

# How Not to Sabotage Your Case

By BRIAN M. KARPFF & MAXWELL J. DAUERMAN

**I**n this modern cellphone era, most everyone carries around what is tantamount to a personal computer in their pocket, making electronic data a key player in family law cases. No doubt one would be hard pressed these days to have a client who does not have a Facebook page or Twitter handle. And most people don't stop to think about how uploading a photo at the beach or a status update regarding their Mercedes can come back to haunt them when they become a party to litigation. Worse yet, a party to a divorce does not anticipate how a social media "check-in" at the local jewelry store with a paramour can make that venture a much more expensive shopping spree.

There are so many ways a party can become exposed to liability or eventually create a litany of damning evidence in the legal process known as "discovery"—the process by which the opposing side can, by law, require you to turn over all sorts of documents, photos, social media output, and other information about yourself. This article, therefore, aims to help you understand how best to keep you, both before and after you are involved in a divorce, from sabotaging your case.

## Social Media

### Dos & Don'ts

The very first thing that a party to a divorce should do is change his or her passwords for *everything!* This includes logins, cellphone codes, emails, social media accounts, Amazon, etc. Don't change it from ILoveShopping1 to ILoveShopping2—get creative. It may even behoove you to create an entirely new email account that is not given to anyone *except* your lawyer. You can typically do this for free, and it will help provide you a safe space for communication.

Now, just because you are engaged in a family law matter does not mean that you need to entirely cease social media usage or go totally incognito. But think before you

post. If you would be embarrassed for your mother (or your judge) to view the post, don't post it. Change your account privacy settings to the highest level possible. For example, you can customize your Facebook profile so that only certain friends can see your posts, your personal approval is required before anyone can "tag" you in a post or photo, and only limited access is given to your past posts. Similarly, Instagram allows you to make your account entirely private, requiring your approval before someone can see your photos. Changing your social media settings is a simple process, and most of these sites provide easy, step-by-step directions.

An old adage goes: "You can only control what you can control." This holds especially true in the digital age, as you cannot always monitor what is posted by others. So, before you take that picture with your "newly single friends"—at the local bar ... with the band with the cute lead singer ... on a Wednesday night when you are supposed to be at home with your children—remember that it could "go viral" among people who know you, even if you aren't tagged in it. Although you could de-tag yourself, it could be too late by the time you discover it and, generally, what goes on the Internet stays on the Internet. And even if you aren't tagged, you are still in the photo. If your friend made the photo "public," then you are out there for everyone to see. Discuss with your friends "no-post discretion" when taking photos.

Although rules vary by state, there is a general principal that reigns supreme: *do not delete past posts or photographs!* At least, do not do this before consulting your lawyer, as many states make this a punishable offense. This kind of deletion can be considered "spoliation," more commonly known on *CSI: Miami* as destroying or tampering with evidence. Even if it is scrubbed from your personal profile, the actual social media providers have back-ups, and other websites may have already



“crawled” your page, placing your content on countless other webpages. Thus, it will be found. Further, if you are responding to social media discovery requests, those very posts could be considered relevant, and your deletion may be a violation of discovery rules.

As you traverse through your proceeding, there will no doubt be a flow of new individuals who enter your life. This is not the time or place to finally have that one-thousandth follower. *Do not* send friend requests to or follow the opposing counsel, potential witnesses, or judges. Your lawyer should be very careful with this, as he or she should not be friends with the opposing party, either. If you do receive a request for a follow from one of these individuals, tell your lawyer! There are many rules that exist that may require disqualification, sanctions, or more.

Social media has created an outlet for individuals to share their interests, thoughts, hopes, frustrations, desires, and political beliefs. For many, this is therapy; it allows them to connect with thousands of like-minded or unlike-minded individuals with the click of a button. During the difficult process of divorce, one may want to use this

as an outlet of sorts. *Be careful.* Do not discuss the case online. What may seem like an innocent post to you could be interpreted in many different ways, creating a potential headache on top of your existing heartache. Further, it could result in a breach of attorney-client privilege. Simply put, this is a personal matter that should not be shared with that guy you haven't seen since high school but who is always asking for Candy Crush help.

Many times, a divorcing party is already “involved” with another person. Even if this is a “secret,” it likely will not stay that way for long. This new paramour will quickly be identified as a person of interest in the case. As such, what he or she posts on social media will be under a microscope, too, and potentially, attributed to their counterpart (you). Remember that there is no privilege between an adulterer and his accomplice, so any pillow talk about what you discussed with your lawyer is now discoverable, and, if your new love interest isn't already made a witness, he or she may be required to be one. The same rules apply for parents, siblings, best friends, barbers, personal trainers, and the like.





