

Current Trends in Litigation Involving the Use of Social Media

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Introduction

Social media now affect all phases of litigation as the various media transform how lawyers handle cases. Lawyers scour all areas of social media to find information posted by parties about their case. Software such as X1 Social Discovery is now available, enabling one to search across a variety of social media sites (such as Twitter, Facebook, Pinterest, and Tumblr) to locate relevant information. The transformation this technology has enabled is evident, especially in personal injury cases. Plaintiffs' lawyers must counsel their clients about the need to preserve electronic evidence—previously a burden reserved for corporate defendants. At the trial stage, lawyers now search social media to evaluate potential jurors during the jury selection process.

Once trial begins, lawyers and judges must make sure jurors are not conducting their own smartphone-fueled investigation about the parties, the accident scene, the crime, the lawyers, or even the applicable law. Another concern during trial is the potential use by jurors of Facebook or Twitter to journal about the proceedings, which might prompt improper conversations about the trial with Facebook “friends” or Twitter “followers.”

Finally, the rise of social media has presented ethical issues that confront lawyers and judges in regard to limits on their own interaction with parties and witnesses through social media sites. Clearly, it is a brave new world of litigation fueled by the rapid changes in how people communicate with each other.

Opportunities for Discovery by Defendants and Risks Posed to Plaintiffs

In the early days of electronic discovery, except in cases where two corporate entities squared off in litigation, the burden of the preservation, collection, review, and production of electronically stored information (ESI) fell on corporations. Before long, plaintiffs' counsel recognized the tremendous burden of time and cost this process imposed on companies and used it for leverage in negotiations. In fact, for many plaintiffs' firms, the electronic discovery phase of the lawsuit became a central strategy.

Soon the demand for ESI became just the first step in a claim that the corporate defendant should be sanctioned because it spoliated important documents by failing to preserve every electronic record of every employee having any arguable connection to the lawsuit. Such claims often took on a life of their own, as the object of the game was to take the eyes of the court off the facts of the actual matter at issue and focus instead on what few documents were not produced (even though hundreds of thousands were).

The widespread adoption of Facebook, Twitter, and other social media tools by millions of people the world over and the tendency of people to say (and display pictures of) the darnedest things on such sites suddenly have turned the tables. Defendants now can use against plaintiffs those same arguments about what is relevant information and what are preservation obligations.

Everyone, it seems, has a computer, smartphone, or tablet. Ownership of such a device virtually ensures the presence of electronically stored information—whether in the form of e-mails, texts, tweets, or Facebook posts—on that device. Obtaining and reviewing that information (provided it is reasonably calculated to lead to the discovery of admissible evidence) is now fair game for

defendants. Moreover, plaintiff lawyers now have the obligation to ensure that their clients preserve that information or risk sanctions or dismissal for spoliation. The plaintiff lawyer who ignores this preservation obligation and does not appropriately counsel his or her client orally or through a formal litigation hold letter or e-mail risks a legal malpractice claim by a disappointed client who suddenly is told that the judge has dismissed the case or imposed significant sanctions.

Litigation Trends Involving Social Media

Several trends are evident as social media transforms how lawyers handle cases both at the pretrial and trial stages:

First, lawyers now routinely ask in interrogatories and depositions whether parties have accounts on Facebook, Twitter, and other social media services and, if so, when the accounts were opened, whether anything has been posted related to the lawsuit issues, and whether anything has been deleted since the lawsuit was filed, or, in the case of a personal injury matter, since the accident occurred.

Second, defense lawyers now routinely press plaintiffs for e-mails and other ESI relating to their lawsuits. If such ESI has not been preserved, defense lawyers are now engaging in motion practice seeking monetary sanctions and/or dismissal of claims.

Third, lawyers in personal injury and matrimonial cases now counsel their individual clients not to delete e-mails or Facebook or Twitter accounts once a lawsuit begins; lawyers concerned about best practices for risk management are providing that advice in writing.

Fourth, courts are now facing the issue of the extent to which parties should be required to produce Facebook postings, even in instances where the party had designated such posts “private” under his or her Facebook settings. Various state and federal courts are now shaping the law in this area with written opinions that explore this tension between claims of privacy versus waiver of privacy when one files a lawsuit that puts into issue the same matters (one’s past or present health) that are the subject of the social media postings (e.g., Facebook comments about one’s health or photos posted that may contradict one’s claims of permanent injury or limitation on one’s activities).

Fifth, lawyers are using social media searches to assist in picking jurors. Also, judges now are concerned that jurors may be discussing cases with non-jurors through Facebook or Twitter in ways that compromise the parties’ right to a fair trial based solely on the admissible evidence presented in the courtroom. This trend is particularly troubling in the context of criminal trials, where constitutional issues of due process and the right to confront witnesses may be implicated.

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Lawyers’ Use of Social Media at Trial

It is certain that any information one obtains about a potential juror can be of great assistance to a trial lawyer when picking a jury. In the past, lawyers in jurisdictions with severely limited *voir dire* often had little more than a name, an address, and brief answers to stock questions posed by the judge on which to judge a potential juror. Such little data often left a trial lawyer in the dark about potential jurors and made jury selection a real crapshoot. Now, however, the ability to search social

media sites for information about potential jurors enables lawyers to make more informed selections of jurors.

Courts around the country are in general agreement that a lawyer can search the Internet for information about a potential juror, provided the lawyer does not make contact with that person. Thus, for example, a lawyer cannot issue a “friend” request on Facebook to a potential juror, as that would be an impermissible communication. Moreover, lawyers must be careful to make sure any search does not generate an automatic response to the person being searched, which alerts him or her to the fact that the lawyer is searching.

