

The duty not to counsel or assist a client to destroy documents on social media

Introduction

As officers of the court we cannot counsel or suggest or recommend to a client to destroy or remove documents (whether paper or in an electronic format) that may be required in litigation. Nor should we be a party to any proposal by a client to destroy or remove documents that may be needed in litigation.

The obligation is well summarised in section 177 of the Legal Profession Regulation 2005 (NSW). This regulation states:

(1) An Australian legal practitioner must not give advice to a client to the effect that a document should be destroyed, or should be moved from the place at which it is kept or from the person who has possession or control of it, if the practitioner is aware that:

- (a) it is likely that legal proceedings will be commenced in relation to which the document may be required, and
- (b) following the advice will result in the document being unavailable or unusable for the purposes of those proceedings.

(2) An Australian legal practitioner must not destroy a document or move it from the place at which it is kept or from the person who has possession or control of it, or aid or abet a person in the destruction of a document or in moving it from the place at which it is kept or from the person who has possession or control of it, if legal practitioner is aware that:

- (a) it is likely that legal proceedings will be commenced in relation to which the document may be required, and
- (b) the destruction or moving of the document will result in the document being unavailable or unusable for the purposes of those proceedings.

(3) Subclauses (1) and (2) apply even if there has been no indication that a specific person intends to commence proceedings in relation to which the document concerned may be required.

Although, Queensland does not have an equivalent provision, the section in the writer's opinion, reflects the ethical standards that would be expected of us. Regard should also be had to the following sections of our Criminal Code 1899:

129 Damaging evidence with intent

A person who, knowing something is or may be needed in evidence in a judicial proceeding, damages it with intent to stop it being used in evidence commits a misdemeanour.

140 Attempting to pervert justice

A person who attempts to obstruct, prevent, pervert, or defeat the course of justice is guilty of a crime.

Increasingly, people are using social media (such as Facebook, Twitter, LinkedIn, and Myspace) to keep in contact or to retain information. The information exchanged or kept on such sites may be relevant to issues in a dispute before the courts (for example, photos of people drunk and disorderly may be relevant in family law proceedings where issues have been raised as to the conduct of a litigant).

Disclosure is an important step in litigation. The various court rules impose significant burdens on litigants and us to ensure the process is properly attended to. As Lord Wright noted in *Myers v Elman* [1940] AC 282 at 322:

“A client cannot be expected to realise the whole scope of that obligation, without the aid and advice of his solicitor, who therefore has a peculiar duty in these matters as an officer of the Court carefully to investigate the position and as far as possible see that the order is complied with. A client left to himself could not know what is relevant, nor is he likely to realize that it is his obligation to disclose every relevant document, even a document which would establish, or go far to establish, against him his opponent’s case.”

The facts in *Lester*, discussed in the next section, highlight an example of a US attorney who has failed to appreciate the scope of his duties. It is only novel in the sense that it concerns an instruction to a client involved in litigation to “clean up” his Facebook page.

Lester v Allied Concrete Co

In Virginia a State Court has sanctioned an attorney for counselling his client to “clean up” his Facebook page. The client had commenced an action to recover compensation for the wrongful death of his wife. The defendant had served a request for discovery relating to the contents of the plaintiff’s Facebook account. The defendant’s attorney had accompanied the request with a copy of a photo that depicted the plaintiff clutching a beer can, and wearing a T-shirt emblazoned with “I ♥ hot moms” and in the company of other young persons. It became apparent that this picture had been reproduced from the plaintiff’s Facebook page. It and other photos may have been relevant as evidence of the plaintiff’s state of mind after the death of his wife.

It was after the receipt of the notice requesting discovery that the plaintiff’s lawyer made the recommendation referred to in the above paragraph. His instruction was based on his concern that they didn’t “want blow-ups of this stuff at trial”.

The plaintiff’s attorney instead of providing the material to the defendant as requested created a scheme to take down or deactivate the client’s Facebook page and to respond that the client had no Facebook page as at the date of the request. The client deactivated his Facebook page as instructed. In the responding to an interrogatory delivered by the defendant

the plaintiff replied that he did not have a Facebook page as at the date of the defendant's request.

The defendant's attorney indicated that an application would be made to the court to enforce the request for discovery of the material.

Subsequently the plaintiff reactivated the Facebook page. After the page was reactivated the plaintiff deleted a number of photos pursuant to the earlier directive from his attorney to "clean up" the Facebook account. The attorney for the plaintiff subsequently delivered a further response. The attorney maintained that at the time of delivering this response that he was not aware that his client had deleted a number of photos.

The plaintiff's attorney also attempted to hide the exchange of emails between his law practice and his client concerning the strategy to "clean up" the plaintiff's Facebook account. This included an intentional omission of details of the exchange in material filed with the court.

The court found that the plaintiff had a duty to disclose and produce the documents and electronic data the subject of the defendant's request subject to any well founded objection. The attorneys and the plaintiff's actions were in breach of obligations under the court's rules. The court held further that both must be held accountable for their actions. Both were ordered to pay sanctions and the attorney was referred to his Bar Association for consideration of disciplinary action.

Comment

We need to be aware that a client could be tempted to destroy, delete or remove documents which may be unfavourable or assist his or her opponent to advance their case. We cannot simply allow the client to do whatever they wish or to make whatever list or affidavit they think fit. We cannot escape our responsibility for careful investigation or supervision of the disclosure process.

If a client will not give us the information we need or insists on swearing an affidavit or delivering a List of Documents which we know is imperfect or which we have every reason to think is imperfect, then our proper course is to withdraw.

Similarly, we cannot counsel our client to "clean up" his or her Facebook or Myspace pages where it is likely legal proceedings may be commenced in relation to which such material may be required. Nor should we participate in a stratagem designed to delete documents or information from such social media pages in circumstances where litigation may be contemplated in relation to which the information contained in such social media may be required.

The attorney in Lester ignored the fundamental responsibility we owe to the administration of justice and paid a heavy financial price for doing so. The writer has no doubt that if a similar

set of circumstances arose in this jurisdiction then a practitioner who engaged in such behaviour would be likely to face disciplinary proceeding for unprofessional conduct.

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If you wish to comment on or discuss any of the issues raised by this note or require guidance on any other ethical issue, contact the Ethics Centre on 07 3842 5843 or ethics@qls.com.au