



37 material is altered, concealed, or destroyed. Applicable law in many jurisdictions  
38 makes it an offense to destroy material for the purpose of impairing its availability  
39 in a pending proceeding or one whose commencement can be foreseen.  
40 Falsifying evidence is also generally a criminal offense. Subdivision (a) applies  
41 to evidentiary material generally, including computerized information.

42 Under these facts, the proper inquiry is whether information on a client's social media  
43 page is relevant to a "reasonably foreseeable proceeding," rather than whether information is  
44 "related directly" or "not related directly" to the client's matter. Information that is not "related  
45 directly" to the incident giving rise to the need for legal representation may still be relevant.  
46 However, what is relevant requires a factual, case-by-case determination. In Florida, the second  
47 District Court of Appeal has determined that normal discovery principles apply to social media,  
48 and that information sought to be discovered from social media must be "(1) relevant to the  
49 case's subject matter, and (2) admissible in court or reasonably calculated to lead to evidence that  
50 is admissible in court." *Root v. Balfour Beatty Construction, Inc.*, 132 So.3d 867, 869-70 (Fla.  
51 2<sup>nd</sup> DCA 2014).

52 What constitutes an "unlawful" obstruction, alteration, destruction, or concealment of  
53 evidence is a legal question, outside the scope of an ethics opinion. The committee is aware of  
54 cases addressing the issue of discovery or spoliation relating to social media, but in these cases,  
55 the issue arose in the course of discovery after litigation commenced. *See, Allied Concrete Co. v.*  
56 *Lester*, 736 S.E.2d 699 (Va. 2013) (Sanctions of \$542,000 imposed against lawyer and \$180,000  
57 against the client for spoliation when client, at lawyer's direction, deleted photographs from  
58 client's social media page, the client deleted the accounts, and the lawyer signed discovery  
59 requests that the client did not have the accounts); *Gatto v. United Airlines*, 2013 WL 1285285,  
60 Case No. 10-cv-1090-ES-SCM (U.S. Dist. Ct. NJ March 25, 2013) (Adverse inference  
61 instruction, but no monetary sanctions, against plaintiff who deactivated his social media  
62 accounts, which then became unavailable, after the defendants requested access); *Romano v.*  
63 *Steelcase, Inc.* 907 N.Y.S.2d 650 (NY 2010) (Court granted request for access to plaintiff's  
64 MySpace and Facebook pages, including private and deleted pages, when plaintiff's physical  
65 condition was at issue and information on the pages is inconsistent with her purported injuries  
66 based on information about plaintiff's activities available on the public pages of her MySpace  
67 and Facebook pages). In the disciplinary context, at least one lawyer has been suspended for 5  
68 years for advising a client to clean up the client's Facebook page, causing the removal of  
69 photographs and other material after a request for production had been made. *In the Matter of*  
70 *Matthew B. Murray*, 2013 WL 5630414, VSB Docket Nos. 11-070-088405 and 11-070-088422  
71 (Virginia State Bar Disciplinary Board July 17, 2013).

72 The New York County Lawyers Association has issued NYCLA Ethics Opinion 745  
73 (2013) addressing the issue. The opinion concludes that lawyers may advise their clients to use  
74 the highest level of privacy settings on their social media pages and may advise clients to remove  
75 information from social media pages unless the lawyer has a duty to preserve information under  
76 law and there is no violation of law relating to spoliation of evidence. Other states have since  
77 come to similar conclusions. *See, e.g., North Carolina Formal Ethics Opinion 5* (attorney must  
78 advise client about information on social media if information is relevant and material to the  
79 client's representation and attorney may advise client to remove information on social media if  
80 not spoliation or otherwise illegal); *Pennsylvania Bar Association Opinion 2014-300* (attorney

81 may advise client to delete information from client’s social media provided that this does not  
82 constitute spoliation or is otherwise illegal, but must take appropriate action to preserve the  
83 information); and Philadelphia Bar Association Professional Guidance Committee Opinion  
84 2014-5 (attorney may advise a client to change the privacy settings on the client’s social media  
85 page but may not instruct client to destroy any relevant content on the page). Subsequent to the  
86 publication of the opinion, the New York State Bar Association’s Commercial and Federal  
87 Litigation Section adopted Social Media Ethics Guidelines. Guideline No. 4.A, citing to the  
88 opinion, states as follows:

89         A lawyer may advise a client as to what content may be maintained or made  
90 private on her social media account, as well as to what content may be “taken  
91 down” or removed, whether posted by the client or someone else, as long as there  
92 is no violation of common law or any statute, rule, or regulation relating to the  
93 preservation of information. Unless an appropriate record of the social media  
94 information or data is preserved, a party or nonparty may not delete information  
95 from a social media profile that is subject to a duty to preserve. [Footnote  
96 omitted.]

97         The committee agrees with the NYCLA that a lawyer may advise a client to use the  
98 highest level of privacy setting on the client’s social media pages.

99         The committee also agrees that a lawyer may advise the client pre-litigation to remove  
100 information from a social media page, regardless of its relevance to a reasonably foreseeable  
101 proceeding, as long as the removal does not violate any substantive law regarding preservation  
102 and/or spoliation of evidence. The committee is of the opinion that if the inquirer does so, the  
103 social media information or data must be preserved if the information or data is known by the  
104 inquirer or reasonably should be known by the inquirer to be relevant to the reasonably  
105 foreseeable proceeding.

106         The committee is of the opinion that the general obligation of competence may require  
107 the inquirer to advise the client regarding removal of relevant information from the client’s social  
108 media pages, including whether removal would violate any legal duties regarding preservation of  
109 evidence, regardless of the privacy settings. If a client specifically asks the inquirer regarding  
110 removal of information, the inquirer’s advice must comply with Rule 4-3.4(a). What information  
111 on a social media page is relevant to reasonably foreseeable litigation is a factual question that  
112 must be determined on a case-by-case basis.

113         In summary, the inquirer may advise that a client change privacy settings on the client’s  
114 social media pages so that they are not publicly accessible. Provided that there is no violation of  
115 the rules or substantive law pertaining to the preservation and/or spoliation of evidence, the  
116 inquirer also may advise that a client remove information relevant to the foreseeable proceeding  
117 from social media pages as long as the social media information or data is preserved.