

SOCIAL MEDIA'S IMPACT ON LITIGATION

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Word of Mouse

Social media sites are growing at a rapid pace and have pervaded both the personal and work space. Facebook. Twitter. YouTube. MySpace. Four Square. LinkedIn. Flickr. Epinion. Blogs. Message Boards. There are even sites specifically for legal professionals including Texas Bar Circle, LawLink, Social Media Law Student, Law.com, Attorneys Online, Above the Law, Justia.com, WSJ Law Blog, Legally Minded. These are just a handful of sites that work to push information out to the public, encourage user participation and user-generated content and connect people both personally and professionally.

Facebook reports over 400 million active users with a recent growth of over 50 million users in just a matter of months; 35 million update their status daily. More than 65 million users logged into Facebook using a mobile device. Twitter is now at over 105 million users. Wikipedia logged in over 15 million pages with over 68,000 visitors monthly, and Facebook's Community Pages now pull data from those pages.¹

Hundreds of large corporations have also joined the social media mix ranging from the Delta Air Lines® blog to the Ericsson® podcast to the Wells Fargo® Stagecoach Island® virtual world to the Southwest Airlines® Ding® widget. Social media sites have also become a hotspot for small businesses and mom-and-pop operators to promote and market their products and services. Nearly one in five small business owners is integrating social media into their business.² Take a look around the Facebook® and MySpace® sites, and you will see numerous small businesses promoting their products and services such as Tippy Clover, a local Houston bar; World of Good® handmade, fair trade eco gifts and products; and Story Matters™, a family history interviewing and preservation service.

With these staggering statistics, it is not surprising that issues around using social media in litigation are increasing at such a rapid pace. Whether you're an individual, small business owner or a corporation, you need to consider issues from who you are "friends" with on social sites to jury instructions on social media use to company litigation communication plans.

There are both risks and rewards to be found in the use of social media. The advantages of social media are well known. It is an opportunity to be where opinions are formed and propagated; identify gaps in products and services; obtain, share and express ideas, thoughts and valuable information; be where your customers are; keep in touch with friends; build, monitor and defend

¹ <http://www.web-strategist.com/blog/2010/01/19/a-collection-of-social-network-stats-for-2010>

² <http://mashable.com/2010/03/02/small-business-stats>

your brand and image; establish a professional network; the ability to reach large audiences in a timely manner; and a multitude of other benefits. Whether you're a judge, an expert witness, partner at a law firm or even serving on a jury, you need to stay abreast of and be alert to how using social media can affect you personally and professionally.

Reports from around the nation

A few recent examples from around the nation show that legal professionals need to be aware and cautious.

Lawyers: A lawyer in Illinois lost her job after writing comments on her blog including information about clients and confidential case details. In Florida, an attorney was reprimanded after posting comments on his blog questioning the motives and competency of a judge. ABA Model Rule 3.3³, Texas Disciplinary Rules of Professional Conduct 3.03 and most state bar rules prohibit lawyers from knowingly making a false statement of material fact to a tribunal.

Lawyers need to be aware that online information has been successfully obtained in litigation. Seeking production and preservation of Facebook accounts should now be considered as part of every defense practice through appropriate discovery processes. And plaintiffs' lawyers should also consider adapting their practices to address social media issues early on with their clients.

Through tracking social media such as blogs, message boards, and online news media, legal professionals and their consultants can study attitudes and opinions about a subject matter, client or case which can lead to more informed jury research and trial strategy.

Judges: According to a public reprimand⁴, a North Carolina judge engaged in unethical behavior by discussing on Facebook a case being tried before him. The judge and defense counsel were members of Facebook, but plaintiff's counsel indicated she was not. In violation of several Canons of the Code of Judicial Conduct, the judge "friended" defense counsel, and each of them discussed aspects of the case on Facebook, constituting ex parte communications. The judge also conducted ex parte online research about the plaintiff by doing a Google search on her and visiting her website.

Florida's Judicial Ethics Advisory Committee has gone so far as to issue an ethics opinion that Florida judges may not "friend" a lawyer who may appear before the judge.⁵ Some judges will voluntarily "de-friend" litigants while a case is before them.

Lawyers should be mindful that in some jurisdictions, judges report incidents where lawyers make statements in court that do not appear to align with their recent Facebook status updates.⁶

⁴ North Carolina Judicial Standards Commission, Public Reprimand, Inquiry No. 08-234
<http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf>

⁵ Florida Supreme Court, Judicial Ethics Advisory Committee, Opinion Number 2009-20 (Nov. 17, 2009) and Opinion Number 2010-06 (March 26, 2010)

Some court systems are now using social media tools such as Twitter, Facebook, YouTube, RSS Feeds, text messages and traditional online press releases to keep lawyers updated on anything from breaking court news and court closings to foreclosure information and lawyer volunteer opportunities.⁷

Jurors: In California, an attorney serving as a juror blogged about the case he was serving on, resulting in the criminal conviction being overturned. Proposed legislation in California would amend civil and criminal contempt statutes to allow admonishment and punishment of jurors who electronically or wirelessly discuss confidential legal proceedings. That includes computers, cell phones and laptops.⁸

You should consider providing social media instruction to the jury when necessary. After a panel of 600+ jurors was dismissed because several of them did research on the case via online sites, a San Francisco court instructed: "You may not do research about any issues involved in the case. You may not blog, Tweet, or use the Internet to obtain or share information."⁹

Clients: Parties to lawsuits are sharing or using information that can be used to get them to settle cases or to discredit their testimony. Social media site postings and photos are being used extensively as evidence in divorce proceedings¹⁰, murder and drunk driving cases, insurance fraud, custody hearings, etc. Some examples follow:

In Ohio, a defendant was charged with statutory rape. He was able to introduce evidence that the victim held herself out on MySpace as an 18 yr old¹¹ and allowed a witness to testify as to the authenticity of the photos.

