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Social Media and the Law: Cautions and Challenges

By Brett Emison

The “New World” of Social Media

The increasing use of social media tools accelerates our current news cycle and has significant potential impact on citizens involved in litigation as well as the attorneys representing them. The new trend of citizen journalism, or “community journalism,” where the public’s commentary, video footage, and reporting is integrated into mainstream, long-trusted media outlets continues to grow in popularity. Social media’s growing popularity results in many more people who blog or “Tweet” about their own legal imbroglios, either from inside or out of the courtroom.¹

The social media waters will only get more treacherous for legal counsel. Recent statistics show that 394 million globally watch video clips online; 346 million regularly read blogs; 160 million users subscribe to RSS feeds;² and it is expected that early next year, Facebook will register its 600 millionth user.³ Attorneys should understand the

potential pitfalls to these growing trends as they pertain to representing individuals who consider themselves media-savvy and also understand ethical limitations on attorneys who wish to use new media tools to communicate with potential or existing clients.

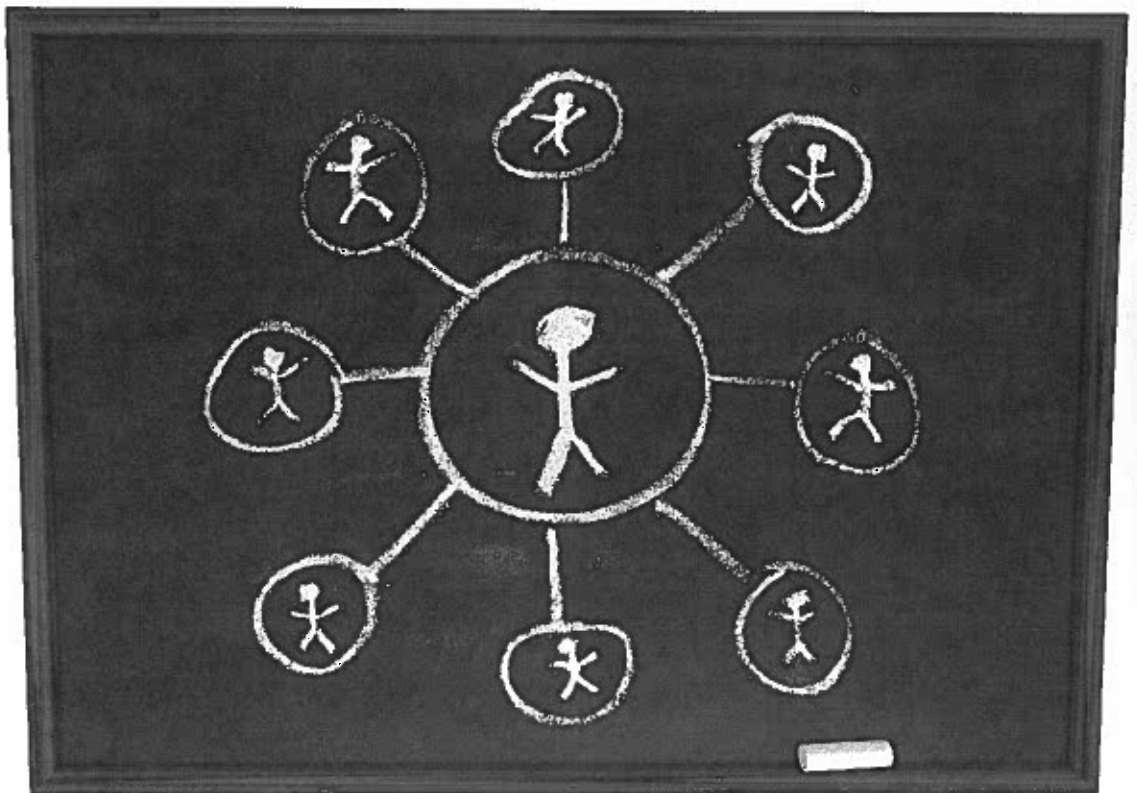
Social Media and Jury Instruction

Advances in technology have now prompted courts nationwide to expand jury instruction. Updated jury instructions in this area are due in part to a West Virginia case, in which the state’s Supreme Court of Appeals ruled that a sheriff convicted of fraud

and falsifying accounts had not received a fair trial when a juror failed to disclose that she was his “friend” on MySpace. The court wrote that “some cautionary words are warranted concerning the prominent presence of the Internet and routine use of and dependence upon various technologies by everyday Americans called to jury service.”⁴

