

SOCIAL NETWORKING AND THE ADVERSARY PROCESS

Catherine F. Peters

cpeters@gallaghersharp.com

Markus E. Apelis

mapelis@gallaghersharp.com

I. INTRODUCTION

The internet has created a platform for a wide variety of new media. Among the most popular and most prolific is social networking. This type of new media essentially provides a realtime forum for the exchange of personal information in various contexts. These tools, and the information they provide, have had a profound effect on litigation and the adversary system. This presentation explores these effects, including the impact social networking has on claims handling, the obstacles social networking presents at trial, and the ethical concerns social networking raises.

II. TYPES OF SOCIAL NETWORKING

A. Facebook: www.facebook.com

Facebook is a social networking tool that allows people to communicate with their friends, family, and coworkers. Users develop a Facebook “profile” which incorporates personal information about the user. Profile information can include, names, birth date, gender, relationship status, employment status, educational history, hobbies, and interests. Users can incorporate photographs, video, and other digital media into their profiles. Users can also update their profile through “wall posts” and “status updates” which provide virtual, realtime updates on information of the user’s choice. Users can also keep track of profile updates of other people they know.

B. MySpace: www.myspace.com

MySpace is similar to Facebook. MySpace users create a profile and upload personal information. The main difference between MySpace and Facebook is the MySpace user’s ability to specifically alter the appearance and layout of a profile using HTML codes.

This material has been prepared by professionals and should not be utilized as a substitute for legal guidance. Readers should not act upon information contained in these materials without professional legal guidance.

C. LinkedIn: www.linkedin.com

LinkedIn is a networking tool geared toward establishing and expanding business and professional contacts. LinkedIn members create a profile that summarizes their professional expertise and accomplishments. LinkedIn members then establish a network of connections by linking to other members and other contacts. LinkedIn also allows members to gather and share data, and collaborate on projects. LinkedIn also provides a forum for employee recruitment.

D. Twitter: www.twitter.com

Twitter, another social networking tool, allows users to post limited messages (called “tweets”) that are then distributed to other users. Twitter users can develop networks of followers, who receive tweets sent from, and updates about, Twitter users.

E. Other Electronic Media

1. www.youtube.com: You Tube allows users to post video online. Also allows users to search and view videos posted by others.
2. www.flickr.com: Flickr allows users to post digital photographs online. Also allows users to search and view digital photographs posted by others.
3. *Blogs*: Blogs are websites that allow their creators and other contributors to post discussions or articles about various topics. Users can visit the blogs, read the materials, and participate in discussions about the topics, usually through the use of a comment or message board.

III. SOCIAL NETWORKING IN LITIGATION: CLAIMS INVESTIGATION

A. Uses of Social Networking

Because of the vast amount of personal information they contain, social networking sites can provide useful tools for investigating a claimant.

1. *Locations*. Social networking sites can provide insight into a claimant’s whereabouts, including current residence, past residences, and other places a claimant may visit or frequent.
2. *Status*. Social networking sites can provide information about a claimant’s employment status, work history and educational background.

3. *Known Associates*. One of the main functions of a social networking site is to build a claimant's social network. These networks are generally available to public users. As a result, a user can see who a claimant is related to, who a claimant is in a relationship with, and who a claimant lists as a friend.

- a. Case Example: *Parker v. Jekyll & Hyde Entm't Holdings, LLC* (S.D.N.Y. 2010), 2010 U.S. Dist. LEXIS 12762.

Named plaintiffs in a potential class action created a Facebook group (a separate Facebook entity usually devoted to a common cause) to identify potential members of the purported class.

4. *Photographs and Video*. Social networking sites allow users to share photographs, video, and other media with persons to whom they are connected – or maybe even with the general public. Viewing the photographs, video, and other media connected with a claimant can give insight into – and more importantly, provide documentary evidence of – the claimant's activities.

- a. Case Example: *State v. Hause*, 12th Dist. No. CA 2008-005-063, 2009-Ohio-548.

Prosecutors used photographs taken from a Facebook page to convict a person of allowing underage consumption of alcohol on the person's premises. The photographs showed underage children consuming alcoholic beverages alongside the adult defendant.

- b. Case Example: *Sedie v. United States* (N.D. Cal. 2010), Case No. C-08-04417, 2010 U.S. Dist. LEXIS 39123.

A plaintiff filed suit against the United States under the Federal Tort Claims Act after the plaintiff was involved in an accident with a U.S. Postal Service truck. The plaintiff was riding his bike at the time of the accident. The plaintiff claimed that, as a result of the accident, he could no longer perform certain activities, including painting. However, the plaintiff listed and discussed his ongoing painting on his Facebook and MySpace pages. The court discounted the plaintiff's damages in this regard.

B. Benefits of Utilizing Social Networking

1. *Information Gathering.* As discussed above, social networking sites can provide a useful platform for gathering information about a claimant, witness, or other relevant person.
2. *Evidence.* The information obtained from social networking sites can be used as evidence in litigation. For instance, a wall post, tweet, or status update may qualify as an admissible statement by party-opponent. See Fed. R. Evid. 801(d)(2); Ohio Evid. R. 801(D)(2).
3. *Settlement Leverage.* The information obtained from social networking sites is often very private, and, as is especially the case with negative information, can be personally embarrassing. The potential that this type of information will be publicly exposed can be very useful in leveraging settlement. One should be wary, however, of the ethical concerns that arise in obtaining and using such information. See Part VI, *infra*.

