Social Media: The Ethical Obstacle Course for You and Your Lawyer

Sophisticated social media sites and "apps" like Facebook, Twitter, Vine, Instagram, Tumblr, LinkedIn, and Foursquare often blur the lines of ethics and legality by giving opposing parties and counsel access to details of the lives of unsuspecting parties, witnesses, other lawyers, jurors, and sometimes even judges. Lawyers often begin a case with a Google search for the parties, opposing counsel, and possible witnesses. The search results can be a gold mine of information.

Because being "connected" is increasingly rooted in being online, rapid-fire technological advances are bound to create some friction with the law. Social media is rapidly becoming a headlining issue in nearly every type of case, from complex intellectual property disputes to actions on business contracts to personal injury matters. Setting aside any debate about the merits of ubiquitous self-expression, the evolution of social media has generated significant controversy within various cases currently in litigation and, on a broader scale, within the Bar itself. This article cannot possibly address every aspect of social media discovery, but it is intended to give a broad overview of several frequently recurring issues in cases involving social media evidence:

1. What evidence can you get?
2. What if the person's profile is "private"?
3. Who can you contact?
4. What should(n't) you post?

Social Media Discovery: What Can You Get?

In February 2014, a Florida appellate court issued an important opinion concerning the permissible scope of social media discovery. The case is *Root v. Balfour Beatty Constr., LLC*, 132 So. 3d 867 (Fla. 2d DCA Feb. 5, 2014). In *Root*, the plaintiff sued a construction contractor and various subcontractors for negligence and loss of parental consortium when her son was hit by a vehicle in front of a construction site. During discovery, the defendants requested numerous postings from the plaintiff's Facebook page, including postings concerning:

- her past and present relationships with all her children, other family members, and significant others;
- her mental health history and any complaints of stress;
- her use of alcohol or other substances; and
- her litigation history.

None of the requests directly pertained to the accident, and when the plaintiff objected, defense counsel admitted it was essentially a blind inquisition:

> These are all things that we would like to look under the hood, so to speak, and figure out whether that's even a theory worth exploring.

The trial court ordered the plaintiff to respond, but the appellate court overturned the ruling, saying the defendants were on an improper fishing expedition. This holding is consistent with the general principle that discovery—regardless of whether it is paper- or Internet-based—should be aimed at relevant information which "appears reasonably calculated to lead to the discovery of admissible evidence." Fla. R. Civ. P. 1.280(b)(1), "General Provisions Governing Discovery." *See also Am. Med. Sys., Inc. v. Osborne*, 651 So. 2d 209 (Fla. 2d DCA 1995) (recognizing that discovery is improper when there is no connection between the discovery sought and the injury claimed).

The rules and legal doctrines that govern discovery pre-date the technological advances that brought us the phenomenon of social media, but Florida courts consistently apply them to requests geared toward social media information. Unless and until courts begin to announce additional or revised standards drafted with social media in mind, the overarching principles of relevance and efficiency will steer discovery even in this more complicated, and as one court put it, "novel," context. *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, *8 (S.D. Ind. 2010) ("Discovery of [social networking sites] requires the application of basic discovery principles in a novel context."). The rules were, after all, designed to be flexible and "one-size-fits-all."

In the meantime, courts will likely require careful analysis of social media content before they will order unqualified production. This can obviously benefit the producing party, but it can also be helpful for the party requesting the information, because while absolutely discoverable in the right circumstances, the volume of social media information may make efficient review and use nearly impossible without some initial culling.

The Person's Profile Is Set to "Private." Does That Change Things?

The short answer is no, but it may require more legal pirouettes to get the evidence. Users' privacy settings play a role in determining what information a lawyer can legally and ethically peruse pre-litigation, but those protections quickly fall away once formal discovery begins. In fact, the national trend appears to be toward *not* recognizing assertions of privacy made by individuals and entities who voluntarily engage in social media use.[1]

Sometimes, the most useful information is the most easily accessible. In a case from 2010, for example, a teen sued her school district when she was not allowed to bring a same-sex date to her high school prom. She requested a preliminary injunction, which the school district defeated by claiming that the student would be permitted to bring her girlfriend to the prom. Only a handful of students attended that prom. Through social media searches, it was discovered that a secret alternative prom, from which the student was excluded, was held simultaneously in a different venue. The students who attended the secret prom posted numerous photographs viewable by any Facebook user, which the student's lawyers attached to their amended complaint. The school district settled the case for a damages award and an agreement to revise

[1] The Sedona Conference® Primer on Social Media (available at https://thesedonaconference.org/ under the "Publications" tab) contains a detailed discussion of the effect a user's privacy settings have in determining whether social media evidence is subject to the protections of the Stored Communications Act, 18 U.S.C. §§ 2701-2712. Discussion of that particular issue is therefore omitted here.

its anti-discrimination policies. *The foregoing is a summary of McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F. Supp. 2d 699 (N.D. Miss. 2010).

