

# Review and Use of Evidence from Social Media



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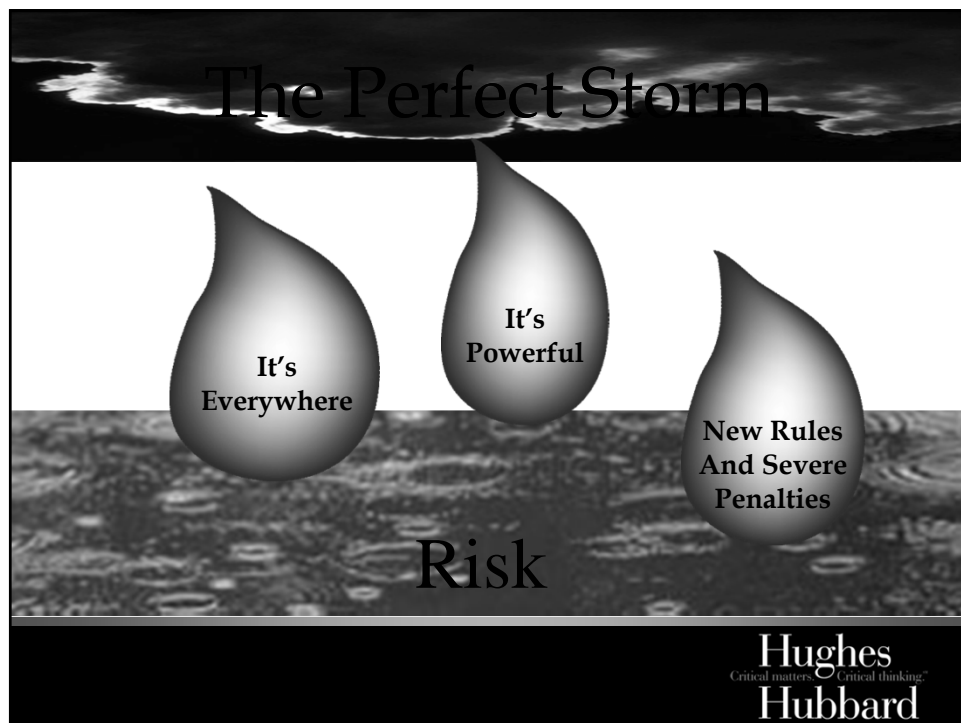
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## What is Social Media?

- Interactive
- Internet-based tools that enhance the sharing of information
- Goal is to maximize user accessibility and self-publication
- A blending of technology and social interaction for the co-creation of value
- Building communities and networks
- Encouraging participation and engagement
- Creates a PERMANENT RECORD

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## Attorneys and Social Media

- Attorneys must be cognizant of how ethics rules interact with the constantly changing social media world
- Courts are more clearly articulating counsel's affirmative duty to act competently and diligently
- **Counsel should expect to be held to a higher standard than ever before**

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## ABA Amendment to Comment 6 to Model Rule 1.1 (Aug. 2012)

- [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.
- ABA Commission on Ethics 20/20 Report (5/8/12) noted that amending comment was critical given the "growing importance of technology to modern law practice."

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## Litigation Holds



- Social media posts are within the scope of “electronically stored information” as that term is used in Rule 34 of the Federal Rules of Civil Procedure
- Company protocols for instituting legal holds should address social media

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## Preservation of Social Media



- Most organizations have in place processes to preserve email and electronic documents, but do not have a process in place to preserve, archive (securely maintain in an indexed and searchable database), and research social media.
- Failing to preserve social media evidence could lead to sanctions and leaves organizations unprepared for producing social media data during e-discovery.
- Attorneys who engage in simple copy-and-paste efforts or screen prints can face significant hurdles to get this information admitted into evidence.

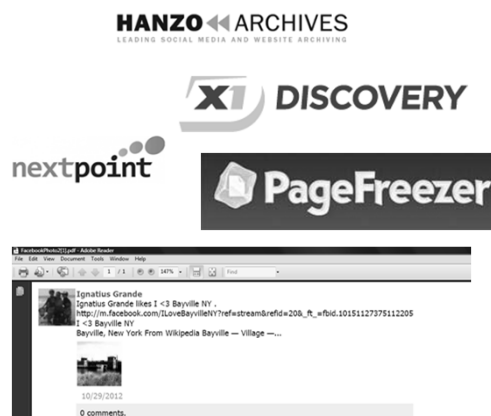
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# Tools to Preserve Social Media

- There are different products available to assist with preserving social media and websites with the appropriate metadata.
- A party will also need to be able to preserve embedded native files, whether those are PDF files, Word documents, Excel spreadsheets, or PowerPoint presentations.
- Most social media preservation tools will connect to a publisher's API (Application Programming Interface), which is seen as the most accurate way to preserve social media web data.
- Are tools out there that preserve Facebook, Twitter, LinkedIn, Gmail & other webmail, Outlook Mail, and other websites.

