

NYSBA

FALL 2018

# Perspective



A publication of the Young Lawyers Section  
of the New York State Bar Association



[www.nysba.org/YLS](http://www.nysba.org/YLS)

# From the Editor's Desk

We are all always learning something new. The theme of this issue is to not be afraid of what you don't know and to embrace the learning process as an enriching experience rather than a scary undertaking. This is my first edition as the Editor-in-Chief for *Perspective*, having transitioned from the previous editor last year. While I am a confident litigator in my daily life, there were many things that were new (and overwhelming) to me in this position—from gathering articles, to knowing whether to italicize a comma in a footnote. I'm glad that I did not let my nerves get the better of me and contacted the previous editor for help. She was able to point me in the right direction for written materials that helped enormously in the process. This solidified my belief that when you don't know, you should ask!

I'm proud to be able to say that this issue is meant to help young attorneys. It includes articles written by both young and more seasoned attorneys. They address the social aspect of being an attorney and give extremely helpful practical tips. The topics vary from a newly practicing attorney's perspective on how to cope with the unknown, to where to get help when you need it, to particular and individualized tips in litigation such as doing a FOIL search, impeaching a witness with prior inconsistent statements, and performing and using social media searches as tools for litigation.

I would have never been able to speak from experience as Editor-in-Chief if I hadn't allowed that experience to happen. I believe that what you don't know will hurt

you only if you leave it unknown. I hope this edition gives you a few answers to some of the questions you may have as a new attorney and encourages you to be open to new learning experiences. Enjoy!

**Respectfully,  
Norina Melita  
Editor-in-Chief**



**Norina Melita**

Norina is the managing attorney at Solomon and Solomon, P.C. and an adjunct professor of Business Law at the College of St. Rose. Her practice focuses on civil litigation involving matters of property damage and collection. She is admitted to practice in the state courts of New York, New Jersey and Massachusetts, as well as U.S. District Court for the Northern District of New York. At home she enjoys spending time with her family and volunteering in the community.

## The Section's District Representatives

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## Request for Articles



If you have written an article and would like to have it considered for publication in *Perspective*, please mail or e-mail it to:

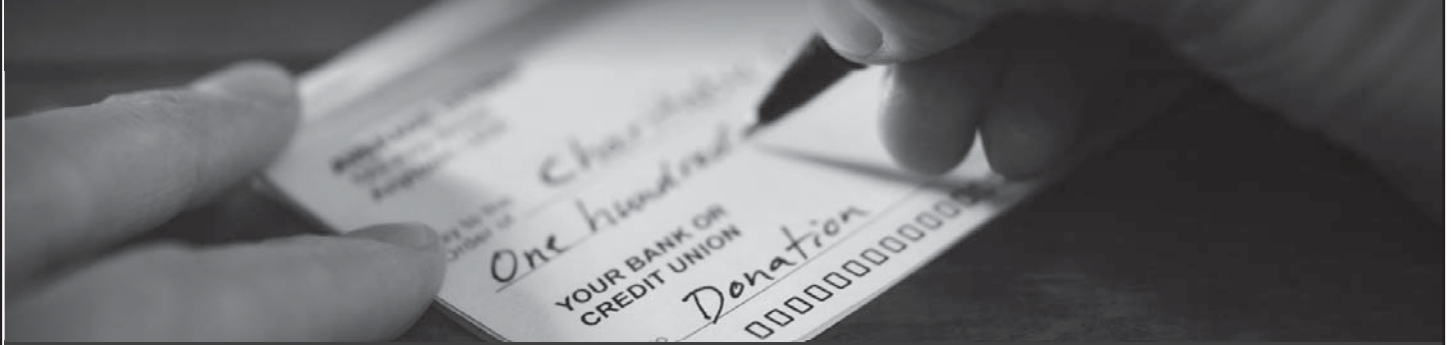
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### Guidelines

Articles can range from op-eds, current events pieces, short-form law reviews, and articles that highlight certain aspects of law or policy. Articles should be submitted in electronic document format (pdfs are NOT acceptable), and include a brief bio.

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# A New Attorney's Condensed Guide to Surviving the First Year in Practice

By Josh Aron

For many, law school can be three years of struggle that culminates in ripples of triumph: graduation, Bar admission, and landing a first job. In fact, passing the bar exam empowered me with a sense of tremendous accomplishment. So, I reported to my first day of work vested with an ability to accomplish. It wasn't long before I was surprised at the great sense of self-doubt and uncertainty that overtook me.

It's accepted wisdom that law school does not prepare you for passing the Bar exam, and that the Bar exam does not resemble the day-to-day activities involved in the practice of law. Unless you have had extensive internships in law school or prior job experience, your first introduction to drafting motions, dealing with clients, or analyzing a case could take place within your first week at your first job. It is also not uncommon that the area of law you practice may not be an area that you have been exposed to in your studies. Starting a new job, with its unique culture and operations, can be challenging in and of itself. That, coupled with the added pressure of learning what it means to be an attorney, can leave the recently admitted and newly hired attorney feeling outside her comfort zone.

My personal situation didn't allow for summer internships, so my first introduction to the practice of law (as opposed to the study of law) was on my first day on the job, and it was quite intimidating.

Life moves fast in the litigation world. So, while I'm still navigating the novelty of what it means to be a practicing litigator, I can already share some insight on how to get to the point where a newly admitted attorney is comfortable putting into practice what he or she has for so long studied and dreamed of.

## I. Mentor

Find a mentor at your place of work. Finding someone who has experience in the same area of law and knows the ins and outs of how the firm operates can streamline your transition. Such a person can help you with the nuances of the law, potential pitfalls, and understanding what is expected of you at the new firm. If the mentor-mentee relationship does not readily present itself, it is worth the effort to develop one. That might entail bringing morning coffee, a working lunch, or any other assertive step within your comfort zone—be it work-related or a common interest. Whether it be prepping for your first deposition, your first trial, or drafting a summary judgment, having a mentor to guide you is highly advantageous.

