How Savvy Lawyers Harness Their Social Media Skills to Win Cases

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Social media is in no way a passing fad. Individuals have embraced social media because it simplifies staying in touch and provides an online platform for sharing photos, stories, ideas, and interests with others. Businesses have discovered social media's utility and use it to reach a targeted audience of present and future customers.

Savvy lawyers too have seized upon social media as a tool in litigation and with good reason. Social media websites contain a rich archive of facts about, and statements by, witnesses, litigants, and clients. Lawyers should see social media websites as a valuable resource for gathering information in litigation. In particular, young lawyers, who tend to be well-versed in social networking, can add value to a litigation team by knowing how to seek out social media evidence.

Facebook is by far the leading social media website. Touting over 800 million active users, Facebook enables anyone to create individual profile pages containing personal data such as hometown, schools attended, employers, family connections, relationship status, hobbies, and even political and religious views. Users can upload photos, video, audio, and other multimedia content and can tag people in photos (or be tagged in others' photos). Notably, Facebook also has geo-tagging features, such as "Places," that enable users to publicize their specific location at a specific time. All of these features represent a potential gold mine of data for those who know to look for it.

Images and comments on social media websites may be highly relevant in civil litigation, particularly in family law and personal injury cases. For example, in Romano v. Steelcase Inc.,
a plaintiff's profile photo showed her smiling on vacation in Florida, which clearly contradicted her allegations of debilitating neck and back injuries and loss of enjoyment in life in her personal injury suit. The court allowed the defendant to seek discovery of current and prior (even deleted) items on the private portions of the plaintiff's Facebook and MySpace pages, reasoning that the plaintiff placed her physical condition, as well as her enjoyment of life, at issue in the litigation.

Just as social media evidence can be crucial in civil litigation, it can also become a factor in criminal prosecutions. In one criminal case, a Facebook post was used to corroborate an alibi. The defendant in a felony armed robbery contended that he was ten miles away from the crime scene at the time, using his father's computer to post on Facebook (specifically, he posted "where's my pancakes?"). The charges against him were dropped. *I'm Innocent. Just Check My Status on Facebook*, NY Times (Nov. 11, 2009). In another criminal case, MySpace photographs and captions were admissible to impeach a minor witness' statement that she was a virgin prior to an alleged rape. *In the Matter of K.W.*, 666 S.E.2d 490, 494 (N.C. App. 2008).

Aside from using social media data as evidence in criminal and civil matters, attorneys also look to social media to learn about potential jurors during voir dire, with some attorneys utilizing courtroom internet connections to perform real-time searches of jurors during the jury selection process. Lawyers also monitor social media during trial to make sure jurors are not engaging in inappropriate online activity. One attorney in Michigan used Facebook to discover that a 20-year old Detroit juror posted news of a guilty verdict on her Facebook page before the jury officially reached a verdict. The juror was removed as a result. *Detroit juror updates Facebook with defendant’s guilt — before the trial is over*, NY Daily News (Aug. 30, 2010); see *People v. McNeely*, D052606, 2009 WL 428561 (Ca. Super. Ct. Feb. 23, 2009) (criminal
defendant not entitled to a new trial for juror misconduct, even though juror failed to disclose that he was an attorney during voir dire and discussed confidential case information on his blog).

**Tips for Discovery of Social Media Information in Litigation**

Courts are mixed on the scope of what social media evidence is discoverable in specific cases. *Compare Romano v. Steelcase Inc.*, 2006-2233, 2010 NY Slip Op 20388 (Sup. Ct., Suffolk Co. Sept. 21, 2010) (private portions of plaintiff's social media page discoverable in personal injury case) and *Crispin v. Christian Audigier, Inc.*, No. 2:09-cv-09509 (C.D. Cal. May 26, 2010) (private portions of plaintiff's social media page not discoverable in copyright infringement case). However, without question, social media websites can be relevant in some cases. As noted by one court: "Facebook usage depicts a snapshot of the user's relationships and state of mind at the time of the content's posting." *Bass v. Miss Porter's School*, 3:08cv1807, 2009 WL 3724968 (D. Conn. Oct. 27, 2009). But the admissibility of data found on social media websites is handled on the same case-by-case basis as any other evidence, and foundation, authenticity, and relevance must be considered. *In the Interest of F.P.*, 878 A.2d 91 (Pa. Super. Ct. 2005). Further, confidentiality and privacy concerns may be implicated, though courts can craft a stipulation or a protective order to ease these concerns. *In camera* review may be sought if necessary. *See Barnes v. CUS Nashville, LLC*, 3:09-cv-00764, 2010 WL 2265668 (M.D. Tenn. June 3, 2010) (non-party witness must accept magistrate judge as a "friend" on Facebook in order for judge to perform an *in camera* review of Facebook page contents).

Attorneys should utilize these five tips for finding social media smoking guns:

1. Regularly check what is publicly available about a witness. Print or otherwise keep records in the event content is removed or made private.
2. Send a preservation letter to service providers and litigation hold letters to opposing counsel.
3. Inquire about a witness’ social media usage, email addresses, and usernames in discovery. Draft narrowly tailored discovery requests to obtain social media data directly from the witness.

4. Obtain a release from the witness before sending a subpoena to social media service providers as providers will only hand over basic data unless the record holder consents.

5. Though costly, consider computer forensics to recreate the posted data.

By following these tips, young lawyers can harness their knowledge of social media to discover a wealth of evidence - evidence that may very well win a case.