It also means that the lawyer should discuss with the client any “other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation.”<sup>24</sup> And while many lawyers feel they do not have knowledge about social media or electronic communications beyond their own passing online interactions, numerous ethics opinions have pointed out that not only do the Rules of Professional Conduct not prohibit attorneys from advising their clients about social networking, “a competent lawyer should advise clients about the content that they post publicly only and how it can affect a case or other legal dispute.”<sup>25</sup>

In the course of consulting with a lawyer about the client’s family law issues, the client “is entitled to straightforward advice expressing the lawyer’s honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront.”<sup>26</sup> This is especially true when the client discloses that social media and other electronic communications have been used in which the client has communicated with others about the underlying situation – which has likely been at times emotional, often heated, and perhaps abusive. Comments to the Rules opine that,

Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, there-

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<sup>23</sup> MODEL RULES OF PROF’L CONDUCT R. 2.1.

<sup>24</sup> MODEL RULES OF PROF’L CONDUCT R. 2.1.

<sup>25</sup> Pa. Bar Ass’n Formal Op. 2014-300, at 6, <https://www.pabar.org/members/catalogs/Ethics%20Opinions/formal/F2014-300.pdf>.

<sup>26</sup> MODEL RULES OF PROF’L CONDUCT R. 2.1, cmt. 1.



fore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.<sup>27</sup>

On top of these requirements to advise clients about not only their legal rights in the particular matter involved, but about what they can or should do to protect themselves in their communications, Rule 3.4 of the ABA Rules of Professional Conduct provides that, “A lawyer shall not: (a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.”<sup>28</sup> Further, “A lawyer shall not counsel or assist another person to do any such act.”<sup>29</sup> The lawyer must not only advise about the ways in which clients should conduct themselves going forward, but also about what to do and not to do about their past interactions. The consequences of a lack of knowledge and of giving improper advice is fraught with peril.<sup>30</sup>

Advising clients about what to do about their social media and other communications may have significant consequences for the lawyer who is unaware of the details of the client’s interactions. For example, in 2009, while representing a client in a suit for the wrongful death of his spouse, a Virginia attorney and his paralegal reviewed the client’s Facebook postings in the course of reviewing the adverse party’s discovery requests.<sup>31</sup> Shortly after reviewing the client’s Facebook page, the attorney’s legal assistant send the client an email commenting about some pictures on the client’s Facebook page, asking about the client’s knowledge about them, and also suggesting that, “There are some other pics that should be deleted.” That same day, the lawyer send an email to the client suggesting that the client “deactivate his Facebook

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<sup>27</sup> MODEL RULES OF PROF’L CONDUCT R. 2.1, cmt. 2.

<sup>28</sup> MODEL RULES OF PROF’L CONDUCT R. 3.4(a).

<sup>29</sup> MODEL RULES OF PROF’L CONDUCT R. 3.4(a).

<sup>30</sup> See, e.g., *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013)(both the plaintiff and his lawyer were sanctioned for “cleaning up” A Facebook page on the lawyer’s advice). The lawyer was later suspended from the practice of law as well as being made to pay \$522,000 for instructing his client to remove photos from his Facebook profile. See *In re Murray*, Docket 11-070-88405 (Aug. 2, 2013), <http://www.vsb.org/docs/Murray-092513.pdf> .

<sup>31</sup> *Allied Concrete Co.*, 736 S.E.2d 699.

page on April 14, 2009.”<sup>32</sup> In discovery responses prepared by the Virginia attorney and signed by the client on April 15, 2009, the response stated that the client, did “not have a Facebook page on the date this is signed, April 15, 2009.” The matter became more tangled when the attorney then repeatedly stated that he had no familiarity with Facebook before the lawsuit – including to the court in which the matter was pending during hearings on motions to compel discovery – until adverse counsel revealed that the client had sent adverse counsel a Facebook message approximately three-months before the answers to discovery were made. All of this resulted in the court entering a judgment against the Virginia attorney personally for his misconduct for more than \$500,000. In addition, he agreed to a five-year suspension of his law license.<sup>33</sup>

Although the disciplinary board found that the original advice was complicated by significant later inappropriate actions — including making false statements to the court, intentionally failing to disclose a known fact to that court, offering evidence known by the attorney to be false, and engaging in professional conduct involving dishonesty, fraud, or misrepresentation – the board also noted that he had obstructed the other party’s access to known evidence and evidence that had potential evidentiary value.<sup>34</sup>

Various state bar associations have since come out with opinions advising attorneys that they have an obligation to provide competent advice to clients about the content of the clients’ social media postings as well as their other electronic communications relative to the matters about which the lawyer is being consulted.