## II. Confidante

While it is important to have a mentor at work, it is equally as important to find a sounding board outside the workplace. This should be, preferably, a seasoned, established attorney who can provide advice and a perspective about the profession. If you don't have anybody in either your inner circle or outer orbit whom you feel comfortable leaning on, perhaps there is a professor from law school

that you have a good relationship with, or even a former law school colleague. It should definitely be someone who is interested in, or at least understands the intricacies of, practicing law.

## III. Written Materials

Utilize Westlaw, the internet, textbooks, class outlines. Even though you are no longer in law school, materials can still be put to good use. Finding written materials that can easily make sense of complex issues will save you time, prevent errors, and ultimately relieve stress. During my transition, my confidante recommended *New York Practice* by David D. Siegel. I found it to be extremely useful. Whatever "book" you use may not solve the exact problem at hand, but for me it fortified my understanding of the subject, and therefore made me more comfortable dealing with problems and questions.

## IV. Continuing Education

While today might be your first exposure to actual litigation, don't forget that you have years of legal training. However, it is incumbent on you to build upon that training. Acquire new knowledge by taking CLE classes that complement your field of law, and take advantage of your Bar Association offerings by attending conferences and joining associations.

## V. Rest and Relaxation

It's a well-known fact that attorneys have the highest rate of stress, alcohol addiction, or miscarriages due to stress. If you don't already have a hobby, find one. The law is a stressful profession, with long hours and major responsibilities. Mental health protection is imperative. Sufficient R and R will lead to productivity at work but also peace of mind at home.

Law is a challenging field with many pitfalls. It also provides considerable satisfaction. As with any career, it takes time to acclimate, become proficient, and excel. Don't get overwhelmed by challenges, as progress is not always linear. Allow yourself the time to learn, graduate from mentee to mentor and, when possible, pay it forward.

**Josh I. Aron, is a litigation attorney at Solomon and Solomon P.C. and is admitted to practice law in both New York and New Jersey. In his free time he enjoys flying drones and spending time with his family.**



**Josh Aron**

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☐ I am a Section member — please consider me for appointment to committees marked.

Name \_\_\_\_\_

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Law school \_\_\_\_\_

Graduation date \_\_\_\_\_

States and dates of admission to Bar: \_\_\_\_\_

## JOIN A COMMITTEE

### Young Lawyers Section Committees

Committee involvement allows you to address unique issues facing new attorneys and opens the door for pro bono opportunities. Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested.

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- \_\_\_ Trial Academy (YOUN2700)

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# NEW YORK STATE BAR ASSOCIATION



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 \_\_\_\_\_ Date of birth \_\_\_\_ / \_\_\_\_ / \_\_\_\_  
 City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_ Law school \_\_\_\_\_ Graduation date \_\_\_\_  
 The above address is my ☐ Home ☐ Office ☐ Both States and dates of admission to Bar: \_\_\_\_\_  
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Class based on first year of admission to bar of any state.

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#### DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS

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<input type="checkbox"/> Business Law**	25.	<input type="checkbox"/> General Practice**	25.	(Focus on Attorneys age 55 and over)	
<input type="checkbox"/> Commercial & Federal Litigation*	40.	<input type="checkbox"/> Health Law**	35.	<input type="checkbox"/> Tax*	25.
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<input type="checkbox"/> Dispute Resolution***	35.	<input type="checkbox"/> Judicial	25.	<input type="checkbox"/> Trusts & Estates Law**	40.
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<input type="checkbox"/> Environmental & Energy Law*	35.	<input type="checkbox"/> Real Property Law <sup>†</sup>	40.	(Law Students, and attorneys admitted less than 10 years)	
<input type="checkbox"/> Family Law*	35.				

Section Dues Total \$ \_\_\_\_\_

\*Law Student Rate: half price \*\*Law Student Rate: \$5 \*\*\*Law Student Rate: \$10 \*\*\*\*Law Student Rate: \$15 †Law Student Rate: \$12.50 +Law Student Rate: FREE

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Section Dues  
(Optional)

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\$
\$

**METHOD OF PAYMENT:** ☐ Check (payable in U.S. dollars)

☐ MasterCard ☐ Visa ☐ American Express ☐ Discover

Account Number \_\_\_\_\_

Expiration Date \_\_\_\_\_ Date \_\_\_\_\_

Signature \_\_\_\_\_

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# The NYSBA Young Lawyers Section Trial Academy: A Young Lawyer's Take

By Patrick M. Butler

I was fortunate to have had the opportunity last year to attend the NYSBA Young Lawyers Section Trial Academy at Cornell Law School from April 5 to 9, 2017. I want to extend a special thanks to the TICL Section for graciously granting me a scholarship. Overall, the Trial Academy is an outstanding opportunity for young lawyers to develop their trial skills. In addition to the attendees, there are team leaders, lecture speakers, and critique faculty in attendance over the course of the five days. The program focused on two fact patterns, one being a civil and the other a criminal case. The civil fact pattern involved a wrongful death motor vehicle accident. The criminal fact pattern was a kidnapping and felony murder case. The attendees were given packets that were to be read prior to the start of the program. These packets consisted of procedural instructions, deposition transcripts, witness lists, exhibits, and jury instructions.

The program consisted of morning and afternoon sessions. In the morning session, seasoned trial attorneys and/or judges gave lectures on all phases of trial. Lectures were presented in the chronological order that a typical trial consists of. Each day of the program built on what was learned the day before. The morning lectures were very informative and engaging. Attendees were instructed on proper trial techniques and also got to see experienced trial attorneys demonstrate jury selection, opening/closing statements, and direct/cross examination.

