

# Social Media and Litigation: A Marriage Made in Hyperspace

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*Editor's Note: The discussion surrounding issues raised in this article may continue with the authors on the EASL Blog. Please send comments pertaining to social media and litigation to me at [ehckeresq@ehckeresq.com](mailto:ehckeresq@ehckeresq.com), and I will add these to the dialogue.*

## Introduction

Almost half of America is using social media and that number is rising rapidly.<sup>1</sup> It permeates our daily lives. As of 2009, over 70% of lawyers had accounts on social-media networks.<sup>2</sup> Over 85% of “younger” lawyers use social media.<sup>3</sup> The person who lacks at least one social-media profile will soon become the exception rather than the rule. As a litigator, this social media provides a wealth of information available at one’s fingertips—information that just a few years ago required the hiring of a personal investigator to obtain. Though this immense wealth of information exists, its presence is not without pitfalls.

This article will:

- Dispense background information about the various types of social media;
- Discuss how social media can be used, both in the courtroom and for other legal purposes;
- Provide strategies for introducing information obtained through social media into evidence;
- Examine the ethical and legal concerns raised by social media and its uses; and
- Present suggestions for further study.

## Types of Social Media

This section covers the more common forms of social media one might encounter in a legal practice. It will briefly focus on the various social media sites that lawyers are most likely to come across when delving into social media based research.

### Facebook

Facebook is the most popular social media platform. Facebook started as a hobby,<sup>4</sup> which is now arguably one of the most successful businesses launched in recent history.

In 2004, Mark Zuckerberg, while a student at Harvard, started “thefacebook” with some financial help from Edward Saverin. Originally, membership was limited to Harvard students.<sup>5</sup> Access to the social network soon

expanded to Stanford and Yale. By August 2006, membership was open to 30,000+ “recognized schools, colleges, universities, organizations, and companies within the U.S., Canada, and other English speaking nations.”<sup>6</sup> That September, Facebook ended its strict exclusivity rules and became open to everyone.<sup>7</sup>

The rest, as they say, is history. As of this writing, Facebook reports that it has more than one billion users who log in at least once per month,<sup>8</sup> half of which will log in to Facebook any given day.<sup>9</sup> People share immeasurable amounts of information on Facebook, including status updates, pictures, videos, and links to stories published on third-party websites, and Facebook stores a great deal of information about its users. One recent article reports that Facebook stores up to 800 pages of personal information *on each user*.<sup>10</sup>

That wealth of information can be a valuable resource for the litigator. Depending on the applicable privacy settings, a quick check on Facebook could provide information that could make or break a case. Certain users allow anyone browsing the Internet, with or without a Facebook account, to access information posted on their profile pages. As will be discussed below, even information that may at first appear unavailable can later be accessed through discovery, subpoena, and court order.

### LinkedIn

LinkedIn is geared toward professional networking, though it shares attributes with other social-networking sites. For example, users can update statuses, add connections, join groups, and network. LinkedIn, however, is specifically geared toward business networking, and users will not find in-site game applications. Nor does LinkedIn boast a chat feature like Facebook’s. However, users can post their educational and work histories, request testimonials from their connections, and supply information about their specialties and publications.

LinkedIn reports that it “started out in the living room of co-founder Reid Hoffman in 2002.”<sup>11</sup> It officially launched in May 2003, and by the end of its first month, had 4,500 members. As of this writing, LinkedIn reports that it has 175 million members in over 200 countries.<sup>12</sup> It is also a publicly traded company on the New York Stock Exchange with the ticker symbol LNKD.

Although LinkedIn is not as ubiquitous as Facebook, it is still useful to the litigator. LinkedIn provides information about employment, friends, and connections. One interesting feature on LinkedIn is the “recommenda-

tions" feature. In a sense, LinkedIn seeks to enhance the traditional résumé with a more-accessible and interactive electronic version.<sup>13</sup>

LinkedIn may indeed be useful to the litigator in its intended use. While some lawyers might be hesitant to create a Facebook-style social media profile, LinkedIn provides a more-reserved alternative for the legal professional. LinkedIn boasts several law-oriented groups, as well as other networking opportunities.

