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AVOIDING LEGAL MALPRACTICE AND BAR COMPLAINTS IN FAMILY LAW CASES

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The highly emotional nature of family law cases subjects an attorney to increased legal malpractice and bar disciplinary complaints by clients, especially when the results achieved do not meet the client's expectations. Attorneys can also be the target of complaints by opposing parties who contend the lawyer engaged in economic harassment or vindictive litigation. By recognizing the realities of this type of legal practice, a family law attorney can practice preventatively to risk manage these concerns.

Background

The stress on an individual going through a divorce is ranked at 92 on a scale of 100.[1] Only the death of a spouse or a child, ranked at 98 is more severe.[2] Mental health experts cite the six stages that a person goes through when faced with a divorce.[3] From an initial stage of denial, a client then progresses through shock or panic feeling they are going crazy, to a roller coaster state where emotions run high from being hopeful to utter despair. Some clients hold out hope that a marriage can be fixed if only changes were made, but in time realize that the marriage is over and nothing further can be done to change that fact. It is only when acceptance of the situation comes that the obsessive thoughts will stop and the healing process can begin.[4]

"When parents go to war over their children, the collateral damage is often devastating. Shattered relationships, consuming rage, and life-long bitterness are commonplace," explains Dr. M. Gregg Bloche, M.D., J.D.[5] Parents are threatened by the potential loss of their children to the other parent. Their new roles in their children's lives can change dramatically.[6]

As individuals in conflict in family law cases often cannot resolve their own problems, they turn to lawyers to not only handle their legal case, but also to take on roles as their financial planner, employment coach, marriage counselor, personal therapist, child psychologist, and friend to talk to. Attorneys are ill prepared to wear all of these hats, and have few resources to offer as an alternative, contributing to the client's desperation. The emotional component of the case clouds the client's judgment about the attorney's representation and whether the lawyer did a good job for them. At the same time, the financial burden of attorneys' fees, expert witness expenses, and court costs throughout the family law case, impacts a client's view of the result often resulting in criticism that the attorney just wasn't that good – or worth the money spent.

With the emotional component of family law cases often affecting the client's perception of the legal work performed by the attorney, lawyers who concentrate in this field should consider the high potential for legal malpractice claims and complaints filed with the Kentucky Bar Association. By taking a proactive approach to these concerns, the family law practitioner can avoid being on the other side of a lawsuit or bar complaint.

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"If I had a formula for bypassing trouble, I would not pass it around. Trouble creates a capacity to handle it."

Oliver Wendell Holmes Jr.

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Legal Malpractice Claims

A confluence of factors, beginning in 2002 and continuing since that time, increased the malpractice risk to attorneys in family law matters.[7] In Kentucky, claims predominate in the area of division of marital property, focusing on the parties' property settlement agreements and Qualified Domestic Relations Orders (QDRO) for ERISA plans. Additionally, court decisions concern the duties attorneys owe to clients in custody litigation.

The failure to properly evaluate assets subject to division for a divorce property settlement agreement and to inform a client of her right to obtain an independent valuation resulted in a jury verdict against an attorney when it determined the wife should have received $162,100 from her ex-spouse, not the $1,500 she actually received.[8] At issue was the value of six of the husband's businesses he deemed worth $3,000 that the wife's attorney did not contest. Although the appellate courts reversed the case, determining that the malpractice claim was time-barred as it was not brought within one year of the date of the discovery of the alleged malpractice, the import of the case to practitioners is clear. To avoid an issue about what advice the attorney gave as to a value of the asset, or the right of the client to have an independent valuation, language in the parties' property settlement agreement should be included to clear up that point. For example, when referring to the value of land, the attorney should state:

> "The parties are the owners of real estate located at (address) valued at $ (number)... The parties have agreed upon the value of the real estate for purposes of division of assets and are not requiring an appraisal of the real estate to be performed despite the fact that they have the right to do so."

Similarly, in evaluating pension and profit-sharing plans, attorney error in the preparation of a QDRO, the failure of the QDRO to include the proper language, and failure to process the QDRO correctly have been the subject of malpractice claims. If an attorney anticipates a potential claim in this area, there are several options available to the practitioner. First, a company or individual who specializes in the preparation of QDROs can be retained to assume the responsibility for the document. Second, if the client lacks the funds to obtain this service, the attorney can utilize language in the parties' property settlement agreement to explain who is responsible for preparing the QDRO; what form is to be used for its preparation (i.e., the form provided by the employer or a generic form); what the QDRO is intended to resolve between the parties (an equal division of the benefits between the spouses, etc.); and if the QDRO fails to do so, what relief the other party has. Sample language can include:

> "The parties agree that the QDRO should direct payments and benefits to the correct spouse as set out in this Agreement. If payments and benefits are incorrectly paid to the wrong party, the party who incorrectly receives the payments or benefits will return them to the Plan Administrator within ten (10) days of their receipt so that the Plan Administrator can pay said payment or benefit to the other party."

