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Q&A with Ballard Spahr's John B. Kearney

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Q How did you get involved with Aspatore's Inside The Minds series to write this book chapter, titled "Current Trends in Litigation Involving the Use of Social Media"? What is the book about as a whole?

A The editors at Aspatore took notice of a recent article I wrote on the discovery of Facebook postings in civil litigation and asked if I was interested in being a part of their latest project. The book is titled *Understanding the Use of Social Media in Litigation: Leading Lawyers on New Evidence Collection Methods and Necessary Precautions for Clients*. Lawyers from various firms across the country (Baker Botts, McGuireWoods, Weil, Gotshal & Manges, among others) supplied chapters.

Q When did you realize that social media was going to have an impact on court cases in various ways?

A In the last five years, I noticed how people, mostly under 40, were willing to share with the world through social media just about everything they did and thought. For litigation lawyers, information is power. The more you know about the opposing party, the better you can control your case, modify strategy, and shape a more favorable outcome. The information being revealed publicly in things like Facebook postings was especially valuable because usually it was not filtered by the person's attorney, with the result that the information sometimes revealed more than one would ever get from an interrogatory or a deposition. Once that light went on, the fight over Facebook began.

Q You suggest that searching social media accounts can help bolster an attorney's case. Overall, do you think that assistance is a positive aspect of the trial process?

A Yes. It is just another way of discovering information about parties, witnesses, and potential jurors. We always did it—now it is easier to do. It appears there is a large class of people who want to say, "Look at me! Look at me!" about all they do.

Q What are a couple of ways using information from social media accounts can benefit a case?

A First, cross-examination. A plaintiff claims he/she can't do a certain activity post-accident. A photo is found on Facebook that shows him/her engaging in such activity vigorously.

Second, picking a jury. Running the names of potential jurors through Google or services like X1 Discovery can retrieve a lot of publicly posted information from social media. The more you can learn about potential jurors, the better you can decide if you want them on the jury deciding your client's case.

Q What is a way that using information from social media accounts can deter or harm a case?

A Picking a jury. A social media search might turn up more information than you can process in the time frame of jury selection. Also, reliance on social media searches rather than gut instinct developed from your experience may not serve your client well.

Q Can you give an example of this?

A The postings are just one piece of information to evaluate, as are the appearance and responses of the potential juror during voir dire. You can't rely on one to the exclusion of the other. But, in my experience, you can tell more about a person from seeing them interact with others and hearing them respond to questions.

Q Which practice areas do you think will be most affected by the evolving inclusion of social media?

A Family law, personal injury, and criminal defense. I think the gathering and use of this information to challenge jurors for cause, especially in regard to comments on Twitter and other sites about attitudes toward criminals, certain racial groups, and the judicial system will occur more often in the future.

Q What types of rules and regulations are being determined regarding the legal and fair use of social media in trials?

A [There are] ethics opinions from various states over issues such as the use of Facebook "friending" of parties, witnesses, and jurors for litigation purposes. […] If something is publicly posted, there is no reasonable expectation of privacy. We have a body of case law developed over many years that discusses what can and cannot be discovered in litigation. […] Moreover, there are

rules […] that address what contact lawyers and their staff may have with witnesses, parties, and experts. Those rules should also apply in the social media era.

Q How should lawyers approach the topic of social media use with their clients?

A If a lawyer has a client who is in litigation, especially in a family, personal injury, or criminal matter, he/she should counsel the client to stop posting and don't delete what they have posted already to avoid claims of spoliation.

Q What makes the information in a social media post more valuable to a lawyer than a verbal claim?

A If someone in an employment suit claims in a post that he/she did something (e.g., "Yesterday I went to Great Adventure"), yet later claims that he/she was home sick that day, they can be cross-examined with that posting, as it goes to their credibility in a direct and effective way.

Q How would the defense of "I didn't really mean what I said" work in regards to an inflammatory social media post? People certainly take to social media when they're most annoyed or fed up about something, and could claim the same defense.

A They would be grilled on cross-examination about the statement that they tried to downplay, and it would be up to the jury to determine if their explanation was credible […]. Jury trials often come down to credibility of witnesses. It doesn't matter substantively whether it is a social media posting or a written statement given to an insurance adjuster that the witness now tries to downplay or refute. It will still be the jury's job to judge the credibility of that witness when he/she tries to distance him/herself from what was said before.

John B. Kearney is a civil trial lawyer with extensive experience in commercial, product liability, environmental, class action, and other complex litigation. A frequent lecturer on eDiscovery, he is head of the New Jersey office's litigation group.

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