### Twitter

One might say that Twitter took the "status update" from Facebook and refined it. Users are limited to 140-character "Tweets," which update "followers" on their activities and other items of interest. Twitter also appears to be premised on the "Do one thing and do it well" UNIX philosophy.<sup>14</sup>

Theoretically, Twitter is the product of a failed podcasting platform.<sup>15</sup> Some controversy exists around its founding. It was a project that started out slowly. During its beginning stages, the platform had fewer than 5,000 users after two months, and the CEO of its parent company bought back investors' stock for an estimated five million dollars. The company is now estimated to be worth in the neighborhood of five billion dollars.<sup>16</sup>

Twitter's value to the litigator lies in the real-time status updates that potential litigants may post. Twitter archives are searchable and largely public. Indeed, the Library of Congress hosts an entire Twitter archive that is continuously updated.<sup>17</sup>

### Other Sites

Although only three social media sites have been discussed in detail, there are myriad others devoted to social networking. Google+ is a new entrant to the scene that at least one person describes as a "throwback to Facebook 2004."<sup>18</sup> MySpace is still around, although it no longer enjoys the level of traffic it did in 2006, when it was still more popular than Facebook.<sup>19</sup> Further, MySpace has shifted its focus to content instead of pure social networking, and has attempted to become "the social network for music."<sup>20</sup>

This article has focused on Facebook, LinkedIn, and Twitter because these sites are currently the most popular social networking sites. It remains to be seen what new developments will bring.

When considering social media, one must keep in mind that none of the "top three" are even a decade old. Social media is ever evolving. At any point in time, a new social networking site may sprout from the depths of the unknown and become a popular destination for individuals to post content that is shared amongst the online community. Litigators must stay on top of the latest developments.<sup>21</sup>

## Uses of Social Media

Social media is helpful to lawyers in researching claims, preparing defenses, trial preparation, and litigation. These uses are discussed below in turn.

### Research

Social media can provide an invaluable tool for initial evaluation of a claim. For example, one might be able to use Facebook and LinkedIn to learn where a potential defendant works, what kind of assets that person might have, content uploaded regarding the future claim, and how that person sees himself or herself in the context of the potential case. Performing this research can help one to be more informed prior to filing suit. In some cases, this research might help a litigator to avoid bringing a claim that sounds great on the surface but breaks down under scrutiny. In other instances, a plaintiff's attorney may uncover valuable information that can be inserted into a complaint's general allegations and perhaps added as exhibits to bolster the plaintiff's count(s).

If one is particularly fortunate, there may be an admission on a social media profile that will go a long way toward building one's case. Lawyers are certainly permitted to conduct research on social-media networks. "Obtaining information about a party available in a [public] Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted."<sup>22</sup>

On Facebook, any person, Facebook user or not, has access to content that is published on someone's Facebook profile (subject to the Facebook user's Privacy settings). The Privacy setting may be changed by the subject to restrict access, by blocking others from "subscribing" to one's updates and changing other permissions. However, no privacy setting will completely restrict a party in a lawsuit from access to published Facebook content. Within Facebook's Privacy Policy in a section titled, "Some other things you need to know," is the following statement:

We may access, preserve and share your information in response to a legal request (like a search warrant, court order or subpoena) if we have a good faith belief that the law requires us to do so. This may include responding to legal requests from jurisdictions outside of the United States where we have a good faith belief that the response is required by law in that jurisdiction, affects users in that jurisdiction, and is consistent with internationally recognized standards. We may also access, preserve and share information when we have a good faith belief it is

necessary to: detect, prevent and address fraud and other illegal activity; to protect ourselves, you and others, including as part of investigations; and to prevent death or imminent bodily harm. Information we receive about you, including financial transaction data related to purchases made with Facebook Credits, may be accessed, processed and retained for an extended period of time when it is the subject of a legal request or obligation, governmental investigation, or investigations concerning possible violations of our terms or policies, or otherwise to prevent harm.<sup>23</sup>

