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LegalTECH

Social Networking Websites: How to Reap the Benefits and Avoid the Hazards, Part I

John J. Cord & Robert K. Jenner

Consider this scenario: You represent an athletic college student who was injured in a car crash. At trial, your witnesses have solidly established liability. The plaintiff testifies that following the collision he can no longer do those things he did effortlessly beforehand. You conclude your client’s examination confident that you have done everything to establish his case. You have prepared him thoroughly – or at least you believe you did – for his impending cross-examination.

Defense counsel stands. She dramatically leans over and picks up a thick manila folder. Pulling out the first page, she asks the plaintiff, “Do you Twitter?” (*What’s Twitter?*, you ask yourself.)

That one question turns into a veritable 90 minute barrage of questions revealing that your client’s “injuries” have been exaggerated greatly. Statements made by him on Twitter, and photographs he and his friends posted on the social networking site, Facebook, reveal that he regularly engages in rock-climbing, running, and football—and has done so even when he was treating for back injuries. And, his MySpace page reveals his unique perspective that “the entire legal system is a sham—gonna get a lot of \$\$\$!”

Welcome to the 21st Century Trial

Social networking websites, such as Facebook, MySpace, Twitter, LinkedIn, Friendster, classmate reunion sites, eHarmony and Match.com are ubiquitous. Plaintiffs, defendants, witnesses and jurors are all using them. Reported users also include judges¹ and the media.² If you ignore the potential hazards that lurk in every site, from the outset of the case to verdict or settlement, you may be undermining your client’s case.

A Primer

The scope of web-based social networking is vast. Essentially, it is electronic internet-based communication. Generally, these sites require a username and password to access the networking pages. Users can set up their own webpages with an *unlimited* amount of personal information. These sites are pathways for communication among family, friends, acquaintances and strangers. Yet, the “social” aspect

¹ The ABA reports that Judge Susan Criss in Galveston, Texas granted a continuance to a lawyer because of a purported death of a family member. Later, the Judge saw that lawyer’s Facebook postings reflected a week of drinking and partying. She then denied a second continuance, and reported the attorney to his senior partner. Molly McDonough, *Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches* (Jul. 31, 2009) <http://www.abajournal.com/news/facebooking_judge_catches_lawyers_in_lies_crossing_ethical_lines_abachicago/>.

² News stories this year have reported that a Kansas federal judge and a Colorado state court judge have both allowed reporters to report about the progress of trials through Twitter. Rex Gradless, *Kansas Federal Judge Allows Twittering Media in Courtroom* (Feb. 24, 2009) <<http://socialmedialawstudent.com/twitter/kansas-federal-judge-allows-twittering-media-in-courtroom/>>; Ernest Luning, *Judge Orders Twitter in the court, lets bloggers cover infant-abuse trial* (Jan. 5, 2009) <<http://coloradoindependent.com/18805/judge-orders-twitter-in-the-court-lets-bloggers-cover-infant-abuse-trial>>.



of “social networking” can be misleading—many people use it for business networking, as well. However, the end result is the same: people communicating about virtually every conceivable topic: education, hobbies, health, sex, activities. Whatever is posted is potentially viewable by the world.

If you do not believe that social networking can affect your cases, take a look at the numbers: Facebook has more than 300 million active users. Two billion photographs are uploaded per month, and over 65 million people actively access Facebook through their mobile devices.³ MySpace has almost 268 million registered users. Twitter does not release statistics on their number of users, but it has been ranked as the third most-used social networking site.⁴ There are countless blogs and personal websites. YouTube, a website where users can create profiles, upload videos and view videos, surpassed 14.8 billion video views in the month of January, 2009. As of March, 2009 it had over 100 million viewers.⁵

The makeup of social network users is counter-intuitive. “Generation Y,” those 25 to 34 year-olds who have grown up in the age of the world wide web and e-mail, comprise a large percentage of users. But even for Facebook, the fastest growing demographic is those aged 35 and older.⁶ Stereotypes are not

³ *Facebook Press Room Statistics* (last visited Sept. 25, 2009) <<http://www.facebook.com/press/info.php?statistics>>.

⁴ Wikipedia, The Free Encyclopedia, *Twitter* (last visited Sept. 25, 2009) <<http://en.wikipedia.org/wiki/Twitter>>.

⁵ YouTube Report 2009, *YouTube Reaches 100 Million U.S. Viewers* (Mar. 5, 2009) <<http://youtubereport2009.com/category/youtube-statistics/>>.

⁶ See Endnote 3, *supra*.