Each day, between the morning and afternoon session, was a luncheon sponsored by various NYSBA Sections. This daily luncheon was a great networking opportunity because attendees got the opportunity to meet attorneys and judges from all over New York State. I met a number of other young attorneys during the luncheons, many of whom I now see in court on a daily basis. Other networking opportunities were receptions that took place in the evening. There were also NYSBA Executive Committee meetings that attendees were encouraged to attend. I not only got the opportunity to sharpen my trial skills but also to meet some of the best litigators and judges in New York State.

The afternoon session of the Trial Academy is where the attendees put into practice what they learned in the lectures. Attendees presented a jury selection, opening statement, direct examination, cross examination,

and closing argument in front of rotating critique faculty. What was great about these presentations was that attendees could take risks and try methods of litigation that they may not have felt comfortable doing in a traditional courtroom atmosphere. The critique faculty, team leaders and fellow attendees then gave you feedback on your presentation. You then worked one-on-one with a seasoned litigator or judge by reviewing your videotaped presentation. This one-on-one work really helped show you what you did right and what you could improve on. By watching your videotaped presentation, you were able to see how your body language and posture affected how your argument actually came across to your audience.

I had some trial experience before attending the Trial Academy, having picked numerous juries and taken to verdict a summary jury trial and unified trial. However, my previous trial experience had been in civil matters, and the Trial Academy gave me the opportunity to try my hand at criminal litigation. For example, I was assigned to do an opening statement for the defense in the criminal fact pattern. Having previously done opening statements defending civil matters, I felt confident that I would be able to deliver an adequate opening statement. I was overly optimistic about my ability to present a criminal defense opening statement, as I got mixed feedback from the critique faculty. That being said, the constructive criticism that I received from the critique faculty is the whole point of the Trial Academy. The critique faculty is not there to pat you on the back and tell you how good of an attorney you are. They are there to point out your shortcomings and help you become a better attorney.

There was also a lot to be learned at the Trial Academy by watching fellow attendees do their presentations. Breakout groups, consisting of about 10-15 young lawyers and a group leader, were designated. The members of my group came from various backgrounds and experiences. When getting feedback from the critique faculty, all group members were also listening to that feedback. On multiple occasions, a member of my group got feedback regarding a particular part of his or her presentation. Another member of my group would then do a presentation, keeping in mind what the critique faculty had just gone over. This gave all members of the group

the opportunity to see how a particular trial technique comes across when done the right way and the wrong way. This “trial by error” type method of learning really helped reiterate the trial techniques and etiquette that were taught. The team leaders, in addition to keeping the presentations organized and timely, also gave excellent feedback.

The lecture materials provided to the Trial Academy attendees are also a great resource. The last trial that I had was a motor vehicle accident case in Queens County, Supreme Court. The case involved a very contentious liability situation, with two completely different versions of events from the plaintiff and defendant. While preparing for the trial, I repeatedly referenced the lecture materials. Introducing a photograph into evidence, or impeaching a witness on a particular point, is not always that easy to do. Written materials regarding opening/closing statements, laying foundation to introduce exhibits into evidence, and common trial objections are just some of the many materials that I obtained and continue to use to this day.

Overall, the Trial Academy is an invaluable experience. I would highly recommend the program to every

young litigator. The diversity and different backgrounds of the attendees, team leaders, lecture speakers, and critique faculty is what really makes the experience unique. I am grateful that I had the opportunity to learn trial practice from some of the best attorneys and judges in New York State.

**Patrick is currently an associate attorney at Maroney O'Connor LLP in downtown Manhattan, concentrating on insurance defense matters. He is one of the firm's trial attorneys and regularly defends motor vehicle, premise liability, and labor law cases. He earned his J.D. from the University of Massachusetts School of Law in May, 2014. He was a member of the Mock Trial team, where he competed in the American Association for Justice's 2013-2014 Regional Student Advocacy Competition in Boston, Massachusetts. Patrick earned his B.A. in Political Science from St. Bonaventure University in 2010, where he was also the captain of the Men's Varsity Swimming Team during his senior year.**

*This article was first published in the Spring 2018 edition of the Torts, Insurance and Compensation Law Section Journal.*



**Patrick M. Butler (third from left in back) with “Team Fox” at the 2017 NYSBA Young Lawyers Section Trial Academy at Cornell Law School.**

# Freedom of Information Law—Every Good Lawyer’s Tool

By Cory Morris

The Freedom of Information Law (FOIL), codified in Article 6 of the Public Officers Law (POL), establishes a mechanism for the public to hold the government accountable (POL § 84). This means that either a member of the public or a lawyer can create a FOIL request to certain New York State municipal entities and obtain information for a myriad of reasons—perhaps for research, government accountability and public participation or, as all attorneys should know, to be utilized in subsequent litigation.

The Committee on Open Government (COOG or “Committee”) is responsible for overseeing the implementation of FOIL and the Open Meetings Law (OML). The Committee’s website provides most of the information one needs in order to understand FOIL and how to make and respond to a FOIL request. The Committee prepares advisory opinions at the request of any person or agency. Such advisory opinions are frequently used in judicial proceedings as exhibits and many judicial decisions have cited opinions rendered by the Committee.

## I. New York’s Freedom of Information Law

New York’s Freedom of Information Law declares that

a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.<sup>1</sup>

Whether it be records relating to police body cameras, government audits, wrongful convictions, traffic cameras or statements made to the police, any member of the public has standing to request such agency’s records, and the attorney(s) who represents a spurned FOIL Petitioner in an Article 78 proceeding is allowed to request reasonable attorney’s fees.

