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2018 THIRD QUARTER

Risks in the Office Setting: Enhancing Patient Safety

AND

Social Media in Litigation

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Social Media as Nonfiction: Using Social Media in Litigation

By David Jones

We all love a good story. As the most social of creatures, we human beings crave the fellowship that comes with sharing details of each other's lives. Throughout history and across cultures, we have used words and images to communicate, record, illustrate, entertain, and celebrate both the remarkable and the routine stuff of our daily experience.

The advent of smartphones and social media has stirred in our species the primal urge to spin rapt accounts about *what just happened.*

I am a trial lawyer. My human subspecies is professionally interested in learning what happened and why, and in telling a compelling story about the facts of what occurred. Social media evidence can provide wonderful thematic content for lawyers to craft and tell a powerful, engaging story that captures the truth of events underlying a disputed case.

But long before a lawyer can present a client's full story to a jury, a judge, a mediator, or an opponent, he needs a strategy for gathering and weaving together the elements of the tale.

Character development

Upon receipt of a new claim or lawsuit, lawyers should investigate opposing parties and witnesses (and even their own clients) using publicly available information on the internet. Increasingly, prudent lawyers engage vendors to conduct social media and Web content data captures for the social media accounts of parties and witnesses. This can help ensure the authenticity and admissibility of the evidence for an eventual trial. The more detail given to the vendor, the better one's chances of developing a fruitful search. For example, the following basic information is useful:

- Full names of investigative targets and any aliases
- Dates of birth
- Physical descriptions (a driver's license photo or headshot is helpful for identification purposes, especially with common names)
- Last known addresses
- Employers/occupations
- Names of spouses, close associates, and immediate family members

- Date of loss, mechanism of injury or details of event, and nature of injuries alleged
- Copy of demand letter or complaint.

It is best to capture this data early—if possible, even before litigation begins. A true forensic capture will preserve all public content. If any posted content is later deleted, the post can be flagged as deleted, which may aid in making a claim that evidence was destroyed.

Planning updated searches or "recaptures" of a litigant's online activity during the pendency of a case can yield powerful impeachment evidence. Counsel may elect to perform follow-up captures, as would be done with traditional surveillance. For instance, it can be effective to recapture social media data immediately before deposition or trial testimony, during "quiet" phases of litigation, around the target's significant life events, or near holidays.

Regardless of the timing of such investigations, attorneys should avoid having their team members perform internet or social media data captures. Doing so makes it possible that the target of an investigation will receive a notification of an attempted contact. More important, this can raise ethical problems for the lawyer and can risk compromising the investigation. Further, because any information gathered will need to be properly authenticated for use at trial, the attorney or team member who gathered the evidence may become a necessary fact or foundational witness.

Setting the scene

For cases in which the geographic location of events is important or an incident may have been newsworthy or witnessed by many people, it is possible to use geofencing technology to capture social media postings or other internet-based content from the physical area of interest or about the subject matter of the event. Experts in forensic data gathering and preservation can assist with setting up these virtual dragnets. If done promptly, these may yield otherwise-ephemeral evidence or otherwise-unknown witnesses.

The plot thickens

Courts across the country have begun to recognize social media as fertile ground for investigation, particularly in personal injury claims. But judges can be reluctant to permit counsel to access an opposing party's social media accounts, especially without limitations in time or scope. So, written discovery tailored to fit the claims and facts of each case can be productive, particularly if an opposing party uses privacy settings to limit public access.

Counsel should consider the timing of written discovery on social media issues. For example, it may be beneficial to send written discovery on foundational issues before the opposing party's deposition. Alternatively, it may be useful to address foundational issues during a deposition and use written discovery after obtaining witnesses' sworn testimony. Either way, one should consider whether overt inquiry may prompt a litigant to delete or modify online content. After all, it is usually preferable to invest in the gathering and preservation of key impeachment evidence early, as opposed to seeking remedies for perceived destruction of evidence later.

It can be wise to discover e-mail addresses and a list of all social media or networking sites that a party created, maintained, or deleted in the recent past.[1] For each account, request the username, handle, or profile name; when the account was created; and when the account was last accessed. If the account was deleted, find out when and why. Counsel may request copies of photographs, postings, videos, notes, profile information, friend lists, instant messaging logs, sent and received messages, and comments that the target or target's friends or other visitors have posted to the party's page, "wall," or account. Focusing the inquiry on the party's activities, hobbies, interests, entertainment, education, work, and health conditions can connect the investigation to relevant information about the party's allegations and claimed damages.