This sentence provides an avenue for relief in the event the QDRO does not operate as envisioned, the document is not properly filed with the employer's Plan Administrator, or not followed by the Administrator as written.

The courts have attempted to allow the parties to value their respective assets by requiring the filing of Preliminary Verified Disclosure Statements[9] and Final Verified Disclosure Statements.[10] However, not all parties or courts utilize these forms, especially in those cases in which the parties have reached an agreement. To avoid a trap in not requiring a client to complete this form, or to incur liability for a client not understanding the values placed on the assets, attorneys should include the following language in the parties' property settlement agreement:

> "The parties have based this Agreement upon the information provided in their respective Preliminary Verified Disclosure Statements - AOC 238, exchanged between the parties during this divorce action."

And, to further avoid future problems about items not disclosed by the other spouse, the following statement should be added if a disclosure was not filed:

> "Each party waives the requirement that the other party file a Preliminary/Final Verified Disclosure Statement."

Documenting adverse rulings in family law cases, and properly disengaging as attorney for a party in child custody litigation, is proactive in avoiding legal malpractice claims. Correspondence with a client by certified mail notifying her that a petition for custody had been dismissed and advising her of her right to appeal and the deadlines for the appeal[11] should be used to establish the time period for a statute of limitations to run. Similarly, utilizing closing letters when the divorce is over, with a checklist of items for the now-divorced client to complete, such as notifying employer of change of marital status, changing beneficiaries on life

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"It's not the load that breaks you down, it's the way you carry it."

Lena Horne

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insurance policies and retirement benefits, etc.,[12] can limit the risk of potential claims from clients, or their heirs, who contend the former clients were not made aware of these requirements.

Family law practitioners can take further solace that, while they can be sued by an opposing party for being successful for their own client while undermining the opposition, there is no legal duty owed by an attorney to the opposing party. Thus no actionable claim can be stated.[13] Similarly, when a former client is found in contempt of court for not following a court's order, her trial attorney cannot be held negligent for damages when the former client is incarcerated.[14]

Referring clients to other professionals for assistance is also proactive when assisting the client in dealing with the stressors of a family law matter. Most health/hospitalization insurance plans include an employee assistance program (EAP) that covers the employee, spouse and family members for counseling. A client's family physician can be asked for referrals for mental health- related problems. The county property valuation administrator can assist with the valuation of real property if funds are not available to retain certified appraisers. Certified public accountants and tax preparers can assist with tax considerations, while human resources personnel and their company pension plan administrators can advise regarding pension and retirement benefit plans. Local bankers can assist with financial planning matters such as refinancing the marital residence, purchasing equity interests, and dividing Individual Retirement Accounts. Utilizing persons in their respective areas of expertise can shift responsibilities for non-legal matters to allow the attorney to deal with the legal issues of the case.

Ethical Considerations Uniquely Applicable To Family Law Cases

As with any area of the practice of law, the "...(f)ailure to comply with an obligation or prohibition imposed by a Rule (of Professional Conduct) is a basis for invoking the disciplinary process."[15] Violations of a Rule does not in and of itself give rise to legal action against an attorney, nor does it create a presumption in such a case that a legal duty has been breached.[16] As the Supreme Court notes, the Rules of Professional Conduct were not designed to be a basis for civil liability, and they can be subverted when they are utilized by opposing parties as a procedural weapon in litigation.[17] However, while the Rules do not establish a standard of conduct by a lawyer, the lawyer's violation of a Rule nevertheless may be considered evidence of a breach of the applicable standard of conduct.[18]

Ethical requirements that an attorney be competent[19] and diligent[20] in family law matters are no different than other aspects of practice. Some attorneys, however, are of the mistaken impression that family law cases do not require any level of expertise. Before taking the occasional family law case, an attorney should ask herself if she possesses the legal knowledge and skill required, and is willing to be thorough and prepare at the level necessary for the proposed representation.[21]

The scope of representation in a family law case should be discussed thoroughly with a client and documented either in a letter of engagement or written fee agreement so there is no misunderstanding as to the duties and responsibilities of the attorney.[22] For example, is the attorney negotiating a property settlement agreement, or only drafting a document evidencing what the parties have already agreed should be the division of marital assets? Is the attorney advising on tax consequences of the terms of the parties' property settlement agreement as they relate to child exemptions or head of household designations? Is the attorney assuming the responsibility for preparation of the documents needed for the transfer of a marital interest in real estate, the refinancing of the mortgage loan against the marital property, or the preparation of the QDRO? Care should be taken so that the client understands what legal work the attorney is actually providing.