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- Following **MAJ on Twitter (@MDforJustice)**.

useful to determine whether a person uses social networking technology. But one thing is certain—those growing up in the age of social networking often have “a much-reduced sense of personal privacy” and do not mind putting their lives out for the world to see.⁷

Social networking sites allow users to post status updates (a technological time line of a user’s day), pictures and links to websites; play games; send instant messages, and e-mail-like messages within the framework of the site. Users are not only people, but include law firms, government agencies, and businesses. These users participate in social networking to share news, promote events, exchange ideas at conferences, drive traffic to their websites and network with others across the globe. Users have access to information on the social networking sites of their contacts. Facebook in particular has transformed “friend” from a noun into a verb. To “friend” someone, in internet social networking parlance, means to accept that person into an electronic social network, allowing that contact access to otherwise private areas of the user’s Facebook pages. Importantly, users can control privacy settings and either (1) allow all of their information to be searchable to anyone with an internet connection; (2) restrict access of most information to “friends” only; or (3) classify friends according to sub-categories (for example, co-workers, family, personal friends) and regulate the content available to each group.

⁷ John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, The New York Times (Sept. 13, 2009) <<http://www.nytimes.com/2009/09/13/us/13lawyers.html>> (citing Professor Stephen Gillers, expert on legal ethics at New York University Law School).

Case Investigation and Prosecution Your Clients

Your initial intake and case investigation should include questions about your client’s social networking and on-line activities. Probing those activities will give you an intimate look at your client’s actual day-to-day thoughts and feelings—or at least, a look at what your client and his or her friends choose to share with the online community. If these impressions are at odds with your client’s legal story, you can evaluate the propriety of proceeding with the case. If you have accepted the case, you should describe to your client (and his or her parents, if applicable) the dangers of the online community as the case goes on, especially upon commencement of discovery. Evidence from social networking sites has been used in criminal trials to demonstrate the defendant’s gang ties, in divorce cases to prove infidelity, in custody battles to show unfit parenting, and of course in civil cases to show exaggerated claims.⁸

In order to ensure that our clients are protected from the dangers of web-based social networking sites, we send them an introductory letter that includes the following language:

It is important that we raise with you the dangers of social networking sites such as Facebook and MySpace. Social networking sites are fun and a great way to keep in touch with

⁸ See Jay Gormley, *MySpace and Facebook Becoming Evidence in Court: Social Networking Sites Replacing Private Detectives* (Feb. 3, 2009) <<http://cbs11tv.com/local/MySpace.Facebook.Evidence.2.926231.html>>; Associated Press, *Facebook Evidence Sends Unrepentant Partier to Prison* (Jul. 21, 2008) <<http://www.foxnews.com/story/0,2933,386241,00.html>>.

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family and friends. However, these sites have the potential to do great harm to your lawsuit if precautions are not taken. Although the courts are not entirely consistent on this issue, it is possible, and indeed you should take as a given, that the defendants will have the opportunity to review every single page of your social networking sites. To that end, please take the following precautions:

1. Make sure that nothing is posted to your site that discusses your injuries. That means that you should post nothing about this topic, and you should instantly delete anything your “friends” may post on this subject.
2. Make sure there are no photographs (posted by you or friends) of you doing physical events that depict what you cannot do because of your physical limitations—this may include gymnastics, dancing, golf, swimming, etc.
3. Make sure you know everybody who is your “friend.” Do not accept “friend” invitations from people whom you do not know. Some of our younger clients have literally hundreds of “friends,” and it is important that every person be vetted and confirmed.
4. Review your “friend” list now. If you are not 100 percent confident that you know who every single person is, block that person as a friend. It is possible, indeed probable, that somebody posing as a “friend” who is actually an agent of the defendant will try to get onto your page in order to obtain incriminating

evidence that can harm your chances of a successful recovery at trial.

When we meet, we will ask to review your social networking page with you.

At the subsequent client meeting, you should get answers to the following questions:

1. Do you now or have you ever had social networking sites, including Facebook, MySpace, Twitter, LinkedIn, or on-line dating sites? What are they and when were they active?
2. Are your social networking sites private or public?
3. Has anyone involved in the litigation ever had access to private areas of your social networking sites?
4. Is there anything on the social networking sites (now or ever) that could compromise your case or your integrity?
5. May I look through your social networking sites?
6. Do you now, or have you ever had a personal or professional website or blog? What are the website addresses? When were they active?
7. Who, besides you, has had authority or ability to change the websites or blogs?
8. Is all the content on the websites or blogs by you or authorized by you?
9. Have you ever posted videos to YouTube or similar sites? What videos and when were the posts made? Do you have a YouTube profile?
10. Do you have any social networking sites created with pseudonyms or fake names?