Of course, companies using social media as an advertising mechanism do not set their pages as "private." Parties can and should expect requests from opposing counsel for posts published on social networking sites, including information about the author, dates created and edited, and even the file path. But keep in mind that discovery requests for social media information must still be tailored to the issues in a particular case.

Overly broad social media discovery requests provide rich grounds for objections, with plenty of case law spanning multiple jurisdictions to support them. While courts do not allow "unfettered access" to someone's social networking history, lawyers well-versed in collecting, authenticating, and using social media evidence have in their arsenal a valuable litigation tool to wield on their clients' behalf. *See Giacchetto v. Patchogue-Medford Union Free Sch. Dist.*, 293 F.R.D. 112, 116 (E.D.N.Y. 2013) ("unfettered access to Plaintiff's social networking history will not be permitted"). For further reading on gathering and using social media evidence in court, please see Michael R. Holt & Victoria San Pedro,[2] *Social Media Evidence: What You Can't Use Won't Help You—Practical Considerations for Using Evidence Gathered on the Internet*, 88 Fla. B.J. 8 (Jan. 2014).

Who Can You Contact?

Social media poses another dilemma regarding potential witnesses: who can you contact, and how? The increasing popularity of social media, including the plethora of blogs that populate cyberspace, has given lawyers and clients alike new ways to identify people of all ages who may have knowledge regarding a case. Sites like Facebook can give a lawyer valuable insight into a person's contacts, but then the question becomes: what can the lawyer do with that information?

While courts need not necessarily understand all of the details about how a piece of technology or a software program works, they must understand how people *use* those things. This understanding is critical to the continuous shaping of legal principles based on reasonableness, such as the reasonable-expectation-of-privacy test. Even the justices of this nation's highest court came under fire earlier this year for their perceived lack of "tech savvy," but pushing judges to become masters of social media becomes more difficult when ethical issues enter the picture and confuse things even more.

In late 2009, the Florida Bar prohibited judges from "friending" lawyers who may appear before them but said judges are allowed to post things on their social networking sites "if the publication of such material does not otherwise violate the Code of Judicial Conduct." Fla. Jud. Ethics Advisory Comm., Formal Op. 2009-20 (2009). Similarly, judges in Massachusetts are allowed a Facebook page, as long as they do not identify themselves as judges, comment on cases pending before them or allow others to do so, or make political statements. Mass. Jud. Ethics Op. 2011-6 (2011). And in North Carolina, a judge received a public reprimand for ex parte Facebook communications with an attorney in a case pending before him. N.C. Jud.

[2] Mr. Holt is a partner in the firm's Miami office, and Ms. San Pedro is an associate there.

Standards Comm'n 08-234. Stories like that are enough to make any reasonably cautious judge stay away from social media entirely, which can make learning its intricacies a challenge, though most judges are rapidly developing a deep understanding of the technology as social media and e-discovery issues crop up with increasing frequency.

Lawyers are governed by slightly different rules. This spring (2014), the ABA issued Formal Opinion 466, announcing guidelines for lawyers' review of jurors' Internet presence. Basically, lawyers can inspect publicly available information regardless of whether the juror is aware of it. The lawyer cannot, however, "communicate directly or through another with a juror or potential juror." The ABA compared these scenarios to simply driving through a neighborhood versus knocking on the juror's front door and asking permission to enter the house.

Witnesses and potential witnesses are fair game in the absence of deception (commonly called "pretexting") and representation by counsel. For example, lawyers cannot ask a third party, including a client or an investigator, to "friend" a witness on the lawyer's behalf (Philadelphia Ethics Op. 2009-02), or use a fake Facebook profile to "friend" a witness (N.Y.C. Ethics Op. 2010-2). That is deceitful and unethical. In addition, they cannot "friend" high-ranking employees of a represented corporation. San Diego Ethics Op. 2011-2 (lawyer has at a minimum a duty to inquire as to the person's corporate role to determine whether the employee is also deemed represented).[3] Other issues may arise depending on the site's terms of use, including whether the site has a code of conduct in place that prohibits users from collecting someone else's publicly available information without informed consent.

For now, it seems that lawyers are free to reach out through social media to unrepresented third persons who may have information about a case, just as lawyers can pick up the phone and interview any unrepresented witness who is willing to talk to them. New York City has even gone so far as to state that it is permissible for a lawyer to try and "friend" an unrepresented person as long as the lawyer uses her own name and profile. (N.Y.C. Ethics Op. 2010-2).