Communication with a client is mandatory for all areas of the legal practice but because of the highly-sensitive area of family law, an attorney must make a conscious effort to promptly consult with a client on pending matters; inform a client of any activities affecting their case as soon as developments occur, and reply thoroughly when information is requested by the client.[23] Explaining issues in a manner "to the extent reasonably necessary to permit the client to make informed decisions"[24] requires the attorney to communicate at a level the client understands. Again, because of the emotional nature of family law cases, face-to-face meetings may be required to confirm the client understands the options available and the consequences of each choice. For some clients, communications by telephone or email may suffice, but the attorney will have to gauge the level of contact needed to meet the ethical duty owed to the client on a client-by-client basis. Copying clients on all correspondence with opposing attorneys, expert witnesses, and court personnel is always necessary, as well as furnishing the client with

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"Advice is what we ask for when we already know the answer but wish we didn't."

Erica Jong

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copies of all pleadings filed with the court. It can never be alleged that a client was not adequately informed when an attorney provides copies of all statutes cited in court pleadings, as well as copies of any legal authority on the issues at hand.

Ethical duties are also owed to opposing counsel in family law cases.[25] While the stress and strain between the parties in these types of cases can increase the volatility of the situation, attorneys must work to take all steps necessary not to increase the emotional level in family law matters by being respectful to opposing attorneys. Returning phone calls to opposing attorneys promptly, and not making personal attacks on opposing attorneys or derogatory statements about the parties is encouraged. Harassing opposing counsel by filing frivolous motions, misusing or overusing emails or facsimiles, and withholding expert reports or exhibits to gain a strategic advantage is not warranted.

At the same time, an attorney's ethical responsibilities to the court cannot be overlooked. Utilizing an *ex parte* proceeding to gain a preliminary order of custody, for example, when a noticed motion and hearing will suffice should be avoided.[26] Making false statements to the court about the facts of the matter is just as serious as failing to correct false statements made before the court by a client or third party.[27] Monopolizing the family court docket with multiple motions on repeated occasions does not meet the attorney's responsibility to use reasonable efforts to expedite litigation.[28] Instead, the attorney should make a good faith effort to seek an agreed order to resolve disputes, reserving to the court those matters about which the parties have been unable, in good faith, to agree.

Risk Management Guidelines for Family Law Practice

What follows is a recap of the points made in this article to prevent legal malpractice and bar complaints in family law matters:

1. Make referrals to other professionals for your clients as appropriate:
    a. If client/spouse is insured, refer to family doctor for counseling and referrals for mental health-related problems.
    b. Appraisers for valuations (real estate, businesses, etc.).
    c. Tax Preparers/CPAs for tax considerations with assets.
    d. Bankers (financial matters such as refinancing; purchasing equity).
    e. Certified Divorce Planners.
    f. Employers' Human Resources Office (retirement issues).
2. Make Property Settlement Agreement SPECIFIC as to who is doing what and why, and set deadlines for steps to be taken.
3. Shift responsibility onto client to obtain documents such as:
    a. Copies of deeds, mortgages, notes, etc.;
    b. Financial records from lending institution (applications; appraisals);
    c. Pension plan documents;
    d. Life insurance policies; and
    e. Copies of all financial records, etc.
4. Send a closing letter with checklist of items for the client to do after the representation is terminated so that client cannot claim she was not told.
5. Follow these "Guidelines for Professionalism" uniquely applicable to family law practitioners:
    1. Do not churn a case.
    2. Do not engage in economic harassment.
    3. Do not participate in vindictive litigation.
    4. Do not do ANYTHING to unnecessarily increase the emotional level of a family law dispute.
    5. Prepare the client to participate in mediation as a meaningful process.
    6. Do not make personal attacks on opposing attorneys and avoid making derogatory comments about the other party.
    7. Use the *ex parte* process sparingly and only in emergencies.
    8. Do not harass opposing attorneys via misuse or overuse of faxes or emails.
    9. Return phone calls to opposing attorneys within a reasonable time period.
    10. Do not withhold or delay exchanging expert reports or exhibits in order to gain a strategic advantage.