The courts have consistently recognized that “the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government... ”<sup>2</sup> The Legislature enacted FOIL to “achieve[ ] a more informed electorate and a more responsible and responsive [government].”<sup>3</sup>

## II. Who and What Can Be “FOILED”?

The legislative purpose in the Freedom of Information Law is mainly accomplished through the definitions of “Agency” and “Record.”

Under Public Officers Law § 86(3), an “agency” is defined as

any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature.



Cory Morris

And Pursuant to Public Officers Law § 86(4), the term “record” is defined as

any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.

This list is not exhaustive, as indicated by the phrase “but not limited to.” “[A]ll records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in § 87(2)(a) through (i) of the Law.”<sup>4</sup> An agency, however, is not required to create a record in response to a FOIL request.<sup>5</sup>

Anything that is a “record” is subject to FOIL. This includes video, audio and other electronic records. Filmstrips used by a professor in a course given in a public college constitute records subject to FOIL.<sup>6</sup> Videotaped news broadcasts retained by the District Attorney’s office constitute a record under FOIL.<sup>7</sup>

As government expands, what becomes government records will expand, from body cameras to school surveillance cameras. At the same time, the statutory exemptions will no doubt create some sort of endpoint for what is subject to disclosure under the New York Freedom of



Information Law. Personal or unofficial documents which are intermingled with official government files and are being “kept” or “held” by a governmental entity are “records” subject to possible disclosure.<sup>8</sup> Physical evidence, namely “articles of clothing and alleged weapons,” does not fall within the statutory definition of a “record” that may be disclosed under the Freedom of Information Law.<sup>9</sup>

Personal injury attorneys can FOIL certain police, fire and emergency medical services’ records. Land use attorneys can FOIL certain municipal records. The public can access local government spending records, from the local hook and ladder company to the water district. The Parent Teacher Association can access school personnel files through FOIL requests. Researchers and academics can inquire of agencies as to studies created by the government and compile statistics for research utilizing real subjects. The range of your clients can vary and you can be creative in how you make use of the FOIL.

### III. Making a FOIL Request—A Litigation Tool

Agency records should be requested in writing. However, there is no talismanic incantation necessary to make a FOIL request. The requirement of Public Officers Law § 89(3)(a) that requested documents be “reasonably described” serves to enable an agency to locate and identify the records in question.<sup>10</sup> Whether a request reasonably describes the records sought may be dependent upon the terms of a request, as well as the nature of an agency’s filing or recordkeeping system (FOIL-AO-18863-provides a good discussion of several types of requests). Public Officers Law § 89(3) states in part that

[e]ach entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied... .

Although the Freedom of Information Law as initially enacted required that an applicant must seek “identifiable” records, since 1978 it has merely required that an applicant “reasonably describe” the records sought.

Agencies bear the burden of denial. An agency has the burden to establish that “the descriptions were insufficient for purposes of locating and identifying the document sought.”<sup>11</sup> “If the agency is able to locate the requested records with reasonable effort, it is required to do so.”<sup>12</sup> The request does not need to be as detailed as a discovery demand pursuant to Civil Practice Law and Rules § 3120.<sup>13</sup> The CPLR objections of overbroad, unduly

burdensome, use of “any and all,” etc., are not appropriate or are subject to different standards.

### IV. Notes for New Lawyers

In sum, FOIL is a powerful tool that allows access to governmental records. Lawyers should take careful note, however, of the amendment to Public Officers Law § 89, which mandates, in certain circumstances, an award of reasonable attorney’s fees to litigants who substantially prevail after the commencement of litigation. It can be a lucrative tool for those who use it successfully and an unfortunate cost for those who lose.

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### Endnotes

1. Public Officers Law § 84 (external quotations marks omitted).
2. *Capital Newspapers v. Whalen*, 69 N.Y.2d 246, 252, 505 N.E.2d 932, 513 N.Y.S.2d 367 (1987) (quoting *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571, 393 N.E.2d 463, 419 N.Y.S.2d 467 (1979)).
3. *Westchester Rockland Newspapers, Inc. v. Kimball*, 50 N.Y.2d 575, 579, 408 N.E.2d 904, 430 N.Y.S.2d 574 (1980) (in accord *Buffalo News, Inc. v. Buffalo Enterprise Dev. Corp.*, 84 N.Y.2d 488, 492, 644 N.E.2d 277, 619 N.Y.S.2d 695 (1994) (“to assure accountability and to thwart secrecy”).
4. Committee on Open Government FOIL Advisory Opinion 12579 (Mar. 16, 2001).
5. POL § 89(3)(a).
6. *Russo v. Nassau County Comm. College*, 81 N.Y.2d 690, 623 N.E.2d 15, 603 N.Y.S.2d 294 (1993).
7. *Pennington v. Clark*, 16 A.D.3d 1049, 791 N.Y.S.2d 774 (4th Dep’t 2005).
8. *Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 505 N.E.2d 932, 513 N.Y.S.2d 367 (1987).
9. *In Re Sideri v. Off. of Dist. Atty., New York County*, 243 A.D.2d 423, 423, 663 N.Y.S.2d 206 (1st Dep’t 1997).
10. *Pflaum v. Grattan*, 116 A.D.3d 1103, 1104, 983 N.Y.S.2d 351 (3d Dep’t 2014).
11. *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 249, 501 N.E.2d 1, 508 N.Y.S.2d 393 (1986).
12. FOIL-AO-18949.
13. *In re Farbman & Sons v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 82-3, 464 N.E.2d 437, 476 N.Y.S.2d 69 (1984).