## Electronic

### Dos & Don'ts

Once a divorce case has been filed (or becomes imminent), you may no longer have the access that you once had to certain information—especially if the opposing party took the first step discussed in this article (the changing of passwords) to the next (and wrong) level of locking you out of financial accounts. As such, at the top of your priority to-do list should be the back-up of all relevant information you have access to (obviously, this does not mean you should violate someone's privacy). Find a safe storage space, such as an external hard drive or private Dropbox account, and download emails, photographs, text messages, business records, account statements, insurance policies, important documents, and the like. If a list or index is maintained identifying these important documents, it will make their use in the discovery process that much easier. Use password protection on your storage mechanism to ensure the utmost security—but make sure you don't forget your password! Maintain this backup in a safe location because it may be your last and only shot at unfettered access to this critical information. Just as with prior social media postings, do not delete or alter documents that are electronically maintained. This, too, could be deemed spoliation of evidence.

**At the top of your priority to-do list should be the back-up of all relevant information to which you have access.**

Do not "brag" about your preparation or about what "dirt" you have found on your husband/wife. Even though it might seem like a good idea to show those "private photos" to your soon-to-be-ex-spouse's co-workers, it isn't. Instead, it could open you up to more liability and even create long-term consequences for the relief you obtain (think: if your spouse loses his or her job, how

will that affect you financially, whether you are the payor or receiver of spousal support?). In addition, there may be local rules or automatic orders that provide specific guidance as to how electronic data is to be maintained, and deleting this may result in a direct violation and a major slap against you by your judge.

Many times, clients believe they have a future as a private investigator. Sometimes they think their case will be a "slam dunk" because they secretly recorded something their spouse said. In many states, however, recording a person without their consent is a serious crime. In the event you have done that, not only are you prohibited from using this information, you could actually wind up

paying or receiving your first year of alimony from or into an account with the Department of Corrections. Prior to becoming Magnum P.I., consult with a lawyer to determine whether you live in a one-party or two-party consent state. The same follows for logging into someone else's email or social media account. By reading your spouse's emails with lawyers, you are violating the attorney-client privilege and not gaining a leg up, and you may even be guilty of wire-tapping—a federal crime. Following this advice will help ensure you wind up "in the black," rather than in the orange (jumpsuit).

### Dealing with the Press and Other Media

When there is a case involving a celebrity or a unique situation, do not be surprised to find the media scouring for a juicy tidbit to fill the twenty-four-hour news cycle. It is important not to discuss the case or try the case in the media. It is likely that the content will be twisted and cause more harm than good. For example, look no further than a bankruptcy case involving the famous music artist who posted photographs referencing the case while also displaying large stacks of hundred-dollar bills. Further, no lawyer wants to find out information about a client from TMZ or a Google News Alert. However, if an opposing party is the subject of many news reports, such reports can provide research avenues—and another way to conduct free discovery.

### How to Filter Advice from Others

Unfortunately, chances are that you will not be the first person you know to go through a family law proceeding. Even if you are, there will always be someone who knows someone who *claims* to have gone through *the exact same thing* and does not understand why you are not getting the same result. Be wary of all the different kinds of advice you will seek and receive, as it is not created equal. Relying on an advice column, for example, may not be wise, as it could be outdated or based on incorrect research. Further, "legal advice" found on the Internet does not create an attorney-client relationship, one that allows a client to hold the professional responsible for the purported guidance. And, the friend (or friend of a friend) *did not* have the same exact facts as you, with the same judge, same mediator, and often, even the same law in effect. Instead, it is important to remember that every case is a snowflake. Each is unique and, no matter how similar they may appear, no two are the same. Expectations need to be managed and tempered, as allowing false hope to exist will only create more stress in an already-difficult experience.





With that being said, ask questions and become educated! Do not forget: this is your case and you are the captain of the ship. Without asking for the proper guidance, it will be difficult to avoid the flashing lights and sirens along the rocky coast.

## Conclusion

This article has provided you some tips to help you avoid sabotaging your case by actions that might otherwise seem benign or routine. Following these tips will allow you to focus on the important things and, hopefully, reach a quick and easy resolution.

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# How Do You Know You Are Ready for Divorce?

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## ● Consider the Custody Laws of Each State

Additionally, financial and custody-related issues in divorce are covered by state, not federal, law. The laws of the state where you live may work better or worse for you than the laws of the state to which you might be moving.

## Have You Exhausted Other Options?

Before you start the divorce process, you might want to see if there is a way to save your marriage.

## ● Might You Be Able to Save Your Marriage?

Have you and your spouse discussed trying couple's therapy? Is it possible that one or both of you would benefit from individual therapy? If you are concerned about your financial security, can you address those concerns through a post-nuptial agreement? Would doing so give you the comfort you need to stay in the marriage?

## ● Legal Separation Is Also an Option

A legal divorce isn't for everyone. Some couples choose to live separate from one another, but stay married. The main factors that prompt couples to follow this path are the ability to file joint income tax returns and the continuation of health insurance coverage.

## Conclusion

To be sure, there are some circumstances where you can't wait to divorce, but when you can, the issues raised above should give you some things to consider in deciding if the time is right for you. FA



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