Similarly, all content published on Twitter may be available for consumption by the general public. While users are given the option to block their Tweets from anyone who has not been admitted as a follower, those same Tweets may be re-published by permitted followers many times over, reaching a much larger audience than intended by the publisher. Further, Twitter has its own "Law and Harm" policy, which states:

Notwithstanding anything to the contrary in this Policy, we may preserve or disclose your information if we believe that it is reasonably necessary to comply with a law, regulation or legal request; to protect the safety of any person; to address fraud, security or technical issues; or to protect Twitter's rights or property. However, nothing in this Privacy Policy is intended to limit any legal defenses or objections that you may have to a third party's, including a government's, request to disclose your information.<sup>24</sup>

In 2010, a New York court addressed the protection of a Facebook user's posted content in a case involving a driver injured in a car accident.<sup>25</sup> The defendant, Harleysville Insurance Company of New York (Harleysville Insurance), did not believe that the plaintiff, Kara McCann, had sustained serious injuries, and made a request for the production of photographs from McCann's Facebook account as a means of verification.<sup>26</sup> The trial court denied (which the Appellate Court affirmed) Harleysville Insurance's motion to compel discovery, finding that the motion was overbroad, along with an apparent lack of proof regarding the relevancy of the Facebook photos.<sup>27</sup>

Parties do not have the ability force the production of all content published on Facebook. In order to require a party to produce published Facebook content, one must be specific in its demand and demonstrate the relevancy of the requested information. The court stated that Harleysville Insurance "essentially sought permission to

conduct a 'fishing expedition' into Plaintiff's Facebook account based on the mere hope of finding relevant evidence."<sup>28</sup> The court did not concern itself with the type of privacy setting the plaintiff attributed to her Facebook content; instead it denied the motion to compel discovery because the defendant did not make a clear showing of the relevance of the evidence.

However, in another 2010 case in New York, the court found the evidence to be relevant, and the party seeking to compel discovery requests was permitted to receive not only current and historical Facebook content, but also pages that had been deleted by the user.<sup>29</sup> The key question is whether the evidence is *material and necessary*. The court stated that disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" is required.<sup>30</sup> The court also stated that preventing access to *private postings* would be "in direct contravention to the liberal disclosure policy in New York State."<sup>31</sup>

## Defense

Occasionally, a person may claim one set of facts in public, but in the so-called "privacy" of his or her online network, an entirely different set of facts will come to light. In this situation, the litigator has a unique opportunity to defend against a claim that might otherwise seem unwinnable.

By effectively using social media to prepare a defense, one can realize a great advantage in preparedness. In one case, a University of Kentucky student sued a nightclub in federal court after she slipped and fell while dancing on a bar at the nightclub. She was injured and alleged that the bar was slippery and wet, and that the nightclub should have done more to prevent the accident. The defendant nightclub sought access to the plaintiff's and a witness's private Facebook pages. At one point, in a unique twist on in camera review, the magistrate judge overseeing the case offered to create a Facebook profile and "friend" witnesses "for the sole purpose of reviewing photographs and related comments."<sup>32</sup> The witnesses, however, never responded to the judge's "friend" requests.<sup>33</sup>

Though the judge ordered Facebook "to produce photographs, messages, wall posts and other information on the profiles of the injured patron and a friend who witnessed the accident," Facebook was able to successfully argue that the Stored Communications Act prohibited disclosure of members' information.<sup>34</sup> Eventually, the plaintiff's profile was reviewed in camera pursuant to the plaintiff's consent, and some content was presumably disclosed to the defense. The case settled on the proverbial courthouse steps, one day before it was scheduled to go to trial.<sup>35</sup> One can only speculate as to the motivation for the settlement, but the potential social media evidence may have been a significant factor.