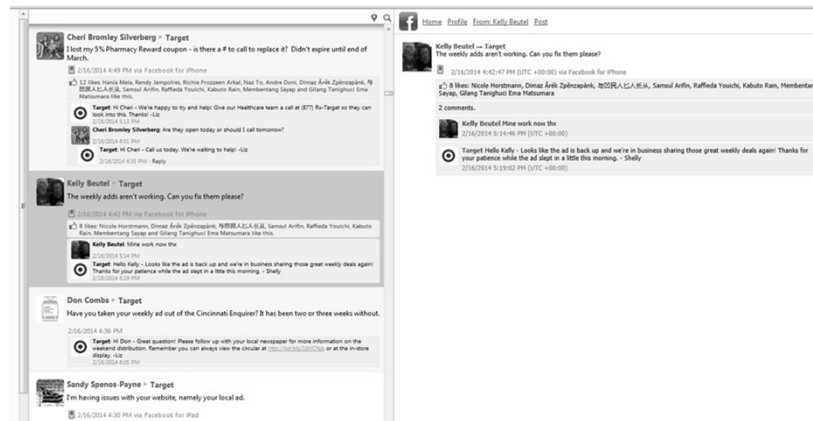
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## Social Media Preservation Tools

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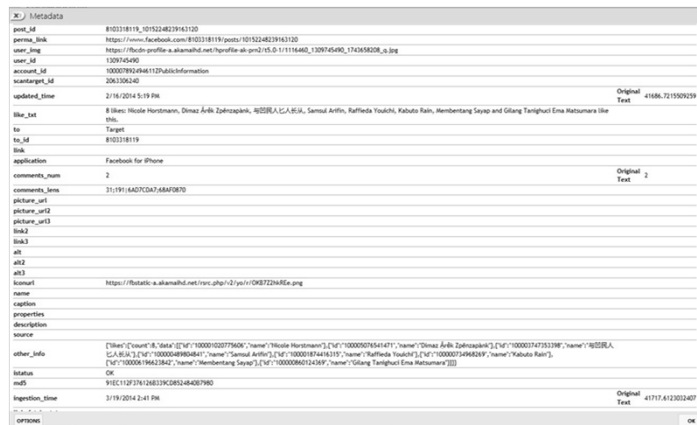
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# Capturing a Facebook Account



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# Metadata Capture



## Captures:

- # of likes
- Names & Unique IDs of users who "Like" and comment
- MD5 hash of page
- Whether post was from website or mobile device

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## Social Media In Discovery



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## Pursuing Social Media Communications in Litigation

- Types of cases where social media could prove helpful
  - Personal Injury
  - Medical Malpractice
  - Divorce
  - Bullying
  - Non-Competition
  - Fraud

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## Using Social Media

- Navigating attorney ethics rules
  - Use of social media to investigate adversarial witnesses
  - Use of social media to investigate non-parties
  - Viewing publicly available social media
- Use of Social Media
  - On a motion to dismiss
  - On a motion for summary judgment
  - At a hearing or at trial

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## Affirmatively Using Social Media

- Attorneys are now expected to conduct web searches for public social media sites of adverse parties or adverse witnesses.
- To access private social media information, a party must identify social media sources that are discoverable and demonstrate that the evidence sought is likely to be relevant.
- Requests for private social media information must be tailored.
  - When asking for social media in discovery, you need to strategize and tailor requests and use proper language

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## Proactively Searching Social Media

- Parties must realize that whatever they post on social media may end up being an exhibit in their case.



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### *Fawcett v. Altieri*

38 Misc.3d 1022, 1027 (N.Y. Sup. Ct. Richmond Co. 2013)

- In this case, the Plaintiff filed a complaint alleging assault and other claims arising out of a fight at a high school tennis match.
- Defendant demanded authorizations to access and obtain copies of Plaintiff's "*current and historical records and/or information and photographs on Plaintiff's social media website pages, including but not limited to Facebook, MySpace, Friendster, Flickr, and any other social media websites.*"
- In denying the motion, the Court held that when discovery of a private account is sought, the requesting party must show with some credible facts that the other party has posted information or photographs relevant to the facts of the case. The Court held that "[c]ourts should not accommodate blanket searches...to impeach a person's character, which may be embarrassing, but are irrelevant to the facts of the case at hand."