Other jurisdictions have followed suit. For example, a committee of the Ohio State Bar Association recently endorsed instructions that can be used in state courts.⁵ The U.S. Judicial Conference recently issued federal judges with new guidelines on instructions to juries, including warning that jurors cannot “communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any Internet chat room, or by way of any other social networking websites, including Facebook, MySpace, LinkedIn and YouTube.”⁶

In this state, 2010 saw revisions to Missouri Approved Jury Instruction 2.01, effective July 1, 2010. Section 8, “Prohibition of Juror Research or Communication about this Case,” now reads:



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Your deliberations and verdict must be based only on the evidence and information presented to you in the proceedings in this courtroom. Rules of evidence and procedure have developed over many years to make sure that all parties in all cases are treated fairly and in the same way and to make sure that all jurors make a decision in this case based only on evidence allowed under those rules and which you hear or see in this courtroom. It would be unfair to the parties to have any juror influenced by information that has not been allowed into evidence in accordance with those rules of evidence and procedure or to have a juror influenced through the opinion of someone who has not been sworn as a juror in this case and heard evidence properly presented here.

Therefore, you must not conduct your own research or investigation into any issues in this case. You must not visit the scene of any of the incidents described in this case. You must not conduct any independent research or obtain any information of any type by reference to any person, textbooks, dictionaries, magazines, the use of the Internet, or any other means about any issues in this case or any witnesses, parties, lawyers, medical or

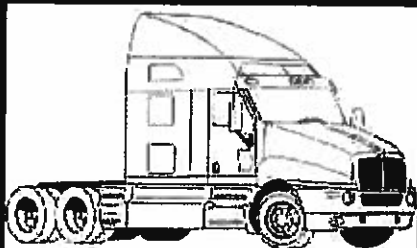
scientific terminology, or evidence that is in any way involved in this trial. You are not permitted to communicate, use a cell phone, record, photograph, video, e-mail, blog, tweet, text, or post anything about this trial or your thoughts or opinions about any issue in this case to any other person or to the Internet, "facebook", "myspace", "twitter", or any other personal or public web site during the course of this trial or at any time before the formal acceptance of your verdict by me at the end of the case.

Social Media as Evidence at Trial

The evidentiary nature of social media is not clear cut. In the Missouri case of *State v. Corwin*, the defendant was convicted of attempted forcible rape, and then unsuccessfully appealed his conviction based on the judge's refusal to enter entries of the victim's Facebook profile to impeach her testimony.⁷ The entries in question referred to drinking and partying by the victim, pictures of the victim dancing with young men, and an entry stating, "I had a pretty rough night and I have the bruises to prove it."⁸ The Missouri Court of Appeals held that none of the information was legally relevant to the defendant being charged with attempted forcible rape of the victim.⁹ The court noted that this particular post was made nine months after the defendant allegedly raped the victim, and so could have no evidentiary bearing on that event.¹⁰ Also, the