Once information is available on social media sites, removal can be difficult—and in certain cases, disastrous. A recent wrongful death action from Virginia graphically illustrates this point.<sup>36</sup> In that case, the plaintiff had potentially damaging material posted on his Facebook profile. His attorney advised the plaintiff to “clean it up,” and deactivate the account. Although the plaintiff received a substantial jury verdict, the amount was cut post-trial due to the plaintiff’s and counsel’s behavior, and both were ordered to pay significant sanctions, including the defense attorney’s fees and costs.<sup>37</sup> In addition to over \$500,000 in sanctions, the attorney was fired from his firm, allegedly no longer practices law, and faces possible further sanctions from the state bar association.<sup>38</sup>

## Trial Preparation

If a claim appears headed to litigation, then social media provides an invaluable tool for trial preparation. If the percentages mentioned above hold true, then roughly half the witnesses will have a social media profile. An obvious advantage to gleaning information from social media profiles is that one can be much better prepared for cross-examination of adverse witnesses—social media can provide ideas for questions that will keep the adverse witnesses off balance. A lawyer can give the impression that he or she knows things about the witnesses that the other side does not. This kind of information can provide an insurmountable tactical advantage. The jury will notice.

Another, more subtle advantage to gleaning information from social media profiles is the corollary to the above-mentioned ability to be disconcerting. The more one knows about one’s witnesses, the better prepared one can be when the other side tries to put one off balance.

The key to being prepared is to prepare. Such a statement might sound less than profound, but its beauty is its simplicity. The more one prepares for trial, the better one comes across to a jury. Being prepared brings with it a sense of confidence that cannot be feigned. Social media provides an excellent source of preparation.

## Litigation

While social media provides a source of preparation for trial, how can it be used in the courtroom? After all, are not most statements made on a social media site the very definition of hearsay?

## Authentication

There are no hard and fast rules when it comes to authenticating social media-based evidence. For example, in a recent Connecticut criminal law case, a defendant sought to impeach a prosecution witness with Facebook printouts from her account. The court refused to allow the evidence. It held that “it was incumbent on the defendant, as the proponent, to advance other foundational proof to authenticate that the proffered messages did, in fact, come

from [the prosecution witness] and not simply from her Facebook account.”<sup>39</sup>

A recent whitepaper from an e-discovery processing firm notes the problem of authenticating social media based evidence. How, exactly, does one make the jump from the computer screen to the courtroom? The author explains:

Under US Federal Rule of Evidence 901(a), a proponent of evidence at trial must offer “evidence sufficient to support a finding that the matter in question is what its proponent claims.” Unless uncontroverted and cooperative witness testimony is available, the proponent must rely on other means to establish a proper foundation. A party can authenticate electronically stored information (“ESI”) per Rule 901(b)(4) with circumstantial evidence that reflects the “contents, substance, internal patterns, or other distinctive characteristics” of the evidence. Many courts have applied Rule 901(b)(4) by ruling that metadata and file level hash values associated with ESI can be sufficient circumstantial evidence to establish its authenticity.<sup>40</sup>

As the paper further explains, metadata and file level hash values are not easy to preserve when collecting social-media-based evidence. Indeed, the author’s corporation is in the business of collecting and preserving social media based evidence.<sup>41</sup> Preservation and authentication of ESI is a highly technical and specialized field.

One option to help ensure eventual authentication of social media based evidence is then, of course, to hire a professional engaged in the business of preserving this data. Another option is to educate oneself to the point of expertise in the field.<sup>42</sup>

Although it may be expensive to hire an e-discovery expert, the initial expense is likely to be outweighed by the future benefit. If one is attempting to keep the cost of litigation manageable, it may make sense to have an investigator or paralegal perform the initial research. One can then follow up with a professional if appropriate.