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## NYSBA Social Media Ethics Guidelines for Attorneys

The NYSBA Social Media Guidelines provide guidelines for attorneys on five subjects:

- Lawyer advertising;
- Giving legal advice in social media networks;
- Gathering evidence on social media sites;
- Advising clients about social media accounts; and
- Reviewing jurors' profiles and posts.



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## Lawyers Obtaining Evidence Using Social Media

The Association of the Bar of the City of New York,  
Committee on Professional Ethics, Formal Opinion  
2010-2, "Obtaining Evidence From Social Networking  
Websites"

- A lawyer may not attempt to gain access to a social network under false pretenses, either directly or through an agent.
- For example, an attorney or hired investigator might try to pose as an old classmate and send a friend request to a potential witness or unrepresented party in order to gather personal information.

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## No Deceptive Behavior

- The committee stated that such deceptive behavior was barred under the New York State Rules of Professional Conduct, namely Rules 4.1 and 8.4(c), which prohibit attorneys from making false statements and engaging in dishonest conduct, respectively
- Rule 4.1: In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.
- Rule 8.4(c): A lawyer or law firm shall not: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation

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## Gathering Public Social Network Information

New York State Bar Association, Committee on Professional Ethics, Op. 843 (Sept. 10, 2010)

- The opinion discussed a lawyer's ethical obligations in gathering public social network information that is not restricted by a user's privacy settings.
- The committee stated that a lawyer representing a client in pending litigation may access the public pages of another party's social networking website for the purpose of obtaining possible impeachment material.
- The committee also noted that searching for such public data is no different than typing a person's name into an Internet search engine, searching print media sources, or conducting research on paid subscription services like Westlaw.

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## Friending Witnesses

- NY City Bar Formal Op. 2012-2: A lawyer can only friend a potential witness to obtain information for use in litigation if the lawyer uses his/her real name, but does not need to disclose the reasons for making the request.



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## Obtaining Information from Twitter



- A man falsely charged with posting an in-court photograph of a 12-year-old sexual assault victim is entitled to information that could identify the culprit who apparently assumed his identity and shared the picture on Twitter
  - “[The Plaintiff] has demonstrated that he has a meritorious case for intentional infliction of emotional harm to the extent necessary to trump any First Amendment protections, including the right to speak anonymously.”

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## Counseling Clients About Their



## Social Media Use

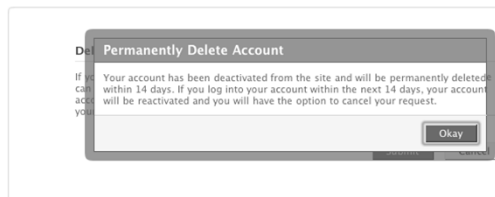


- During litigation, attorney instructed his client to remove photos from the client's Facebook profile
  - Attorney advised the client via e-mail to “clean up” his Facebook page because “we do NOT want blow ups of other pics at trial so please, please clean up your facebook and myspace.”
  - He also advised client that there were “other pics that should be deleted.”
- Attorney also had client deactivate Facebook account so that attorney could “truthfully” represent to defense counsel that on the date the answer to the discovery was signed the client had no Facebook page.

*Lester v. Allied Concrete Co.*, Nos. CL08-150, CL09-223 (Va. Cir. Ct. Sept. 1, 2011).

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## Sanctions



- Attorney was sanctioned \$522,000 and client was ordered to pay an additional \$180,000 for having obeyed the instruction.
- Attorney's misconduct was referred to the Virginia State Bar and the allegations of the client's perjury to the local prosecutor.

**Lesson Learned:** Social Media needs to be treated like any form of ESI and lawyers need to be careful with advice that they give clients re: social media.

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## Painter v. Atwood

(D.Nev. March 18, 2014)

- In sexual harassment case, the Plaintiff deleted certain damaging Facebook comments after retaining counsel and claimed that she was young and didn't know what she was doing.
- Court held that:
  - "Plaintiff had an obligation to preserve her Facebook comments; she deleted the comments with a culpable state of mind, and the comments were relevant to Defendants' claim. Although Plaintiff's counsel may have failed to advise Plaintiff that she needed to save her Facebook posts and of the possible consequences for failing to do so, the deletion of a Facebook comment is an intentional act, not an accident, and the Court cannot infer that Plaintiff deleted Facebook comments...after she contemplated the instant litigation, for an innocent reason."