Conclusion

A legal practice concentrating in family law cases can be a challenging, yet rewarding experience, for a practitioner. However, because of the emotional roller coaster nature of such cases, and the varying reactions each client will have depending upon the case's outcome, attorneys should be

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"If everyone is thinking alike, then somebody isn't thinking."
George S. Patton

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mindful that they are more likely than most practitioners to be a target for a legal malpractice or bar association disciplinary complaint.

[1] United States Mental Health Association, "Divorce Support" by Cathy Meyer, Editor

[2] Id.

[3] Id.

[4] Id.

[5] M. Gregg Bloche, M.D., J.D., "Child Custody: When Parents Go To War" in The Hippocratic Myth (March 2011)

[6] Id. at 5.

[7] See, Lawyers Mutual Insurance Company Risk Manager, Winter 2003

[8] Faris vs. Stone, 103 S.W.3d 1 (Ky. 2003)

[9] AOC Form 238; See, FCRPP 2

[10] AOC Form 239; FCRPP 2

[11] See, Marshall vs. Samuel, 2003-CA-001412- MR (Ky. App. 2004)

[12] For a suggested list of these items, refer to LMICK's Risk Manager, Spring 2005

[13] See, Collins vs. Brown, et al., 2007-CA-00847-MR (Ky. App. 2010)

[14] Benton vs. Boyd & Boyd, et al., 2010-CA-002058-MR (Ky. App. 2012)

[15] SCR 3.130 at Preamble XX

[16] Id. At XXI

[17] Id.

[18] Id.

[19] SCR 3.130(1.1)

[20] SCR 3.130(1.3)

[21] Id. at 1.1

[22] Id. at 1.2

[23] Id. at 1.4

[24] Id.

[25] See, SCR 3.130(3.3) and (3.4)

[26] See, SCR 3.130(3.3)

[27] Id.

[28] SCR 3.130(3.2)

FAIR DEBT COLLECTION PRACTICES ACT MALPRACTICE CLAIMS AND THE BONA FIDE ERROR DEFENSE

The FDCPA (15 U.S.C. §1692 *et seq.*) imposes virtually strict liability for consumer debt collectors who violate any of the Act's numerous prohibited conduct and required conduct provisions. This law spawned a cottage malpractice industry capitalizing on debt collector lawyers who carelessly or inadvertently violate the Act. While often the claims are meritorious, many are weak or frivolous filed by claimants hoping for a quick nuisance settlement. In either case a claim can be expensive and time consuming.

The first risk management principle for consumer debt collection lawyers is to know what you are doing by meticulously complying with the Act. Second, understand and comply with the requirements for use of the bona fide error defense provided for in the Act. To assist lawyers in preserving this defense, this article provides an overview of the bona fide error defense and offers risk management suggestions for implementing internal controls to satisfy the requirement that the debt collector maintain procedures reasonably adapted to avoid a bona fide error.

Bona Fide Error Defense

15 U.S.C. § 1692k(c): A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

A recent New York court decision* succinctly explained the bona fide error defense as follows:

To avail itself of this defense, a defendant must prove:

(1)the presumed FDCPA violation was not intentional;

(2)the presumed FDCPA violation resulted from a bona fide error; and

(3)that [the defendant] maintained procedures reasonably adapted to avoid any such error."

The procedures need not be "foolproof," but must constitute a "reasonable precaution" to avoid the error at issue. The bona fide error defense is an affirmative defense, and the defendant bears the burden of proving its elements at trial by a preponderance of the evidence. To survive summary judgment, a defendant must make a showing sufficient to establish the existence of, or at least a factual question as to, every element of the defense. *See* Fed. R. Civ. P. 56(c)…. (*citations omitted*)

**Lee v. Kucker & Bruh, LLP And Kucker* (No. 12 Civ.04622 (LGS) US District Court, S.D. New York (2013).

Is an Unintentional Mistake of FDCPA Law a Bona Fide Error?

Initially there was a split of authority whether a lawyer making an honest error in misinterpreting the FDCPA could use the bona fide error defense for a claim resulting from that error. A minority of courts, including the 6th Circuit Court of Appeals, held that the defense in §1692k(c) is not limited to clerical or factual errors, but extends to mistakes of law.

