

Friends, Tweets, and Posts: The Potential Pitfalls Every Litigator Should Know About the Internet's Social Networking Tools

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Social networking sites are not just for teenagers anymore. Membership on sites like Facebook and Twitter, as well as the usage rates of blogs and internet forums are skyrocketing. Social networking users include witnesses, adversaries and jurors, many of whom tend to communicate in a more spontaneous and less guarded manner when posting online. Social networking sites offer a treasure trove of information to counsel, providing valuable background information, as well as potentially uncovering bias or commentary and facts relevant to a case. Counsel should take advantage of the information available but must do so in accordance with professional standards of responsibility. While social networking sites have great potential to provide useful information for litigators, they also may pose serious pitfalls, such as potentially violating the prohibition against *ex parte* contact with a represented individual or a juror.

Resources

Facebook is the more popular younger sibling of the first generation of social networking sites like MySpace and Friendster. While the majority of Facebook users are under 26, the fastest growing group of users is women over 55.¹ Similarly, men over 55 are joining Facebook at unprecedented rates.² These older users are joining a well-established trend; over 10% of the American population is on Facebook.³

A Facebook user creates a Profile with a variety of identifying information such as hometown, employment and educational history. Users can also update their Profiles with commentary from the user as often as the user wishes. In addition, each user collects "Friends," other Facebook users who are listed on each user's Profile. Each Facebook user decides whether to make his Profile viewable to anyone who is a registered user of Facebook or to restrict it in a variety of ways. If a Profile is restricted, a visiting user must first become a Friend of the user in order to view that user's Profile. Facebook users also may belong to "Groups" established on Facebook. Groups include those related to political affiliation like Democratic National Committee, activist groups like Greenpeace and the National Rifle Association, and more obscure groups like "I Hate Target," "Fans of Madoff," "Shame on You Chevron," and "End AIG." Not just individuals maintain Facebook Profiles; many companies, interest groups, trade groups, and even some law firms do as well.

Blogs – which include sites like Above the Law and the Drudge Report, as well as sites started by users whose commentary focuses on much more narrow topics and are followed by a discrete group of readers – are similar to Facebook in that the author uses the site to post commentary, photos and videos. Different sources estimate that 60-94 million Americans are blog readers, while an estimated 26 million Americans have started a blog.⁴ Some blogs are sites to which only one individual posts, while others allow multiple users to post. Typically a blog shows its posts in reverse chronological order and offers an archiving function that allows searches of prior posts. Blogs often allow anonymous posts with the author using a pseudonym. Some blogs offer readers a RSS feed, which provides an update of new content from the site that streams directly to an email address.

Similarly, Twitter is a website that allows users to create a "microblog" or posts of not more than 140 characters, called "tweets." Users may also sign up to receive tweets from other Twitter users (called "following"). Use of Twitter is still catching on but catching up to Facebook's popularity quickly – its membership in the past 12 months increased over 1300%.⁵ Unlike Facebook, but like the anonymity of many blogs, Twitter allows "vanity URLs" or user names like "ObamaNews" and "dooce." Therefore, it may be difficult to identify the individual behind the tweets. Unlike Facebook, there is no requirement that a Twitter user first grant permission to someone who

wants to read his tweets. Each user can, however, see the list of other users who are “following” his tweets. The tweets are blasted to each user’s followers whenever a post is made. Users read the tweets on Twitter’s site, a mobile phone, or through a variety of third party software created to receive and organize tweets. Like Facebook, Twitter is not used only by individuals; some companies (and law firms) allow and encourage their employees to use Twitter to send out announcements or make brief inquiries to which Twitter facilitates a quick response.

Finally, internet forums are online discussion sites hosted by a variety of organizations that allow users to post commentary and questions. Some forums require users to register, and some may allow users to post using a pseudonym. There are forums dedicated to any topic imaginable, including financial markets, the safety of child car seats, claustrophobia and government conspiracy theories.