# Young Lawyers Section Summer Meeting

June 2018



## Topics were:

**Flip Your Memory Switch:** Memory Techniques for Lawyers

**The Introverted Lawyer:** Authentically Empowered Advocacy Knowing Who You Are to Get the Results Your Clients Need. An Introspective Look at Introverted Lawyers and How to Amplify Our Voices in an Authentic Manner to be Impactful Advocate

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## Themis Luncheon: Women in the Law Share Their Stories

*August 2018*







# Finding the Dirt: A Basic Guide for Social Media Search in Litigation

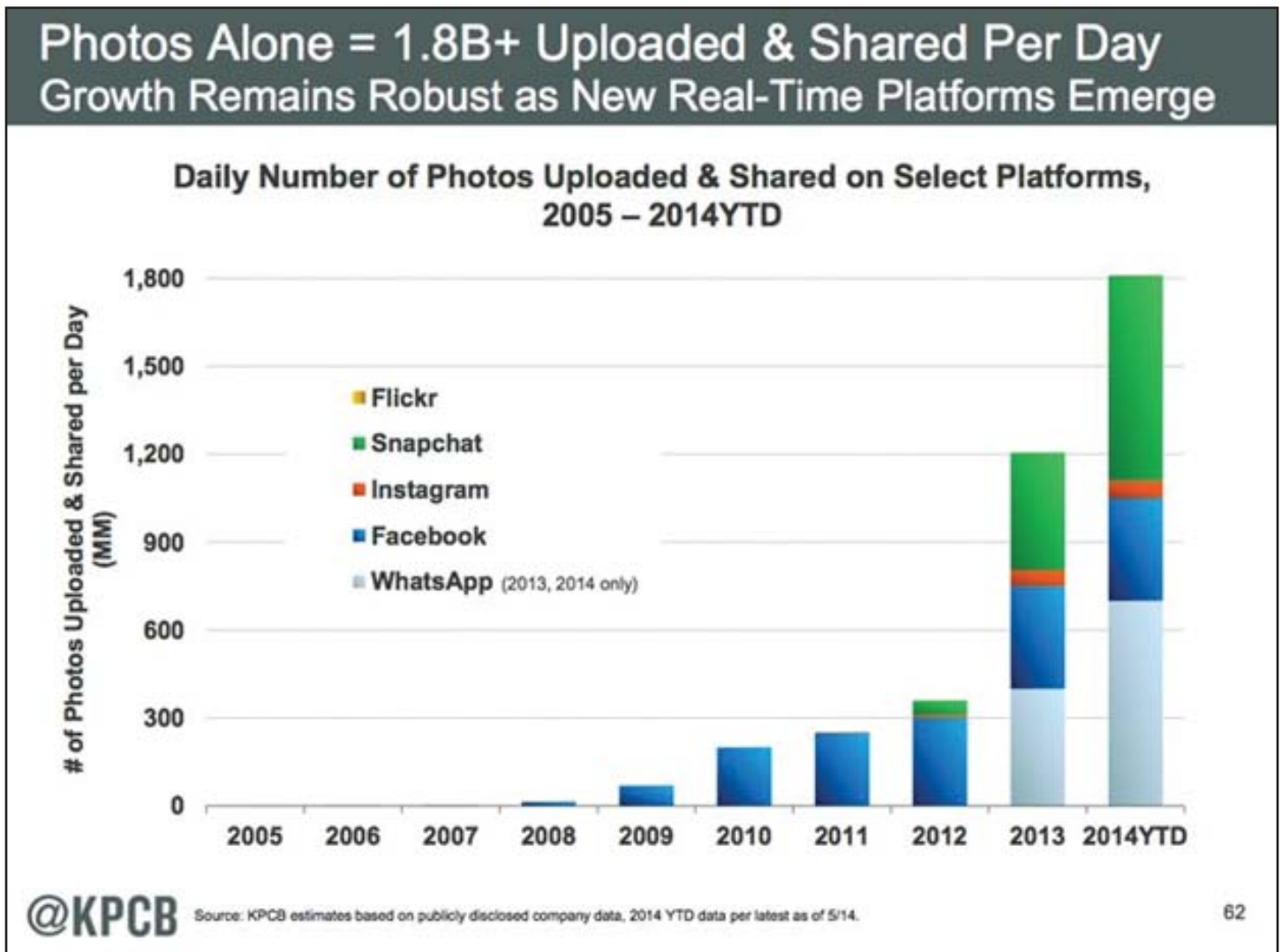
By Robert J. Connor, Jr.

## I. Introduction

It is no surprise social media has become a large part of our everyday lives. Websites like Facebook, Twitter, and YouTube dominate the online community. Facebook alone has over 1.32 billion daily users.<sup>1</sup> It is by far the most popular social media website, used by 79 percent of American adults. By comparison, Instagram is the second most popular with 32 percent. Even more staggering, in 2014 statistics from Kleiner Perkins Caufield & Byers

searches are becoming integral to the early investigation of nearly all cases, regardless of practice area: personal injury, criminal, family law, even collection matters.

This guide is meant to help those conducting searches locate, analyze, and preserve information in addition to helping those issuing assignments understand what is involved. All too often social media searches are viewed as “playing on Facebook” when a complete search entails a great deal more. This guide will not focus just on tradi-



showed more than 1.8 billion photographs alone were shared online *per day*.

Given the trend, the numbers are likely far higher today. Social media has become a dominant factor in how Americans view the world they live in. It has also, unsurprisingly, become a boon to the legal field. Social media

tional social media websites, but will attempt to provide a method for conducting a comprehensive online search.

For this reason, the fundamentals of social media search will be examined: the who, what, when, where, why, and how. While the focus of this article is social media searches in the context of litigation, this same



process can be applied to other scenarios such as vetting an employee, opposition research, or running background checks.

## II. Why Search at All?

The most important question is why look at social media at all? What is the value of analyzing a subject's online presence? Ask most attorneys about social media in their cases and there will invariably be at least a few stories. This can range from posts subverting the opposition's version of events to compromising comments damaging credibility, or photos undermining claims of injuries. This latter category tends to contain the most dramatic, useful, and entertaining stories.