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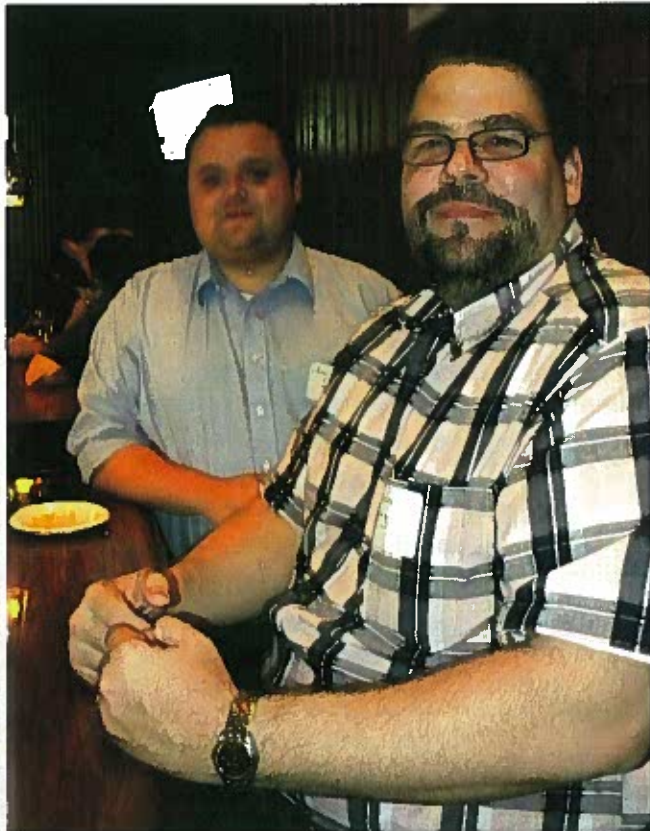
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defendant wanted to admit into evidence a printout of all or many of the victim's Facebook postings, the scope of which far exceeded the issues in the rape trial. The court held that because the printout included a host of irrelevant evidence, it should not have been admitted as evidence in the rape trial.

With few exceptions courts have allowed discovery of social networking site information relevant to the case at hand. Some recent cases in which social media played a role in discovery or trial:

- A mistrial was declared last year in an eight-week Florida drug trial, after a juror admitted to the judge he had been doing research on the case on the internet. The judge discovered eight other jurors had been doing the same thing.¹¹ This is the origination of the newly minted phrase "Google mistrial."
- In *Leduc v. Roman*, the Ontario Superior Court ruled that a defendant in a car-crash personal injury case had the right to cross-examine the plaintiff on the contents of his Facebook page. He ruled the page was likely relevant to the case: "To permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial."¹²
- A New Jersey plaintiff alleged that the defendant, an insurance company, wrongfully refused to pay health benefits for her children's eating disorders.¹³ The insurance company contended the disorders of the children were non-biologically based mental illnesses and thus not covered under the insurance policy.¹⁴ The defendant sought information on the children's MySpace or Facebook pages.¹⁵ The court ordered the plaintiffs to turn over the children's e-mails, diaries, and other writings that were "shared with other people" about their eating disorders, including entries on MySpace or Facebook, noting the lower expectation of privacy where the person asserting the privacy right made the information public in the first place.¹⁶
- Last year, a Canadian insurer, Royal & Sun Alliance Insurance Co., sought to defend what they believed to be a fraudulent insurance claim.¹⁷ Justice David Price of the Ontario Superior Court of Justice denied the insurer's request to turn over photos from her Facebook page, stating that the insurer had failed to prove that the private social networking pages at stake contained relevant material.¹⁸ The plaintiff was suing her insurance company after a car crash that she said left her unable to do heavy housework, tend to her garden, snowmobile, go horseback riding and

play tennis, golf or "winter sports" as she used to, according to court documents.¹⁹ The judge criticized Royal & Sun's lawyers for failing to ask the plaintiff to produce her Facebook page as part of her sworn affidavit, or to bring up the social media site in her cross-examination.²⁰ The judge then allowed Royal & Sun's attorney to cross-examine Ms. Schuster again because the social media site "is a relatively recent phenomenon and the disclosure obligations and remedies are still being articulated in relation to it."²¹

- New York has addressed the issue in two cases.²² In *Romano v. Steelcase*, the court ordered authorization to access the plaintiff's Facebook account be given after a factual predicate had been established when deposition testimony appeared to be contradicted by a photograph seen on the plaintiff's Facebook page.²³ *McCann v. Harleysville Insurance*, decided more recently, held that the insurance company had not actual basis for seeking access to the plaintiff's Facebook account and that the insurance company's request was simply a fishing expedition.²⁴

Assuming information from a social networking site is discoverable, the question becomes whether it is admissible. The decisions above indicate that if information is deemed relevant, courts will allow the jury to consider it as they would any other piece of evidence.

On an individual basis, attorneys should counsel their clients to keep in mind the omnipresent nature of their online communications. Attorneys should check to see if their clients and opponents have a profile on a social networking site. Attorneys and clients should assume that information posted online will be shown to a jury.