## Admission by Party Opponent

The most natural use for social media in the courtroom is the admission by a party opponent. The admission by a party opponent is not an exception to the hearsay rule, but is actually considered non-hearsay under the Federal Rules.<sup>43</sup>

New York recognizes the same exception.<sup>44</sup> Accordingly, one of the first places one should look for possible

evidence is the opposing party's or parties' social media profiles. There could very well be something out there in hyperspace that could be highly relevant to a claim or defense.

### Impeachment

Social media might be used to impeach a witness. A lawyer representing his or her client in litigation may access and review the other party's published social media contact to search for potential impeachment material.<sup>45</sup>

As an example, in the previously mentioned Connecticut criminal case, the defendant likely could have introduced the contradictory Facebook printouts for impeachment purposes had the evidence been authenticated properly. Social media can provide fertile ground for impeachment evidence.

### Effect on the Listener

One of the broader exceptions to the hearsay rule is the effect it has on the listener. For example, if one's client saw a Facebook post that infuriated him or her, then the attorney might be able to inquire as to how a certain post made the client feel. It can help to give context or to explain why a client acted in a certain way in a given situation.

There is also an additional benefit to the effect-on-the-listener exception. One should keep in mind that it is "hard to unring the bell, once that bell has been rung." As a practical matter, evidence introduced for the effect it has on the listener—although not offered for its truth—still gets before the jury. As another saying goes, "If you throw a skunk into the jury box, you can't instruct the jury not to smell it." We certainly do not advocate using this tactic indiscriminately, but on occasion, it may be one's best bet for getting effective and relevant—yet technically inadmissible—evidence before the finder of fact.

### Independent Legal Significance

If a statement has independent legal significance, then it is admissible, even though it might otherwise be considered hearsay. Contracts can be created online through social media. Libel, slander, and threats can all be expressed via social media. It only matters that the thing of independent legal significance was said, not that it is true.

### Courtroom Closing Notes

There are certainly other uses of social media based evidence, and ways to introduce it. This article has sought to provide some of the more common methods one might employ for introducing social media into evidence. This is not an exhaustive list. One could make an argument, for example, that Facebook postings are business records. Ultimately, whether or not one is allowed to use social media based evidence in a courtroom setting will depend on the trial judge, the other litigants, and one's creativity.

### Pitfalls

No matter how enticing the information one might glean from social media profiles, it must always be viewed with a healthy dose of skepticism. It would be foolhardy to suggest that glancing at a few social media profiles will prepare one for a trial. People lie. One can never be absolutely sure that the person behind the profile is the same person he or she purports to be. Content may be posted on someone's social media profile by a third party without the owner's permission and/or knowledge. Social media's greatest value lies in providing a starting point. It should never be regarded as a substitute for further research.

Social media profiles are not, as a rule, overly easy to access. Various privacy controls can prevent a member of the general public from viewing a person's personal profile. In most cases, the lawyer using social media to investigate a claim, prepare a defense, or prepare for trial will fall into the member-of-the-general-public category. In addition, at least one ethics opinion has held that it is unethical for an attorney to "friend" an adverse party or potential witness in a case without disclosing the purpose for the friend request.<sup>46</sup>

The New York State Bar Association, however, has clearly held that publicly available Facebook and MySpace postings are fair game.<sup>47</sup> That said, various jurisdictions have stated that social network information must be discovered ethically, and that lawyers are prohibited from using deception to gain access to such material.<sup>48</sup>

Ultimately, one will have to vet social media based evidence using the same criteria that one would use for any other type of evidence. This is an exciting and developing area of the law, but attorneys must exercise professional judgment in using social media in the courtroom and otherwise.