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## Criminal Law and Social Media

- Law Enforcement Use
- Sentencing Issues
- Cyberstalking
- ID Theft
- Unlawful Access to Another's Account
- Sexting and Child Pornography
- Sexual Predators
- Orders of Protection
- Probation Issues

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## Let's post our crime on Facebook!



- This theft didn't even come to the Jenkins City Police Department's attention until the photo was posted on Facebook and started circulating around the small town of Jenkins that has barely more than 2,000 residents.

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## Memorializing Crimes on Social Media

A South Miami man confessed to fatally shooting his wife and posted a photo of her dead body on Facebook.



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## Chris Lane Murder



Social Media evidence helped connect Oklahoma teens to murder of Australian Chris Lane in August 2013.

- Police say it appears the boys were keeping a log of the crimes on their Facebook pages and believe they killed an animal before shooting Chris Lane.
- James Edwards tweeted on last Tuesday - just two days before the shooting - that he was 'With my n\*\*\*\*\*s when it's time to start taken life's [sic].'

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## Use of Social Media at Trials and Court Proceedings



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## Social Media Trial Tips

- During voir dire, counsel should inquire as to jurors' usage of the Internet generally, and social media specifically. Inquire as to what websites jurors frequent, how often they access those websites, and if they post to those websites.
- Counsel should request that in his initial instructions to the jury, the judge expressly prohibit research and communications on the Internet at any time during the trial. The instructions should explicitly reference and prohibit the use of social media, including Facebook, Twitter, etc.
- Where juror misconduct seems apparent, counsel should strongly consider a post verdict motion for voir dire of a juror to determine whether juror misconduct has in fact occurred.

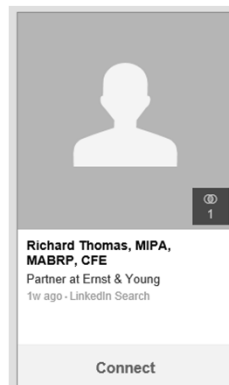
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### Researching Jurors



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## New York Ethics Opinions re: Juror Research

- NY County Lawyers Ass'n Op. 743 (5/18/11) – ethical for an attorney to search a prospective juror's social media website (e.g., Facebook, Twitter, LinkedIn, MySpace), provided that the attorney does not engage in contact with or send a friend request to the potential juror.
- We conclude that if a juror were to...learn of the attorney's viewing or attempted viewing of the juror's pages...that *would* constitute a prohibited communication if the attorney was aware that her actions would cause the juror to receive such message or notification.
  - New York City Bar Formal Opinion 2012-2

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## BUT SEE ABA Formal Opinion 466 (Juror Research) April 2014

- It is not improper for a lawyer to look at social media postings by a juror in advance or during a trial.
- Lawyers are prohibited from communicating directly with a juror or potential juror.
- Lawyers should not "send[] an access request to a juror's electronic social media."
- However, if the potential juror becomes aware that a lawyer is reviewing a juror's Internet or social media presence, such conduct would **not** count as a communication from the lawyer.

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## Juror Research In the News

- A first-year associate came close to derailing a high-profile Manhattan federal fraud trial this past fall, after a juror complained that he had been “cyberstalked” on LinkedIn.
- U.S. District Judge Jed S. Rakoff admonished defense attorneys after a juror sent him a note complaining “the defense was checking on me on social media.”
- The head defense attorney, took responsibility, saying he wanted them checked to make sure a juror with a criminal conviction or connection to Bank of America did not slip through.
- Defense counsel said the juror was not sent any kind of message – “he probably knew about the search because of an automated message from LinkedIn..”