You should consider updating your intake forms and questionnaires to include these questions. For some clients and cases, the safest course is for them to shut down their social networking sites during the litigation. However, that solution is not realistic in all cases. Therefore, as the case progresses, be sure to check in on your client periodically to see if there are any damaging posts. With the permission of your client, you or someone in your office should also “friend” your client to keep track of new events or posts that could impact the client and his or her case.

Finally, consider examining your client's social networking pages in search of useful evidence. In particular, the client or the client's friends may have posted corroborating messages or photographs that can bolster his claims. It may give you insight into good character evidence that your client may not otherwise discuss with you. Finally, it may provide you with more options for potential damages witnesses—find those friends or relatives who frequently post on your client's social networking sites.

Witnesses and Opposing Parties

When investigating social networking sites by witnesses and opposing parties, what ethical limits are imposed on the lawyer? Standard case investigation should include searching the internet for witnesses and parties for impeachment evidence; however, if that search reveals that a person of interest has a social networking site, lawyers must tread carefully. Anything that a user posts on-line is fair game to

the extent that it is equally available to everyone searching on the internet. However, if a user regulates his or her privacy setting by blocking content from non-friends, a lawyer or his agent is almost certainly precluded from using deception to gain access to that content.

The Philadelphia Bar Association’s Professional Guidance Committee recently opined that it was improper for a lawyer to ask someone to “friend” an adverse witness in order to obtain personal information about that witness.⁹ In the hypothetical situation presented to the committee, the lawyer believed that the witness would allow access to his site, presumably because of the large number of friends that the witness had.¹⁰ The lawyer’s agent would only state truthful information (including his or her name), but would not disclose his or her purpose for requesting access to the witnesses’ site.

The committee found that this tactic would likely violate the Pennsylvania Rules of Professional Conduct,¹¹ including: (1) 5.3: Responsibilities Regarding Nonlawyer Assistants (a lawyer cannot order or ratify conduct of a non-lawyer that would violate the Rules if the lawyer so acted); 8.4: Misconduct (a lawyer cannot engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and 4.1: Truthfulness in Statements to Others (a lawyer cannot make false statements of material fact or law to a third person in the course of representing a client). The conduct would be deceptive because the person requesting friend access would “omit a highly material fact,” the fact that the witnesses’ posted information would be used in the litigation, and that the witness might not otherwise allow access if he knew of the true intentions of the person requesting access.

The same result would likely be reached in Maryland and most other states. However, lawyers have other options to acquire this information. The lawyer may advise the witness of their representation of the client and request access to their social networking site, though admittedly this is not likely to be successful. The lawyer may contact others who are “friends” with the witness in the hopes of finding someone who is merely an acquaintance and who would allow access for the purposes of the litigation. In essence, this would be arguably no different from interviewing a witness who has information about a defendant. ✱

Conclusion

It is extremely important that you be vigilant in order to protect your client's interests. Regardless of your technological sophistication, your office must have a framework to guard against the very real dangers created by web-based social networking. In the next issue, you will learn about the discoverability of social networking through subpoenas and requests for production of documents, as well as the uses, effects and problems associated with social networking at trial.

9 Philadelphia Bar Association Professional Guidance Committee, *Opinion 2009-02* (Mar. 2009) <http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf>.

10 The number and identity of friends a person has on Facebook is publicly available.

11 The relevant portions of the Pennsylvania Rules of Professional Conduct are identical to the Maryland Lawyers' Rules of Professional Conduct.

Biography

John J. Cord, *Miller & Zois, LLC*, graduated from the University of Colorado School of Law. He concentrates his practice on assisting victims of automobile negligence, medical malpractice, and defective products. He is licensed to practice in Maryland, the District of Columbia, Pennsylvania, Georgia and Minnesota. He is a member of the American Association for Justice and is a former chair of the MAJ Technology Committee. Read his blog at www.drugrecalllawyer.com, and follow him on Twitter at @johnjohncord.

Robert K. Jenner is a principal in the Baltimore, Maryland law firm of *Janet, Jenner & Suggs*. He has 25 years experience representing consumers against the manufacturers of dangerous pharmaceutical drugs and defective medical devices. Rob has been honored by his peers for inclusion in the Best Lawyers in America® the Maryland Superlawyers®.

Coming soon...

Part II of Social Media Websites: How to Reap the Benefits and Avoid the Hazards

Look for it in the Winter 2009 issue of
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