The US Supreme Court settled this issue in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S.Ct. 1605 (2010). The Court held that "[t]he bona fide error defense in §1692k(c) does not apply to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA…. A violation resulting from a debt collector's misinterpretation of the legal requirements of the FDCPA cannot be 'not intentional' under §1692k(c). It is a common

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maxim that 'ignorance of the law will not excuse any person, either civilly or criminally.' " (*citation omitted*)

The Court found that lawyers may assert §1692k(c) for defense of violations resulting from qualifying factual errors and clerical errors. The Court's only example of factual error is the "factually mistaken belief … that a particular debt arose out of a nonconsumer transaction and was therefore not 'covered' by the Act."

The Court left open the question whether the bona fide error defense could be asserted when the error concerned state or federal law other than the FDCPA. The Court determined that since the *Jerman* "case involves only an alleged misinterpretation of the requirements of the FDCPA, we need not, and do not, reach those other questions."

What Are Procedures Reasonably Adapted To Avoid Any Error?

Horror Story: The *Lee* case cited above is a classic example of a firm failing to have procedures in place to avoid error. In attempting to collect alleged back rent from Lee, the firm relied exclusively on two reports supplied by the client. After having no success in collecting back rent, the firm commenced eviction proceedings against Lee. When the firm realized that Lee was actually current on his payments the firm discontinued the eviction action. Lee then sued the firm and the client for violation of the FDCPA. The firm asserted the affirmative defense of bona fide error.

In evaluating this defense the Court found that the delinquency reports the firm received from the client were suspect because one showed a payment that was not subtracted from the amount of the debt claimed. A second report showed the debt owed had increased. The increase was the result of the client not only failing to credit Lee with the payment that had been received, but instead adding it to the amount owed. Not withstanding these apparent errors in calculation, the firm made no effort to verify the accuracy of the reports with the client.

The Court then looked to the firm's procedures for avoiding error. Lawyer Kucker's testimony when asked about these procedures is a classic of a sort (*Could this be you?*):

> Q: And is it also your testimony that your firm, you and/or your firm had reasonable procedures that had been adopted to avoid the error?
>
> A: Yes. It's called my law license.
>
> Q: What other reasonable procedures, if any, were adopted to avoid the error . . .?
>
> A: I believe — I believe that as an attorney, since I am ethically mandated to understand the law, that my law license is — and my good standing in the bar . . . are reasonable procedures under the statute. . . .
>
> Q: So what specific procedures did you and your firm adopt to avoid violating the Fair Debt Collection Practices Act?
>
> A: ... [T]he law firm is responsible for all its paralegals and its process servers, everything is under the auspices of the firm . . . I believe in this circumstance the difference between debt collectors who are not attorneys and debt collectors who are attorneys, because certainly whether I have a manual or I go listen to somebody's lecture, it doesn't provide any greater obligation for my firm to have procedures to avoid errors in the litigation than my requirement that as attorneys we follow the law and don't violate it in the process.
>
> Q: So what specific procedures did you and your firm adopt to avoid violating the Fair Debt Collection Practices Act?
>
> A: I believe I answered the question.

The Court summed up its denial of the bona fide error defense and ruling in favor of Lee as follows:

> Defendants had no procedures designed to avoid discoverable errors in their client's computation of the amount due. Their sole procedure was to rely blindly on their client's business record maintained in the regular course of business. The Court need not reach the question of what procedures might have been adequate, as well as practical under the circumstances, to avoid liability for the error that occurred here, such as asking the client to verify in writing whether a tenant received a SCRIE or another form of rent subsidy, providing training and protocols for document examiners to detect irregularities, or maintaining procedures for employees to follow up with the client when the information provided is questionable. While the court makes no finding of what procedures would have been sufficient, the absence of any procedure to avoid discoverable errors clearly is insufficient. On the undisputed facts, Defendant cannot satisfy the third prong of the bona fide error defense. No reasonable jury could conclude that Defendants' procedures were reasonably designed to avoid the type of error that occurred in this case.

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"If you want to test your memory, try to recall what you were worried about one year ago today."

E. Joseph Cossman

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Effective Procedures: Firms that have successfully used bona fide error as a defense presented evidence of some of these procedures:

1. Leadership:
   - Employment of compliance manager who oversaw application and implementation of FDCPA collection safeguards.
   - Appointment of firm's senior principal to be responsible for ensuring compliance with the FDCPA.
     - The principal attended conferences and seminars, subscribed to trade publications, distributed relevant cases to the attorneys, provided all employees (attorneys and nonattorneys) with the firm's FDCPA Procedures Manual.
     - Conducted mandatory meetings discussing FDCPA developments at least twice a year.