Mining the Potential and Avoiding the Pitfalls of Social Networking Sites

Counsel Should Independently Research and Directly Ask Parties, Witnesses and Jurors About Their Use of Social Networking Sites

Just like many other internet resources, social networking sites contain a wealth of information about adversaries, witnesses and jurors. In a recent criminal trial, the key witness – a police officer whose arrest of the defendant led to the gun possession and resisting arrest charges at issue – had posted a series of comments on his MySpace and Facebook profiles – such as “watching ‘Training Day’ to brush up on proper police procedure” – that supported the defendant’s depiction of the officer as overzealous and inappropriate.⁶ After the defendant’s attorney introduced this evidence to support the defense theory of the case – that the officer was “motivated to cover up his use of excessive force” – the jury acquitted the defendant of the felony gun possession charge.⁷ In several recent DUI cases, defendants received more severe penalties because the defendants had posted pictures of partying on their Facebook profiles.⁸

Counsel should ask witnesses and parties (either through discovery or in depositions and interviews) and jurors (to the extent allowed) about their use of social networking sites. Valuable information may include whether the individual (1) uses Facebook, (2) belongs to any “Groups” on Facebook, (3) uses Twitter, (4) follows tweets from any particular Twitter poster, (5) has created a personal blog or reads any particular blogs regularly, or (6) regularly posts to or reads any internet forums. Counsel should, of course, follow up on the responses received to determine the accuracy of the statements given. Even though counsel only has a brief time to research jurors before selection and may not be able to adequately uncover all public social networking sites linked to a juror, it is still worthwhile to continue research following jury selection. Information discovered during internet searches – even if completed after the jury is impaneled – can provide grounds for excusing a juror if a juror was dishonest during selection or provide a basis for appeal.

In addition to asking witnesses and jurors about their use of social networking sites, counsel also should perform independent research. Most attorneys visit an opposing party’s website and perform Google searches on adversaries and witnesses, but all counsel should consider the additional wealth of resources available. Looking at a Facebook Profile can provide a treasure trove of identifying information which could prove valuable for learning background and potential bias. Facebook users often post employment and educational background which can provide a baseline expectation when preparing for a deposition. In addition, a Facebook Profile often leads you to blogs that the user reads or the user’s favorite internet sites. For example, it would be useful to know whether a potential juror in an environmental contamination case belonged to a Facebook group supporting environmental causes or identified as a favorite an internet site devoted to identifying toxic household products. Following a Twitter user’s tweets may also provide insight into facts that may be relevant to your matter. For example, a personal injury plaintiff may post about his current physical activities, or a corporate defendant may post about its operations, products or finances. Commentary posted on an internet forum may be similarly

enlightening. For example, a party in a divorce proceeding may post about facts that led to the separation, or financial issues relevant to a distribution of property. Similarly, a manufacturer may host a blog that discusses various product information.

When mining the internet, counsel⁹ must remember, however, the prohibitions against contacting either individuals who are represented by counsel or jurors.¹⁰ To the extent access to a Facebook user's Profile is restricted, a request by an attorney to be that user's friend would arguably constitute an inappropriate attempt to contact an individual represented by counsel or a juror. However, when a Twitter user signs up to follow another user's tweets, the broadcasting user need not grant permission in order for the tweets to be followed, although he or she can view each of the users signed on as a follower. Because anyone can sign up to follow a user's tweets, without being approved by the user in any way, such a request seems to avoid the prohibition against contacting a witness or juror. Blogs and internet forums tend to be similarly publicly accessible, and counsel's review of a witness's or juror's blog or posts made to an internet forum should not implicate any professional responsibility concerns. When reviewing such information made public in cyberspace, however, counsel should consider the appearance of impropriety and ensure that she would be comfortable if her identity as a follower or reader of the information became public.

*Counsel Should Request the Judge Admonish the
Jury to Refrain From Communicating About Trial In Any Way*

While counsel should take advantage of social networking sites for the valuable information they can provide, counsel should also be aware of the ways in which such sites may impede the factfinding process. In several recent cases, jurors' posting of information about trial proceedings on Facebook and Twitter has led to the excusal of a juror, provided the basis for requests for mistrial and appeal, and violated the principle of secret jury deliberations.¹¹ Although judges routinely admonish juries to refrain from discussing trial proceedings, counsel should request that judges remind jurors of the breadth of that admonition.