This material is admissible through hearsay exceptions in most jurisdictions. It also tends to resonate with jurors who can easily be lost in a sea of expert opinions, legal rules, instructions, arguments, and contradictory testimony. Everyone can relate to a photo, video, or post from Facebook. Moreover, a dramatic confrontation over a Tweet may be the closest a trial comes to a *My Cousin Vinny* moment and capture the jury's attention.

## III. Whom to Search

The first question when contemplating social media searches is whom to search. This question is easily answered: Everyone! Every party, fact witness, investigator, and expert witness can and should be searched. Anyone in the case who could potentially give a deposition, sign an affidavit, or testify at trial should be researched.

Attorneys usually restrict searches to the opposition. This is a disservice to the case and the client. A lot of questions can be answered by social media. Are there relationships between witnesses? Could there be some underlying bias? Do the parties have a history? Is the key fact witness a known embellisher? Like every avenue of investigation, it is impossible to know what can be found online until the search is done.

Expert witnesses should not be forgotten. Social media searches can be a way to either verify or disprove claims made in a *curriculum vitae* (CV), or find information for a challenge on cross-examination. Online reviews of individual doctors, engineers, and other professionals may prove useful, or open additional avenues of investigation. The expert witness system is based largely on trusting a CV actually represents an expert's credentials. An old proverb holds true: Trust, but verify. The impact on a case if a search reveals the CV of the opposition's expert is incorrect or misleading could be enormous!

It is just as important to search your own client and witnesses in the case. Bear in mind, *praemonitus praemunitus*: forewarned is forearmed. If something is "floating" out there, which compromises your client, or your posi-

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**Robert J. Connor, Jr.**

tion, it's better to find it at the start and have time to formulate a plan of action than have an 11th hour surprise.

## IV. When to Search

Social media is a fluid platform. These sites are continually updating privacy and security settings giving users ever greater control over what the public can see. These security preferences can be changed repeatedly and instantaneously. This has an impact on when social media searches should be done.

An initial search should be done as soon as a party or witness's identity is known. The subject should not be given an opportunity to alter his privacy settings, or delete or edit any content. A party should not be expected to know, or follow, the rules regarding spoliation of evidence.

Due to the fact that the platform is so fluid, searches should be updated throughout the case. Privacy settings could be relaxed, old content restored, new information made available, or the "Holy Grail," relevant content removed prompting spoliation motions and sanctions. On Facebook and some other websites, posts are often marked as "Edited" when they are changed after the fact. This can be a useful tool as they also note when the edits were made.

Some major events prompting an updated search include: depositions; fact witness disclosure; expert witness disclosures; affidavits; and final trial preparation. Do not take a “one and done” policy for social media. The closer to trial, the more it will be on a subject’s mind, increasing the chances of a post or comment online. These updated searches do not need to be as exhaustive as the initial. A brief review of the known profiles should suffice.

## V. What to Search

Facebook, Twitter, Instagram, and LinkedIn are a good place to start, as they are the most popular social media websites. However, other platforms should not be forgotten. YouTube is often overlooked in social media searches. Websites like Tumblr, Redditt, Flickr, Four-Square, Pintrest, MySpace, and whatever other websites happen to be popular at the time, should be searched. The popularity of these sites can ebb and flow.

In addition, search engines like Google, Bing, and Yahoo should be used. It is important to use all three as each has a different algorithm which may yield different results.

GoFundMe can also be a treasure trove of information. It is not uncommon for friends, family, or an individual himself to create a GoFundMe page after an accident or illness. Reviewing the page can yield some useful information. Depending on your jurisdiction, the proceeds from the GoFundMe campaign itself could even be an offset for damages.

## VI. How to Search

Often the only information available in the beginning is the subject’s name and address. An excellent place to start with this limited information is LexisNexis or West-Law. Both offer access to a variety of public records. Running these searches can result in useful information: date of birth, criminal history, prior lawsuits, e-mail addresses, phone numbers, past residences, and known associates.<sup>2</sup>

Next, Facebook should be searched. As mentioned above, Facebook is by far the largest social media platform; if the subject has any online presence, he or she will likely have a Facebook profile. While it is becoming more common for those under 25 not have a Facebook account and strictly use Twitter or Instagram, it is by no means a universal trend. Subsequently, other large platforms can be checked: Twitter, Instagram, and LinkedIn.

Searching the subject’s name alone is not enough. Full names used in pleadings or legal documents are rarely what people use for online profiles. A search should be done for the first name’s alternative variants and spellings. For example, William should also be searched as Will, Willie, Willy, Bill, Billy, Billie, etc.; and Elizabeth should also be searched as Liz, Lizzie, Bes, Bessie, Bess, Eliza, etc.

Going back to information from the public records, profiles can be looked up by email addresses. These often contain information like nicknames or birth years. For example, the email address is joeysmith92@gmail.com, may reveal that the user normally goes by Joey versus Joe or Joseph and that he was born in 1992. Additionally, 92 could indicate another important date, such as graduation or marriage. This can help narrow down results.

Another helpful tip is to search for a subject’s spouse, siblings, or children (if this information is available), then search the friends list for the subject. One profile may provide a link, handle, screen name, or profile name used on other sites. Keep a lookout for these.

Married women often add their maiden name on their profiles using either a “*nee*,” a hyphen, or parenthesis. This makes it easier to reconnect with childhood or pre-marriage friends. Use this to help in your search.

Some additional trends to consider: younger (usually more professional) individuals sometimes use a combination of their first and middle names for their social media profiles, omitting the last name. The purpose is usually to make social media searches (by, say, a potential employer) more difficult, or to maintain separate personal and professional online presences. Many married individuals, or long-term couples, have shared accounts. It may be worth searching different variations of John and Jane Smith, such as: John And Jane Smith; John-and-Jane Smith; JohnN’Jane; etc.