IV. SOCIAL NETWORKING IN LITIGATION: PRETRIAL AND DISCOVERY PROCESS

Not all social networking tools are readily available to the general public. Even those social networking tools that are publicly available may not offer immediate access to certain content or information. For instance, a Facebook user can limit access to personal information to only those other users who are the user's friend. Various discovery mechanisms can provide access to this otherwise restricted content.

A. Written Discovery Requests

1. *Electronic Data from Social Networking Sites are Discoverable.*
 - a. Case Example: *Bass v. Miss Porter's School* (D. Conn. 2009), Case No. 3:08-CV-1807, 2009 U.S. Dist. LEXIS 99916.

Following an *in camera* review of documents withheld from production on the basis of privacy and relevance, the court ordered that the contents of a Facebook page, including the private messages sent between users was discoverable.

2. *Interrogatories and Requests for Production*

Written discovery can be useful in identifying and producing an opposing party's social networking materials. A written request that an adverse party preserve and maintain relevant social networking materials may also be helpful.

B. Subpoena Power

1. Not all parties may be willing to freely provide unlimited access to social networking materials. In some instances, the parties may not even have access to the information sought. For example, pictures are removed, messages are deleted, and the party from whom the materials are sought no longer has access to the materials.
2. A subpoena directed to the social networking site itself may provide access to these hard-to-locate materials. A subpoena may also circumvent an obstructionist party or a court that does not compel production of the materials sought.
3. Be aware, however, that like many entities that maintain electronic data compilations, social networking sites may have a document retention policy that only stores electronic data for certain lengths of time. After the social networking site has purged its data, in accordance with its document retention policy, the social networking materials may fall beyond the reach of any subpoena.

V. SOCIAL NETWORKING IN LITIGATION: JURORS AND SOCIAL MEDIA

A. Jurors and Social Media During Trial

1. *Example:* In December of 2009 a jury in Baltimore, Maryland convicted the Mayor of Baltimore, Sheila Dixon, of one count of fraudulent misappropriation by a fiduciary. She was accused of taking \$630 worth of gift cards intended for the city's poor. She filed Motion for a New Trial based in part on the revelation that five of the twelve jurors had become Facebook friends and used Facebook to discuss the trial while it was pending.
2. *Example:* A juror in England posted details of the child abduction and sex assault case on Facebook and then invited her Facebook friends to help her decide whether the defendants were guilty or innocent. She wrote on her Facebook page: "I don't know which way to go, so I'm holding a poll."

3. *Example:* In May of 2008, a jury foreman in a manslaughter trial in West Palm Beach, Florida, used his iPhone during a recess in deliberations to look up the definition of the word "prudent," which he then relayed to other jurors. The defense attorneys requested a new trial due to juror misconduct. The judge in the case denied the request, concluding that any juror misconduct did not affect the verdict.
4. *Example:* A juror in Arkansas tweeted regarding the verdict against a building materials company, which had been ordered to pay out \$12.6m to its investors. The company appealed the decision, claiming that the juror's messages, including one which read: "Nobody buy Stoam. It's bad mojo and they'll probably cease to exist, now that their wallet is 12m lighter," demonstrated that the juror "was predisposed toward giving a verdict that would impress his audience".

B. Jury Instructions

Jury instructions should include specific references to social media, and warn jurors not to discuss the case on their respective social media accounts.

1. *Ohio Jury Instructions:*

The OJI does not address the issue of juror research via the internet. The current Admonition to jurors regarding research and media states as follows:

OJI 301.07: NEWSPAPER, RADIO AND TV. You are instructed not to read, view, or listen to any report in the newspaper, radio, or television on the subject of this trial; do not permit anyone to read or comment upon them to you or in your presence. Such reports may be incomplete and are sometimes inaccurate. You may only consider and decide this case upon the evidence received at the trial. If you acquire any information from an outside source, you must report it.

2. *Judicial Conference Committee on Court Administration Proposed Model Jury Instructions:*

a. Before Trial:

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not

consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom. Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.

b. Before Deliberation:

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

3. *South Carolina Jury Instruction:*

The Supreme Court of South Carolina issued an order to judges that the jury is to be instructed as follows:

The court shall instruct jurors selected to serve on a jury that until their jury service is concluded, they shall not:

- (a) discuss the case with others, including other jurors, except as otherwise authorized by the court;

(b) read or listen to any news reports about the case;

(c) use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation. These devices may be used during lunch breaks, but may not be used to obtain or disclose information prohibited in subsection (d) below;

(d) use a computer, cellular phone, or other electronic device with communication capabilities, or any other method, to obtain or disclose information about the case when they are not in court. Information about the case includes, but is not limited to the following:

(I) information about a party, witness, attorney, or court officer;

(ii) news accounts of the case;

(iii) information collected through juror research on any topics raised or testimony offered by any witness;

(iv) information collected through juror research on any other topic the juror might think would be helpful in deciding the case.