### Suggestions for Further Study

The Electronic Discovery Reference Model is a group created in 2005 "to address the lack of standards and guidelines in the electronic discovery (e-discovery) market."<sup>49</sup> The group, in conjunction with FindLaw, provides an "Interactive Guide to Electronic Discovery," which is a helpful resource for understanding the e-discovery process and best practices.<sup>50</sup>

Regarding the ethical considerations associated with use of social media, a recent *Delaware Law Review* article argues that competency and diligence require attorneys to account for social media in investigation and discovery.<sup>51</sup>

Another recent *Duke Law Journal* article explores sanctions for e-discovery violations and ESI, and identifies "230 sanction awards in 401 federal cases."<sup>52</sup> This article

provides an excellent overview of the issue of pitfalls in preservation of ESI and sanctions.

There are many blogs devoted to e-discovery and social media as it relates to the practice of law. One such blog that was very helpful in writing this article is the Next Generation eDiscovery Law & Tech Blog.<sup>53</sup> E-discovery and the use of social media in litigation are fast-developing—perhaps the *fastest* developing—areas in the practice of law. New resources become available every day and the potential for innovation is wide open. We encourage readers to continue the discussion on the EASL Blog.

## Endnotes

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13. Indeed, one of the features of LinkedIn is that users are encouraged to upload a traditional “paper” résumé in order to complete their profile.
14. See Scott Merrill, *Do One Thing, and Do It Well: 40 Years of UNIX*, TECHCRUNCH.COM, Aug 21, 2009, [http://techcrunch.com/2009/08/21/do-one-thing-and-do-it-well-40-years-of-unix/\(explaining UNIX's underlying philosophy\)](http://techcrunch.com/2009/08/21/do-one-thing-and-do-it-well-40-years-of-unix/(explaining%20UNIX's%20underlying%20philosophy)).
15. Or so the story goes. See Nicholas Carlson, *The Real History Of Twitter*, BUS. INSIDER, April 13, 2011, [http://articles.businessinsider.com/2011-04-13/tech/29957143\\_1\\_jack-dorsey-twitter-podcasting](http://articles.businessinsider.com/2011-04-13/tech/29957143_1_jack-dorsey-twitter-podcasting) (explaining that Twitter evolved from the failure—or unfeasibility—of the Odeo podcasting platform, which was intended originally to be used with Apple products).
16. *Id.*
17. Matthew Raymond, *How Tweet It Is!: Library Acquires Entire Twitter Archive*, LIB. OF CONG. BLOG, Apr. 14, 2011, <http://blogs.loc.gov/loc/2010/04/how-tweet-it-is-library-acquires-entire-twitter-archive/>.
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19. Yadav, *supra*, note 4.
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27. *Id.*
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40. John Patzakis, *Overcoming Potential Legal Challenges to the Authentication of Social Media Evidence*, X1 DISCOVERY (2011), available at [http://x1discovery.com/download/X1Discovery\\_whitepaper\\_Social\\_Media\\_2011.pdf](http://x1discovery.com/download/X1Discovery_whitepaper_Social_Media_2011.pdf).
41. *Id.*
42. While this may be within the realm of possibility for some readers, an instruction manual is well beyond the scope of this article. We encourage all readers to consider the "Suggestions for Further Study" located on pp. 24-25 of this article for more information.
43. Fed. R. Evid. 801(d)(2) (2012).
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46. Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02 (March 2009).
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48. See N.Y. City Comm. on Prof'l Ethics, Formal Op. 2010-2; Phila. Bar Ass'n. Op. 2009-02.
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51. Margaret M. DiBianca, *Ethical Risks Arising From Lawyers' Use of (and Refusal to Use) Social Media*, 12 DEL. L. REV. 179 (2011).
52. Dan H. Willoughby, Jr., Rose Hunter Jones, Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 790 (2010), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1487&context=dlj>.
53. Though it is a commercial project, the blog provides an excellent resource for getting up to speed on social media and e-discovery issues. Next Gen. eDiscovery Law & Tech Blog, X1DISCOVERY, <http://blog.x1discovery.com/>.

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