Lawyers should always take precautions to collect the social media evidence they need while staying within the confines of the ethical rules. Even if a party or witness has a private profile, or is unwilling to "friend" you in the case of unrepresented persons, ordinary discovery channels can often provide an equally effective, more established way of obtaining the information. For further reading on attorneys' use of social media, please see Richard A. Greenberg's[4] article *Why Can't We Be Friends? Limitations on the Use of Social Media by Attorneys*, which was published in Florida Defender on August 1, 2014.

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[3] If it is the client, not the lawyer, who improperly obtains an opponent's secret or confidential materials, the lawyer has a clear ethical duty to advise the client that the materials cannot be retained or used without informing the opposing party. Fla. Bar Prof. Ethics Comm., Op. 07-01 (Sept. 2007). *See also Castellano v. Winthrop*, 27 So. 3d 134 (Fla. 5th DCA 2010) (firm disqualified after spending more than 100 hours reviewing attorney-client communications and confidential information from USB drive client took from opposing party).

[4] Mr. Greenberg is a partner in the firm's Tallahassee office.

What Should(n't) You Post?

We all know we should be careful when leaving our electronic footprints on the world wide web. But what happens when something your company posted—or something a third-party user posted on your company's page—could hurt your position in litigation? For now, companies should employ a best practices approach to keep those postings from happening (a topic in and of itself), and if one still finds its way onto the company's site, you should neither destroy nor alter the content if it may be relevant to present or future litigation. Destruction or alteration constitutes spoliation of evidence, and a court can impose sanctions. *See, e.g.*, *Hawkins v. Coll of Charleston*, 2013 WL 6050324 (D.S.C. 2013) (sanctions imposed on plaintiff who deleted Facebook messages and other content after he filed discrimination suit in which his mental state was at issue).

The duty to preserve evidence arises when a party "reasonably anticipates" litigation. Therefore, in the event of a particularly egregious post, a company should at a minimum preserve the offending post or web page with *all metadata* available to the company[5] intact before removing the posting.

Preservation, though sometimes difficult, is critical. Lawyers who try to "clean up" clients' Facebook pages expose not only their clients but also themselves to liability, because destroying evidence is illegal. *See, e.g.*, *Lester v. Allied Concrete Co.*, 10/21/11 Order in Charlottesville, Virginia, Circuit Court Case Nos. CL08-150 and CL09-223 (ordering attorney to pay $542,000 for advising client to delete photos from his Facebook profile, and ordering client to pay an additional $180,000 for doing so).

There is no Florida case directly addressing this issue. Therefore, the Florida Bar's Professional Ethics Committee has been tasked with preparing a proposed advisory opinion on this exact question. *See* summary of Proposed Advisory Opinion 14-1, *available at* http://www.floridabar.org. The Committee will address these four questions:

1. Pre-litigation, may a lawyer advise a client to remove posts, photos, videos, and information from social media pages/accounts that are related directly to the incident for which the lawyer is retained? (The current trend suggests the answer is "no.")
2. Pre-litigation, may a lawyer advise a client to remove posts, photos, videos, and information from social media pages/accounts that are not related directly to the incident for which the lawyer is retained?

[5] The Sedona Conference® Primer on Social Media advises organizations to "remain sensitive to the role third parties play in creating or maintaining social media. . . . With the exception of internally hosted sites, an organization may not have access to relevant content or be in privity with the social media site." The site may instead have a direct relationship with an employee of the company or some other third party. The test in the preservation context is therefore whether the company has *control* of the content, which usually translates to "can the company access it?".

3. Pre-litigation, may a lawyer advise a client to change social media pages/accounts privacy settings to remove the pages/accounts from public view?
4. Pre-litigation, must a lawyer advise a client not to remove posts, photos, videos, and information whether or not directly related to the litigation if the lawyer has advised the client to set privacy settings to not allow public access?

Proposed Advisory Opinion 14-1 (parenthetical after 1 added.) Stay tuned for an update.

The bottom line is, as it has always been, that companies can save thousands of dollars in litigation by being mindful from the outset of the fact that everything they post online can be seen by customers, competitors, and possibly a court. When it comes to social media, prevention really is worth its weight in gold.

For further reading on social media in the employment law context, please see Leonard Dietzen, *Emails, Smart Phones, Social Media and Employment Issues Oh My!* and Brian Hayden, *Employers, Employees and Social Media*, both available at http://www.rumberger.com/ under the "Shop Talk," "Labor & Employment" tab.