The subject may have more than one profile on a single platform. This could be for a variety of reasons: a personal page and a professional page; loss of login information, etc. If one profile is found it does not mean the search is over. Additional results should be reviewed so matching profiles are not missed. These older, sometimes forgotten, profiles can contain some surprising material.

After finding a profile, the next step is to verify it. The easiest method is by birth date. Look at posts for that date. Even if the site does not indicate it, or the subject does not announce it, there may be Happy Birthday messages from friends. If the profile indicates a different birthday, it can usually be eliminated.

Another way to verify is by examining the friends list and comparing it to the list of associates (children and spouses); location (city or address); employer; or by the content of the page itself (mentioning the current lawsuit, for example).

Once the subject’s page is reviewed, the search can branch out to family and friends. Viewing the pages of every friend or follower is not practical, of course, but the list can be narrowed by looking at the profile and seeing who likes, shares, and comments most often. While subjects may control what they post on their profiles, set

their own security settings, and manage tags, they cannot control friends' profiles. Family and friends are more apt to post embarrassing, or incriminating, statements, photos, or videos of an individual than he would be himself. So it can be worth the time to look at them as well.

Once the social media platforms have been searched, the next step is to search Google and other engines for more information on the subject. This should be done after the social media sites to increase the likelihood of having enough information to narrow results to relevant material.

Descriptors can be added in the search, such as the name of the streets the subject has lived on and the names of the cities/towns the subject has lived in to further narrow results. Each should be searched separately. If the earlier research uncovered a creative social media handle, screen name, or profile name, search these too. It is common for one name to be used across multiple social media platforms.

Boolean searches can be a useful tool. A Boolean search is a type of search allowing users to combine keywords with operators such as AND, NOT, and OR to produce more relevant results. Combine this with quotation marks, which can be used to find exact words or phrases. For example, John Smith in New York City returns 318,000,000 results on Google whereas "John Smith" AND "New York City" returned 1,030,000. The latter limits the search results to only those containing the two phrases.

It is important to be vigilant about published police radars, news articles, and obituaries. Police radars can be especially useful as they include all arrests regardless of whether the matter was later prosecuted. This can be useful when deciding whether to conduct a full criminal history on the subject.

## VII. What to Look For

Once a profile has been found and verified, it's important to look at everything available. One should resist the temptation to simply look at posts from the day of the incident, or browse for useful photos. There could be useful information hidden anywhere on the profile page. Many sites have a "biography" section; take a look at this in addition to what is posted or displayed on someone's wall or timeline.

One may be able to find information about the subject's financial situation. Parties in a lawsuit often plead poverty—something as small as a vacation photo or boasting of a new car is useful to contradict these claims. Relevant to collection matters, there may be clues or information about assets to seize.

Of course, one of the primary objectives of a social media search is to find information regarding the present case. However, this is not the only objective. It is equally

important to look for information regarding credibility. Photographs<sup>3</sup> or videos of the subject consuming excessive amounts of alcohol or illicit drugs and engaging in other illegal activity are always useful. Additionally, stories regarding cheating, lying, or scheming are important to note as they could undermine credibility.

Social media is also useful in getting to know the subject as an individual. It can help a person find out the subject's likes and dislikes. This can be important information for depositions or courtroom testimony. It might show an individual to be hot-tempered or impetuous regarding certain topics. This could be used to your advantage at trial if the right questions are asked.<sup>4</sup>

Alternatively, asking about a favored sports team or movie can set a person at ease, and loosen tongues. As with many things in litigation, the usefulness of this information depends on the style of the questioning attorney. Either way, the more information gathered about the subject the better. Some may seem irrelevant now, but one can never know what direction a case may take.

## VIII. How to Save What You Find

Just as important as finding information is saving it. Simply "screen-shooting" or copying the relevant information is not enough. It is important to save a complete copy of the profile so the information is available for later use.<sup>5</sup> If a spoliation motion is necessary, it is useful to have a full copy of the profile.

An easy method is to utilize the "print as PDF" function on most web browsers. This process not only saves a complete color copy, but also automatically hyperlinks to any additional content. To do this, scroll to the bottom of the profile. Next, make sure to expand all comment sections, "see more" links, replies, and/or re-Tweets so all of the content is visible. Then print the page as a PDF in the browser's options menu. Now the entire profile can be printed or viewed whenever required.

## IX. Ethical Issues

In most jurisdictions, attorneys have a duty to avoid unauthorized contact or deceptive tactics when dealing with litigants or third parties. Many state Bar associations have applied this to social media. An attorney can examine what is publicly available but cannot send friend requests to circumvent privacy settings, or ask anyone employed by their firm or office to do so.

An attorney (or his office) should not contact a party to the current suit through private messaging, comments, or any other method of communication available on social media. If the subject is not a party in the current action, some jurisdictions may allow communication if you do not engage in deceptive tactics and identify yourself as an attorney.<sup>6</sup>

Attorneys also have a duty to mitigate the loss, destruction, or spoliation of evidence. Attorneys cannot instruct or advise anyone to delete or alter information from social media. In fact, attorneys should advise their clients to do the opposite and let them know they should not alter or delete any social media information. In some jurisdictions, attorneys may be able to advise an individual to alter the security and/or privacy settings on their accounts to make finding information more difficult for the opposition. Attorneys should consult the state Bar association rules, ethics opinions, and relevant case law in their respective jurisdiction before doing so. Clients should be counseled to avoid social media, or carefully consider what they post or share during the case.

The best practice is to simply observe what is publicly available and make no contact. If useful information is there, or suspected, discovery requests and motions to compel can be used to access what is hidden behind privacy and security settings.