So what can be done? Start with a Google search to see whether the name comes up.¹ Run searches on Facebook, Twitter, and LinkedIn, as well. Do not assume, however, that your search for John Q. Public came up with information about the person of that name in your jury pool. Double-check your information before you rely on it. Bad information can be worse than no information at all.

If you can obtain names of potential jurors ahead of time (as some jurisdictions allow), get them. That way, you will have enough time to conduct your searches and analyze the information you obtain in a thoughtful way.

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Ethical Considerations for Social Media Use in Lawsuits

Lawyers cannot ignore online sources of information to represent a client competently. Comment (8) to Model Rule 1.1 requires lawyers to “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”² States have weighed in on this issue, as well. New Hampshire Opinion 2012-13/05 notes that lawyers “have a general duty to be aware of social media as a source of potential useful information in litigation to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation.”³ Also, New York County Opinion 2012-2 notes that “Indeed, the standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on a case.”⁴

However, lawyers must exercise caution in this area. Several ethics opinions in recent years have addressed how and to what extent lawyers may use social media sites to investigate jurors.

One lesson is that lawyers may not ask jurors to grant them access to the nonpublic portions of sites like Facebook and LinkedIn by sending a seemingly harmless “friend” request or similar inquiry.⁵ Some have been concerned about whether a lawyer’s review of publicly available information about a juror becomes problematic if the site advises the juror of the search. ABA Formal Opinion 466 (April 24, 2014) did not find the lawyer to be improperly communicating with the juror in violation of ABA

¹ See, e.g., *Carino v. Muenzen*, No. L-0028-07, 2010 WL 3448071 (N.J. Super. Ct. App. Div. Aug. 30, 2010).

² See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 466 at 2 n.3 (2014).

³ *Ethics Committee Advisory Opinion #2012-13/05*, NEW HAMPSHIRE BAR ASS’N, http://www.nhbar.org/legal-links/Ethics-Opinion-2012-13_05.asp (last visited Sept. 29, 2014).

⁴ *Formal Opinion 2012-2: Jury Research and Social Media*, NEW YORK CITY BAR, <http://www.nycbar.org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02> (last visited Sept. 29, 2014).

⁵ OREGON STATE BAR, FORMAL OPINION 2013-189 (2013), available at https://www.osbar.org/_docs/ethics/2013-189.pdf.

Model Rule 3.5(b)⁶ because it was the online service, not the lawyer, that was “communicating with the juror based on a technical feature” of the site. Note that at present, if one researches a juror on LinkedIn or Twitter (to name a few sites), the researching lawyer has the option of remaining anonymous.

Not all ethics opinions on this topic are in total accord. Thus, New York County Opinion 743 (May 18, 2011) and New York City Opinion 2012-2 (2012) both concluded that a lawyer may be found to have communicated impermissibly with a juror if that juror becomes aware of the lawyer’s online research. The New York opinions emphasize the potential impact on jurors from the lawyer’s activity; if a juror becomes aware of the research being done by the lawyer, it could tend to influence the juror’s trial conduct.

[...]

Key Takeaways

- Harvest information about your opponents that they have posted themselves on social media, to use against them. When questioning the discoverability of such postings in civil litigation, the trend is in favor of it. Such information is considered closer to the truth because these posts are often composed in unguarded moments, without filters or editing by an attorney. Search all sites where your opponent may have made comments and/or posted photos or videos to develop facts contrary to the story being told, to refute those claims. Photographic evidence that belies your opponents’ claims also undermines their credibility in the eyes of the jury and requires your opponents to spend time and energy undoing the damage they did to their own story.
- Search sites such as YouTube and Instagram as sources of information about your opponent provided by others, which could also present a story or image different from what the attorney has presented. If an accident is involved, search for videos posted to YouTube that are tributes to the victims, which could contain interviews with friends and discussions of the decedent that may bring new information to light. Make time to search YouTube and similar sites for any information about the case that could possibly taint jurors who watched such a video, and include a jury charge to address this issue.
- Use LinkedIn to help locate hard-to-find witnesses and check facts related to a party’s career, including education and work history. Compare the posted information against personnel files, work applications and résumés submitted to obtain a job, searching for discrepancies that can be vital in various types of employment cases. This site is also useful in gathering information about potential jurors.
- Search for confirming or contradictory interests and activities through the pictures posted on Pinterest. Such information can give ammunition for cross-examination and support or erode a witness’s or party’s credibility.
- Try to balance concerns of privacy with discovery obligations by requesting the court conduct an *in camera* review of a party’s social media postings or appoint a special master to do so. In preparation for this task, submit a standard privilege log to guide the person conducting the review, as well as the party seeking the discovery, to the nature of the postings and the basis for withholding them. To avoid discovery of these postings, stress

⁶ MODEL RULES OF PROF’L CONDUCT R. 3.5(b) (1983).

the private nature of the information and the availability of less intensive options. Narrow the scope of the requests to convince the court it is not being done solely to harass a party. Support the request for private postings by referencing available public postings on the opponent's social media accounts. Use interrogatories, document requests, and depositions to develop the underlying record. Include a specific request for all social media content and the form in which it appears.

- Whenever possible, use social media to investigate potential jurors to help in jury selection. However, take every precaution that you do not make contact with them; i.e., do not make friend requests on Facebook or the equivalent on other sites. Make sure you understand the functions of the sites you are using to ensure that a notification is not automatically sent to the person being searched. Double-check all information before using it. Faulty information can be more damaging to the jury selection process than having no information.

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