Online photos are now being used during DWI/DUI sentencing. Joshua Lipton, 21, posted a photo of himself on Facebook wearing an orange prison jumpsuit with the words "Jail Bird" during a Halloween party. The Assistant Attorney General displayed the photo in court as part of a PowerPoint presentation with the title "Remorseful?" The Superior Court Judge focused in part on the photo when deciding to sentence Lipton to two years in state prison for his DUI.¹²

Companies: Have you factored in potential expenses of litigation for your company? For companies, use of social media is not yet a major issue, but it is growing rapidly and it is just a matter of time before a big case hits. Employees on social networking sites can result in a potential disaster for a company embroiled in a lawsuit. Trends in eDiscovery litigation indicate

⁶http://www.abajournal.com/news/article/facebooking_judge_catches_lawyers_in_lies_crossing_ethical_lines_abac_hicago/

⁷ <http://www.facebook.com/pages/New-Jersey-Courts/92569242329>

⁸ California Bill Number AB 2217 (Feb. 18, 2010), http://leginfo.ca.gov/pub/09-10/bill/asm/ab_2201-2250/ab_2217_bill_20100218_introduced.html

⁹ <http://socialmedialawstudent.com/featured/courts-cracking-down>

¹⁰ "Divorce lawyers: Facebook tops in online evidence," Associated Press, Leanne Italie (June 28, 2010)

¹¹ *State v. Gaskins*, 2007-Ohio-4103

¹² <http://newsblog.projo.com/2008/05/facebook-photo.html>

that courts are likely to hold companies responsible for their social media records. Imprudent statements made on such sites could prove devastating: they could disclose compromising information, reveal privileged communications with company attorneys, outline the company's litigation strategy, provide the opposing party with a strategy, violate a protective order or settlement agreement, or even provide deemed admissions of the company itself. Most companies' litigation communication plans do not account for or address this possibility.

Witnesses: Attorneys may not use subversive methods to obtain information about witnesses, including asking third parties to friend a witness, according to a recent Philadelphia Bar Advisory Opinion.¹³

In Texas, a Houston judge ordered a law firm involved in a fraud case to remove an excerpted video deposition from YouTube as an improper attempt to influence public opinion and primarily because it was not officially a "public record" and had not been properly filed with the court.¹⁴

Note that while some courts limit or ban certain uses of social media, there are still numerous jurisdictions that permit, and in fact encourage, use of social media in their courts in certain situations. In Colorado, attorneys argued that live-blogging and Tweeting a local sensational case could tip witnesses to proceedings before they testified, thus impeding a fair trial. A Colorado judge took a different approach and allowed Twitter in the courtroom stating that "...there are other manageable options and less restrictive options than shutting down the flow of information during the trial." The court further instructed witnesses to not read about the testimony of other witnesses.¹⁵

While the form may be evolving, the simple fact is the internet---and social media sites---are here to stay. You need to learn about them, the parameters around each, your jurisdiction's rules and how you can use them to your benefit and how they may be used against you or your client.

Below is list of tips for legal professionals:

- ✓ Social networking sites are here to stay so take advantage of the significant benefits they offer
- ✓ Use common sense and common courtesy
- ✓ Know and abide by the relevant rules of conduct including the ABA Rules of Conduct, the Texas Disciplinary Rules of Conduct and the rules of any jurisdiction in which you are practicing

¹³ The Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02 (March 2009). http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf

¹⁴ "Judge Orders Counsel to Remove Deposition Excerpt From YouTube," Texas Lawyer, by Brenda Sapino Jeffreys (Dec. 9, 2008).

¹⁵ "Judge Orders Twitter in the Court, Legs Bloggers Cover Infant-Abuse Trial," *The Colorado Independent* by Ernest Luning (Jan. 5, 2009)

- ✓ Be cautious of the boundaries between personal and professional conduct online
 - Be careful what you reveal about yourself
 - Be careful what you post about others (e.g., judges, clients, opposing counsel, witnesses)
- ✓ Manage your online reputation
- ✓ Utilize social networking sites to gather valuable information in litigation, keeping within ethical boundaries
- ✓ Companies/firms need to be mindful of e-discovery and record retention issues and any related duty to preserve evidence
- ✓ Consider setting up alerts or monitoring services for yourself, your law firm, clients, witnesses, etc.
- ✓ Educate, educate, educate. Educate yourself and your employees on social media uses and pitfalls.
- ✓ Establish robust social media guidelines and policies