## X. Conclusion

The process outlined above is intensive and will require time to complete thoroughly. As noted, you do not know what you can find until you look. Participants on social media measure success in likes, shares, re-tweets, and comments. These seemingly innocuous pleasures can reveal a lot in litigation.

In the modern litigation landscape, a case can be won or lost on the internet. Attorneys should use every resource in their arsenal to secure a favorable outcome for their client. Social media should not be overlooked. A thoroughly executed social media search should be a fundamental part of any case preparation and analysis and could very well put your case on the path to victory.

## Endnotes

1. <https://www.wordstream.com/blog/ws/2017/11/07/facebook-statistics>.
2. You may need to check your office's subscription to these databases to determine what fees are applicable.
3. One note regarding videos and photos: these could have been taken days or even years before they were posted. When examining them, read the descriptions and any comments to pin down when they were taken.
4. On the other hand, if you know this information about your own witness prior to depositions or trial testimony, you can more effectively prepare.
5. This is useful to determine what, if any, information was altered or removed.
6. For more information, consult your State Bar Association rules, opinions, and relevant case law. An overview of ethical issues regarding social media search is available in *Social Media Snooping and Its Ethical Bounds* by Agnieszka McPeak, available at [http://arizonastatelawjournal.org/wp-content/uploads/2015/01/McPeak\\_Final.pdf](http://arizonastatelawjournal.org/wp-content/uploads/2015/01/McPeak_Final.pdf).

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## Impeachment by Prior Inconsistent Statement

By Rick Collins

You are in the middle of trial and a witness for the opposing party says something on direct examination that's unfavorable to your case. But wait—you have evidence that she said something different on an earlier occasion, and it is contained in an official report, sworn statement, deposition or similar document. The document is right in front of you. What can you do with it on cross-examination?

Impeaching a witness through a prior inconsistent statement can be a devastatingly effective moment of high drama in the courtroom . . . if done correctly. What is the most effective way to cross-examine a witness on a prior inconsistent statement? There are a few different variations to establish the foundation. I like to use this four-step process (acronym: CRAC):

1. Commit the witness to her version on direct examination;
2. Rebut this version with the substance of the earlier statement;
3. Accredit the reliability of the earlier statement;
4. Confront her *verbally* with the earlier statement.

Let us go into the four steps in more detail. We will use a simple hypothetical:

*You represent one party in a car accident. A witness for the other party has just said on direct examination that the light was red for your client. However, in a signed statement the day after the accident she said the light was green for your client. Your goal is to impeach her credibility with the earlier statement.*

### 1) Commit

Q: "You just told this jury a few minutes ago that the light for my client was red, right?"

A: "Yes."

This step requires only a single question. Keep it short and parallel the exact words of the direct testimony to minimize evasion and ensure a simple affirmative response.

### 2) Rebut

Q: "In fact, isn't it true that the light for my client was green?"

A: "No, it was red."

Use another single question, explicitly contradicting her direct testimony. Make sure you repeat exactly what

she said in the earlier document that is inconsistent. It should be a short, simple question, not a compound question. After just committing to the opposite set of facts, her response essentially has to be negative.

### 3) Accredit

Q: "You gave a statement to an investigator the day after the accident, didn't you?"

(Answers to all the questions that follow will be yes.)

"He came to your house, did he not?"

"He knocked on the door, right?"

"You let him in?"

"He told you why he was there, correct?"

"He told you he wanted to know about the accident?"

"You agreed to tell him, yes?"

"You wanted to be honest about it, of course?"

"You wanted to be accurate about it, yes?"

"While you were talking he was writing, yes?"

"Then he handed the piece of paper to you?"

"You read it, didn't you?"

"He asked if it was accurate, yes?"

"You told him it was?"

"You signed the statement, right?"

"You signed the statement because it was accurate, correct?"

This is the only step requiring multiple questions. The exact questions, and the number of questions, will depend on the type of document containing the prior inconsis-



Rick Collins

tent statement and the circumstances under which it was made. The general idea is to build up the credibility of the prior statement. Questions that show that the witness wanted to be truthful and accurate, took the time to read the document, signed it, etc., all help to bolster its credibility. In most cases, the statement will have been made at a time much closer to the events in question when it was fresher in the witness's memory. The goal of this step is to convince the trier of fact that the witness was unlikely to have been mistaken or untruthful in that document.

#### 4) Confront

Q: "And in [that document] you signed, you said the light for my client was green, didn't you?"

This step requires a single question. At this point you will likely get a yes answer (especially if you have one hand holding the corner of a piece of paper which she likely knows says what you say it does). If the witness says yes, sit down. You've won! You have impeached the witness. If the witness says no, or if the witness says she doesn't remember, you may want to take the paper in both hands and ask slowly, deliberately, "Didn't you say the light for my client was green?" At this point you've got the witness skewered on a spear. If she is smart, she will admit the inconsistency rather than be embarrassed with the physical document itself. That's when you say "no further questions" and sit down. You have won. You have impeached the witness.

If the witness continues to play games by saying she doesn't remember or if she denies making the statement, it is then—and only then—that you need to show her the

document itself. It shouldn't come to that. Producing the document, having it marked and showing it to her is a last resort. Think of it as something you don't want to do unless you absolutely have to. Too many young lawyers seem to want to have the document marked and show it to the witness before even starting the foundation. You should not be showing the document unless and until you've completed all four steps and the witness is refusing to admit the inconsistent content of the document.

If you follow this four-step CRAC process you will handle most prior inconsistent statements (and even omissions in prior statements) successfully. With minor adaptations you can use it for all types of past statements. If you want to learn these, and other successful techniques, and generally be a better prepared trial lawyer, I highly recommend taking a trial advocacy course such as the Young Lawyers Section Trial Academy offered through the New York State Bar Association.

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ISSN 0743-6475 (print) ISSN 1933-8511 (online)

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