In an ongoing personal injury case in Ohio, a juror posted on his Facebook Profile that he was "in hell . . . aka jury duty."¹² The judge excused the juror but declined to declare a mistrial.¹³ In a federal political corruption case in Pennsylvania, a juror hinted on his Facebook Profile that the jury had reached a verdict, stating "[s]tay tuned for a big announcement on Monday everyone!"¹⁴ The judge concluded that the juror had not inappropriately communicated with anyone about the case and chose not to remove him.¹⁵ The jury convicted the defendant, but his attorneys reportedly intend to use the juror's posting as a grounds for appeal.¹⁶ In a fraud case in Arkansas, a juror sent tweets during the trial, including a direction that "nobody buy [defendant's stock]. Its bad mojo and they'll probably cease to Exist, now that their wallet is 12m lighter."¹⁷ The juror's postings are one of the grounds for appeal cited by defendants.¹⁸

Counsel should ask judges to remind jurors that their obligation to refrain from communicating about deliberations includes even the most oblique reference to the proceedings on social networking sites. Counsel may also want to consider whether that admonition should extend so far as prohibiting any email or text messages between jurors or the creation of private social networking sites for jurors (such as a private blog, private tweets, or Facebook Group), out of concern that a non-juror could receive such a communication, either intentionally or otherwise.

*Counsel Should Request the Judge Admonish
Jury to Avoid Witnesses' and Parties' Social Networking Sites*

As judges prepare to admonish jurors to refrain from performing independent research into the facts of a case or the law, counsel should encourage judges to include the additional reminder that jurors should not research the social networking sites of the parties, witnesses, fellow jurors or counsel. The growing ubiquity of social networking sites means that jurors instinctively turn to

such sites whenever they need information about a person or entity. Counsel should request that judges remind jurors that such research is not allowed.

*Counsel, Parties and Witnesses Should
Consider Their Own Social Networking Presence*

Admonishments from a judge aside, no attorney, party or witness should feel confident that a juror abides by the prohibition against independent research. Attorneys should ensure that their own, their clients' and their witnesses' social networking sites are accurate, consistent with their claims and an image they feel comfortable portraying to adversaries and jurors.

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¹ Anita Gates, *For Baby Boomers, The Joys of Facebook*, N.Y. Times, March 22, 2009, http://www.nytimes.com/2009/03/22/nyregion/new-jersey/22Rgen.html?_r=1. In the past six months, Facebook membership of women over 55 has increased 175%.

² *Id.* In the past six months, Facebook membership of men over 55 has increased 138%.

³ <http://www.insidefacebook.com/facebook-global-market-monitor/>

⁴ <http://technorati.com/blogging/state-of-the-blogsphere/>

⁵ http://news.cnet.com/8301-13577_3-10200161-36.html

⁶ Jim Dwyer, *The Officer Who Posted Too Much (or Maybe Just Too Callously)*, N.Y. Times, March 11, 2009, <http://www.nytimes.com/2009/03/11/nyregion/11about.html?scp=5&sq=devious&st=cse>.

⁷ *Id.*

⁸ Philip K. Anthony and Christine Martin, *Social Media Go To Court: Litigators Find There's More to Web 2.0 Than What Jurors Post on Their Facebook Profiles*, The Recorder (San Francisco), February 20, 2009, at 5.

⁹ Jury consultants and others acting at the direction of counsel must also abide by applicable ethical standards. See, e.g., Model Rule of Professional Conduct 5.3; *Midwest Motor Sports v. Arctic Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003) (affirming sanctions imposed for counsel's use of private investigators who improperly contacted witnesses).

¹⁰ See, e.g., Model Rule of Professional Conduct 3.5 (prohibiting *ex parte* contact with juror during trial); Model Rule of Professional Conduct 4.2 (prohibiting *ex parte* contact with an individual the lawyer knows to be represented).

¹¹ See, e.g., *United States v. Thomas*, 116 F.3d 606, 618 (2d Cir.1997) ("The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system.")

¹² Kimball Perry, *Jury Duty and Facebook Don't Mix*, Cincinnati Enquirer, January 30, 2009, <http://news.cincinnati.com/article/20090130/NEWS01/301300076/1055/news>.

¹³ *Id.*

¹⁴ Shannon Duffy, *Fumo Convicted by Federal Jury on All Counts*, The Legal Intelligenser, March 17, 2009, at 1.

¹⁵ *Id.*

¹⁶ John Schwartz, *Mistrial by iPhone: Web Research Upends Trials*, N.Y. Times, March 18, 2009, <http://www.nytimes.com/2009/03/18/us/18juries.html?scp=1&sq=mistrial&st=cse>.

¹⁷ *Id.*

¹⁸ *Id.*