C. Practical Tips

1. *Petition.* Ask the court to restrict the juror's access to communication devices such as cell phones and computers.
 - a. Beginning July 1, 2010 in Indiana the bailiffs will be required to collect all cell phones, computers or other electronic media from jurors during deliberations.
2. *Voir Dire.* Potential Jurors should be questioned regarding their personal use of social media. The judge or attorneys should ask whether jurors use the Internet and social media sites, the specific sites they use and whether they would be able to abide by the necessary restrictions during trial.

VI. ETHICAL IMPLICATIONS OF SOCIAL NETWORKING AND TECHNOLOGY

A. Communications with Client

1. *Text Message During Depositions Not Protected by Attorney-Client Privilege.*

Case Example: *Wei Ngai v. Old Navy*, 2009 U.S. Dist. LEXIS 67117 (D.N.J. July 31, 2009).

Plaintiff Wei Ngai, a minor child, injured her eye on a clothing rack at an Old Navy store in Edgewater, New Jersey. Plaintiffs' counsel deposed the General Liability Claims Manager for Defendant via video conference. The witness was in Sacramento, California and Plaintiffs' counsel and Defendant's New Jersey counsel were in Fort Lee, New Jersey, and Defendant's Pro Hac Vice counsel was in Michigan. Prior to and during the course of the deposition, the Michigan counsel and the deponent exchanged numerous text messages.

The Court held that the text messages sent before the deposition were privileged. But those sent during the deposition were not privileged. The Court further found that counsel in Michigan engaged in conduct that violated Rule 30 by communicating with the deponent after she was sworn for the deposition and throughout the deposition.

B. Judicial Conduct

1. *Ex Parte Social Media and Grounds for Recusal and Discipline.*

Case Example: *Whitley vs. Whitley*, Iredell County File No. 07CVD0008.

In June of 2009, a North Carolina judge was reprimanded for “friending” a lawyer in a pending case, posting and reading messages about the litigation, and accessing the website of the opposing party. The judge recused himself from the case and a new trial was ordered.

During trial, Judge Terry and the attorney for one party became “friends” on Facebook. During the course of the trial, the attorney posted comments about the trial and the judge responded to those comments. The attorney then posted on his “Facebook” account, “I have a wise Judge”.

The North Carolina Judicial Standards Commission found that Judge Terry had ex parte communications with counsel for a party in a matter being tried

before him and was influenced by information he independently gathered by viewing a party's web site while the party's hearing was ongoing.

The judge violated the Carolina Code of Judicial Conduct, including failure to personally observe appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved (Canon 1), failure to respect and comply with the law (Canon 2A), failure to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Canon 2A), engaging in ex parte communication with counsel and conducting independent ex parte online research about a party presently before the Court (Canon 3A(4)). Judge Terry's actions constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute (N.C. Const. art IV, § 17 and N.C.G.S. § 7A-376(a)).

2. *Can a Lawyer and a Judge be Social Media "Friends"?*

The Judicial Ethics Advisory Committee of the Florida Supreme Court recently advised judges who are member of social networking websites such as Facebook not to accept lawyers who may appear before them as "friends." It is acceptable however, for a judge to have a page on a social networking site, accept "fans" and post comments, photographs and campaign related material, as long as the items posted do not violate the Florida Judicial Code of Ethics.

Canon 2B states: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge." See also Ohio Code of Judicial Conduct Rule 1.2 and Rule 2.4(C).

C. Attorney Conduct

According to a Pew Internet & American Life Project tracking survey, the percentage of adult internet users who have a profile on an online social network site went from 8% in 2005 to 35% by January of 2009. The number of younger attorneys using social networking is even higher. According to a recent Lexis-Nexis poll, as quoted by the New York Times, 86% of attorneys ages 25 to 35 are members of social networks such as LinkedIn and Facebook

1. *Example:* An attorney in California was suspended from the practice of law for 18 months due to his conduct as a juror in a felony trial. The Supreme Court of California determined that he failed to maintain respect due to the

courts by not disclosing that he is an attorney and he improperly posted comments about the trial on his blog.

Wilson was impaneled on a jury hearing a trial in which the defendant faced five felony burglary charges. The judge cautioned jurors not to discuss the case both in writing and orally. Nonetheless, Wilson posted an entry on his blog that identified the crimes, the first name of the defendant and the name of the judge, whom he described as “a stern, attentive woman with thin red hair and long, spidery fingers that as a grandkid you probably wouldn’t want snapped at you.”

Wilson’s action resulted in the court of appeal vacating the judgment in the case and remanding it back to the trial court.

2. *Example:* Speaking at a recent ABA conference, Judge Susan Criss of District Court in Texas recalled a young lawyer who asked for a trial continuance because of a death in the family. Judge Criss checked the lawyer's Facebook status and saw that while there was a funeral, the lawyer spent the week posting about all the parties she attended and posted pictures of her drinking wine and mojitos. When the lawyer asked for a second delay, Judge Criss refused to grant it, and told her what she had discovered on Facebook.