For any responsive materials one's opponent withholds on the grounds of privilege, confidentiality, or any other basis, counsel should consider requesting a privilege log identifying the withheld materials specifically.

Conflict and dramatic tension

The arc of a lawsuit is often punctuated by taking sworn testimony of witnesses. Attorneys thus consider whether to explore social media topics during a deposition. The nature of the questioning may depend on the facts of the case, the volume and nature of the witness's social media presence, and the inquiring lawyer's own familiarity with various social media platforms.

One may establish basic background information with a witness to lay a proper foundation for the social media records sought to be used later. Asking questions about historical or biographical information—aliases, birthdates, prior addresses, names of family members and close friends[2]—early in a deposition as "background" may make a witness less suspicious than making these inquiries along with questions about social media. Establishing these foundational anchors can help if the pointed inquiry about social media evidence—particularly if it is juicy—provokes denials about the authenticity of the information.

If counsel decides to delve into the details of a witness's social media use, he may explore the witness's habits and practices with the available social media platforms. The lawyer may wish to confirm the user's e-mail addresses, whether the witness uses aliases on social media, the dates or eras of time during which the witness used particular sites (specifying the common sites listed above), and the reasons the witness might use one account over another. Counsel should ask whether profiles are public or private, find out if any of the witness's e-mail or social media accounts have ever been hacked, and explore whether anyone other than the witness has access to the accounts or can post to the accounts.

If early investigation has captured forensic evidence useful for undermining the witness's testimony, the lawyer should consider whether it would best serve his client's case to deploy that evidence

David Jones *is a Member, Hall & Evans. LLC. Contributing authors include* ***Katherine Otto,*** *Messner Reeves LLP;* ***Andrew Reitman,*** *Hall & Evans, LLC; and* ***Joseph Buchholz,*** *Summit Litigation Support, Inc.*

during the deposition, or spring the traps later at mediation or in trial.

Dénouement and resolution

Social media evidence can be of great value in the performance art of a trial. Long before the courtroom drama begins, a lawyer should develop a plan for whether, how, and when to disclose social media evidence, how to deploy the evidence at trial, and how to overcome an opponent's anticipated objections to its use. Like an old "Choose Your Own Adventure" gamebook, there are countless technical and procedural rabbit holes that a trial lawyer must be prepared for. Among the lawyer's potential excursions are the following three.

First, as with all types of evidence, if counsel wishes to admit social media evidence into the court's record, he must first disclose the evidence to the other side, long before trial. That will spoil the element of surprise, but it may also make it easier to ensure that jurors will get a close look at the evidence. Conversely, under limited circumstances, it is possible to impeach a witness's testimony, challenge a witness's credibility, or refresh a witness's recollection using previously-undisclosed evidence. To do that, counsel will be limited in using the evidence and must first justify using it for these purposes. Doing so requires navigating a gauntlet of evidentiary conditions that restrict the use or display of "extrinsic evidence" to challenge a witness's testimony.

Second, the lawyer should assess the relevance of each piece of social media evidence to the elements of the opposing party's claims, and decide whether the evidence makes the important facts in the case more true or less true than they would otherwise be. This requires selectivity and judgment about what to put in, what to leave out, and what attempts the other side may make to justify or explain away the evidence.

Third, counsel should carefully consider the myriad of rules governing hearsay evidence, and know how to overcome objections properly, based on the hearsay rules. Social media postings may contain statements or images intended as communications, and the postings themselves may be communicative conduct that bears on the facts or the claims.

Final thoughts

Lawyers or not, we humans have always been storytellers. Our early ancestors painted cave walls to cast the narratives of their experiences. Over time, we developed traditions of oral history; and pictograms became written characters, which morphed into alphabets, written language, and the printing press. Typewriters, cameras, and computers followed. Now, with smartphones and internet access, each of us has nearly limitless ability to record and broadcast our stories to an attentive world.

When appropriately integrated into the evidence developed in a lawsuit and presented at trial, these stories told on social media help expose the truth we seek to reach in our system of justice. MPL

Footnotes

1. The most popular platforms tend to include Facebook, Twitter, Instagram, LinkedIn, Flickr, Snapchat, YouTube, Reddit, Pinterest, Google Plus+, Tumblr, and Vine.
2. These names can be useful for obtaining social media evidence from others' profiles—family members and friends are typically less diligent than parties in scrubbing their profiles before litigation.