2. Publications and Printed Material:
   - Distribution of an in-house FDCPA compliance manual updated regularly and supplied to each firm employee.
   - Cards containing required statutory language posted on telephones used for collection purposes.
   - Subscribed to trade publications and distributed relevant cases to attorneys.

3. Training:
   - Training seminars conducted for firm employees involved in collecting consumer debts.
   - Employees sent periodically to seminars on FDCPA compliance.

4. Review Procedures:
   - Firm used an eight-step, highly detailed pre-litigation review process to ensure accuracy.
   - Review procedures used to determine whether follow up with the client is appropriate because the documents or other information provided is questionable.

5. Computers:
   - Firm's computer system was reasonably adapted to avoid errors.

Primary source for Effective Procedures: ABA/Lawyers' Manual on Professional Conduct §301:416, Statutory Liability, Bona Fide Error.

Conclusion

Many lawyers, especially those practicing as sole practitioners or in smaller firms, resist developing detailed written operating procedures, seeing them as unnecessary for the scale of their practice. The risk management error of this kind of thinking is never more obvious than in the application of the FDCPA bona fide error defense. You must have reasonable procedures in place to avoid error to avail yourself of this defense. We recommend that you review the five categories listed above of effective procedures and tailor a program for your practice that qualifies as "reasonably adapted to avoid error."

RISK MANAGING ADVICE TO CLIENTS ON SOCIAL MEDIA MATTERS

You may have heard of the Virginia lawyer who was required to pay opposing counsel $542,000 and was suspended from practice for five years for advising a client to delete parts of his Facebook page. The lawyer represented the client in a wrongful death suit. The client's wife was killed when the defendant's cement truck crossed the centerline and collided with the client's car in which he and his wife were riding. After the defendant's lawyers sought access to the client's Facebook page, the lawyer had a paralegal advise the client to clean it up. As a result of this advice the client deleted 16 photos including one in which the client, an allegedly distraught widower, was holding a beer can and wearing a T-shirt with the inscription "I ♥ Hot Moms."

Once again the Internet creates new ethical and legal issues for lawyers likely not covered when you were in law school – think Facebook, Twitter, Friendster, Flickr, LinkedIn. As one wag put it: "There's no limits to human stupidity as far as what you can put on a Facebook page." This truism is now seen as an opportunity to discover information about litigants that undermines their position or can be used as impeachment.

In the absence of any known Kentucky authority, the following guidance from an excellent New York ethics opinion* is offered for your analysis of the issues. The Ethics Committee considered the question in the context of a civil action: "What advice is appropriate to give a client with respect to existing or proposed postings on social media sites." The Committee concluded that:

> Lawyers should comply with their ethical duties in dealing with clients' social media posts. The ethical rules and concepts of fairness to opposing counsel and the court, under RPC 3.3 and 3.4, all apply. An attorney may advise clients to keep their social media privacy settings turned on or maximized and may advise clients as to what should or should not be posted on public and/or private pages …. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of

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evidence, an attorney may offer advice as to what may be kept on "private" social media pages, and what may be "taken down" or removed.

The Committee summed up its opinion as follows:

It is permissible for a lawyer to:

- Review what a client plans to publish on a social media page in advance of publication and those that have already been published.
- Guide the client appropriately on social media activity to include formulating a corporate policy on social media usage.
- Counsel a witness to publish truthful information favorable to the lawyer's client.
- Discuss the significance and implications of social media posts (including their content and advisability).
- Advise the client how social media posts may be received or presented by the client's legal adversaries and advise the client to consider the posts in that light.
- Discuss the possibility that the legal adversary may obtain access to "private" social media pages through court orders or compulsory process.
- Review how the factual context of the posts may affect an adversary's perception.
- Discuss possible lines of cross-examination.

It is not permissible for a lawyer to:

- Direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim; an attorney may not participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.

This opinion is sensible and consistent with the Kentucky Rules of Professional Conduct. It is a good place to start research on a social media ethics issue and is readily available with a Google search. Do not forget to avail yourself of the KBA Ethics Hotline if in doubt about the proper advice to give on social media issues.

**Advising A Client Regarding Posts On Social Media Sites, New York County Lawyers Ass'n Comm. On Professional Ethics, Op. 745, 7/2/13.*