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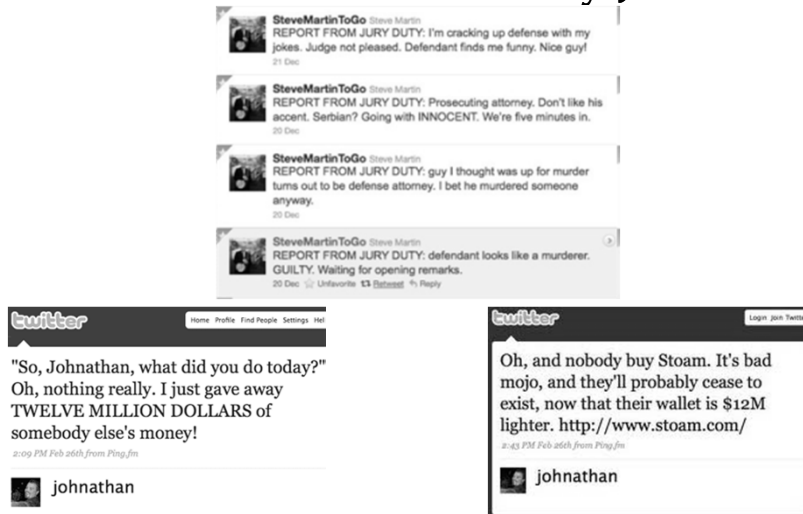
## Jurors and Social Media: A Dangerous Mix?

- Jurors can “Google” the lawyer, defendant, witnesses, judge
- Jurors can “follow” a reporter who is covering the trial on Twitter
- Jurors can “follow” the defendant on Twitter
- Jurors can access attorney’s, defendant’s and judge’s Facebook pages
- Other possibilities?



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# Misuse of Social Media by Jurors



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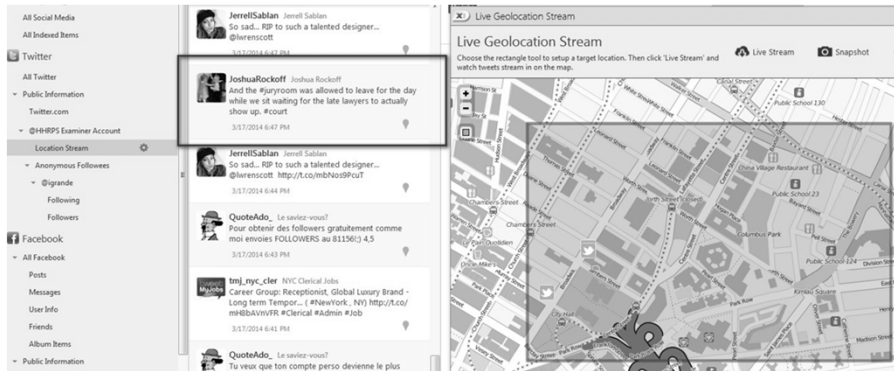
## Jurors & Social Media

- New trial sought because 5 jurors became Facebook friends and “changed jury dynamics”
- Manslaughter conviction overturned due to jury foreman's use of an iPhone to look up the definition of "prudent" in an online dictionary.



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## Jurors Tweeting in Real Time



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## Ramifications of Juror Social Media Use

### Trending Topic

Lawyers increasingly are using jurors' social-media posts as a reason to appeal convictions and acquittals.

Facebook post by Juror No. 1 in a 2010 case in Sacramento, Calif.:

'Back to jury duty can it get any more BORING than going over piles and piles of metro pcs phone records... uuuuughhhh.'

In a recent survey, 30 federal judges discussed which action they took when social media were used by a juror.



Source: Federal Judicial Center

The Wall Street Journal

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### NY Civil Pattern Jury Instruction 1:11, Discussion with Others - Independent Research.

- All electronic devices including any cell phones, Blackberries, iPhones, laptops or any other personal electronic devices must be turned off while you are in the courtroom and while you are deliberating after I have given you the law applicable to this case. [In the event that the court requires the jurors to relinquish their devices, the charge should be modified to reflect the court's practice]
- It is important to remember that you may not use any internet services, such as Google, Facebook, Twitter or any others to individually or collectively research topics concerning the trial, which includes the law, information about any of the issues in contention, the parties, the lawyers or the court. After you have rendered your verdict and have been discharged, you will be free to do any research you choose, or to share your experiences, either directly, or through your favorite electronic means.

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### Social Media and Settlements

- The ease with which individuals can post on social media has also made it easier than before to violate confidentiality agreements
- In a very recent case, the former head of a private school, lost out on an \$80,000 discrimination settlement because of his daughter's Facebook post, which violated the confidentiality provisions of the settlement agreement.
  - "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."

*Gulliver Sch., Inc. v. Snay*, 2014 BL 51911, Fla. Dist. Ct. App., 2/26/14)  
(finding confidential agreement violated by daughter's post)

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Questions?

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tumblr.



Instagram



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