The Pennsylvania Bar Association in its formal opinion 2014 – 300 advised that, “as the use of social media expands, so does its place in legal disputes . . . . While an attorney is not responsible for the information posted by a client on the client’s social media profile, an attorney may and often should advise a client

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<sup>32</sup> See *In re Murray*, Docket 11-070-88405; *Allied Concrete Co.*, 736 S.E.2d 699.

<sup>33</sup> *In re Murray*, VSB Docket 11-070-088405 & 11-07-088422, <http://www.vsb.org/docs/Murray-092513.pdf> (July 9, 2013).

<sup>34</sup> *Id.*

about the content on the client's profile."<sup>35</sup> The opinion further advised not only that the attorney should inform the client about the client's obligation to preserve information that may be relevant to their particular legal dispute, but also that, "Tracking a client's activity on social media may be appropriate for an attorney to remain informed about developments bearing on the client's legal dispute."<sup>36</sup>

The difficulty pointed out by all of these ethics opinions is that all advice is client-specific. Knowing what advice to give requires not only a modicum of knowledge about the social media clients are using, but also a duty to affirmatively inquire about how the client is using them and an obligation for the lawyer to be cautious in the advice given. The attorney needs to make sure not only that the client is instructed about the importance of not destroying potential evidence, the attorney must also be sure not to inadvertently or impliedly suggest to the client how the client can skirt the rules against tampering with evidence. The Comments to Rule 3.4 make clear the lawyer's duty in advising clients about what to do by pointing out that "fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like."<sup>37</sup>

So what is a family lawyer – or any lawyer for that matter – supposed to do when meeting with a client who is heading into uncharted waters? The attorney must first understand that the client wants and needs to know what rights the client has available and what is the best course of action to proceed. The attorney must also understand that clients are often deeply and emotionally engaged in a family law matter that feels very personal and is often emotionally threatening.

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<sup>35</sup> Pa. Bar Ass'n Formal Op. 2014-300, at 4.

<sup>36</sup> *Id.* See also D.C. Bar Ass'n Ethics Op. 371 (2018), <https://www.dcbbar.org/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm> ("In litigation, client social media postings could be inconsistent with claims, defenses, pleadings, filings, or litigation/regulatory positions. A lawyer must address any such known inconsistencies before submitting court or agency filings to ensure that claims and positions are meritorious under Rule 3.1, which requires a non-frivolous basis in law and fact, and that misrepresentations are not made to courts or agencies.")

<sup>37</sup> MODEL RULES OF PROF'L CONDUCT R. 3.4, cmt. 1.

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The attorney needs to be aware, be sensitive, be conscious, and be cautious.

First, the attorney needs to be familiar with current trends in social media and electronic communications. Know something about the social media and electronic communications platforms that people are using generally. Know the general nature of that platform. Know the nature of the interactions made on the platform and whether it is an open system or a closed one. Attorneys don't need to know much detail about the platform – or regularly use it. But the attorney must be aware about what can be done on it and the kinds of communications that a client may post on it.

The attorney also needs to be sensitive to the client's emotional, psychological and legal situation. All attorneys need to understand that clients – but especially clients who are involved in personal and emotional personal and family matters – will reach out to others – not just friends and family, but interest groups and others, posting and communicating about their life, their situation, and their problems.

The attorney needs be conscious of all of the possible consequences of a poorly worded social media comment or a hastily communicated post. Attorneys should know that there are many clients who will not heed any advice not to use social media, but instead will act on their emotions, only later maybe realizing the damage caused.

Be cautious. Attorneys are required to competently advise their clients about their legal rights and legal liabilities. Because social media and electronic communications are so widely and heavily used, attorneys must caution their clients about wise and safe use of those platforms – while also being aware that the attorney should not imply to clients ways in which they can skirt their legal duty to preserve electronic evidence that is or may be important to their case or that is harmful to their case, but must be preserved, or its destruction may create insurmountable problems for the client.