Social Media and Legal Ethics in a Digital Age

Increasingly, lawyers themselves are engaging social media channels. They do so in the quest for information about parties in a lawsuit, witnesses, and jurors. They also look for information that either corroborates or undermines their client's case. Some lawyers may try to identify and interact with potential clients. The growing social media phenomenon has raised a number of ethical issues including the investigation of witnesses or opposition using social media tools, "friending" of judges, and online solicitation of clients.

Missouri Rule 4-4.2 and Social Media

While it is true that simply visiting a public website would not normally be considered prohibited communication under the Rules of Professional Conduct, writing an email, wall post, or online chat is prohibited. Rule 4-4.2 states that "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the

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lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”

Rule 4-4.2 “applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.” But if that “matter” is broadly defined, an online conversation that was intended to comply with this guideline can fall short. And it is worth noting that Rule 4-4.2 applies even if the attorney did not initiate or consented to the communication. In these cases, “(a) lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule 4-4.2.”

An attorney who is unsure whether a communication with a represented person is permissible may seek a court order. For situations where a normally prohibited communication is deemed necessary, a lawyer can also seek a court order to have that exceptional circumstance authorized.

Social Media and the Appearance of Impropriety

Social media may raise ethical issues where lawyers have “friended” judges on social media sites. Florida’s judicial ethics committee last year recommended that judges refrain from “friending” lawyers who appear before them, to avoid giving the impression they have special status.²⁵ And the Canadian Bar Association recently released new guidelines for lawyers on advertising, including using social media.²⁶ The document warns lawyers that the normal rules apply, and states that Facebook and Twitter are particularly dangerous.²⁷

Online “friendships” between lawyers and judges may also have practical pitfalls. A Texas lawyer asked Judge Susan Criss for a trial continuance because of the death of her father.²⁸ However, the lawyer had posted a series of Facebook updates detailing a week of drinking and partying while she was supposed to have been grieving.²⁹

Social Media and Client Solicitation

Increasingly, attorneys are using social media, online forums, and web ads, to identify and interact with potential clients. From a national perspective, the American Bar Association’s Model Rules of Professional Conduct reflect this growing trend. Rule 7.3 (Direct Contact With Prospective Clients) includes interactive media by stating that “(a) lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer’s doing

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Social Media ‘Dos & Don’ts’ for clients

DO remove profiles. Consider taking down your Facebook or other social media pages and profiles entirely.

DO use the highest privacy settings. If you maintain your social media profiles, make sure that your privacy settings are set at the highest level. Ensure that only your “friends” can see *any* of your information (**not** “friends of friends” or the general public).

DO be careful who your “friends” are. Create friend lists to further narrow which friends can access your information. Create lists to ensure that only certain friends can see your photo albums and status updates. **Only accept friend requests from people you actually know.** Remove “friends” who are merely acquaintances or people you barely know.

DO make yourself invisible. Remove yourself from Facebook search results by selecting “only friends” under search visibility in your profile settings. Remove yourself from Google search results by going to Internet Privacy Settings and unchecking the box for Public Search Listing.

DO remove/untag photos. Consider removing all photographs of yourself from social media pages. Untag all photos of yourself and choose “only me” for who can view photos of you in which you are tagged.

DO be cautious. Assume anything you post online – including status updates, messages, wall posts and photographs – will be seen by defense lawyers, the judge and the jury. Consider how these could be perceived, especially presented out of context.

DO ask your friends to be cautious. What your friends post online may have negative repercussions on you.

DON’T assume you are safe. “Friends” may (intentionally or unintentionally) pass along information to others who may be working for defense lawyers or an insurance company. “Friends” may be upset with you or wish to settle a grudge by attempting to undermine your claim.

DON’T give information about your case. Do not send e-mails or otherwise give information about your case, its progress or your health to anyone but your lawyers.

DON’T join Web chat groups. You do not own the information you post online and it is highly searchable.

DON’T enter insurance Web sites, post on message boards, participate or comment on blogs or go into chat rooms about insurance and claims-related issues.

DON’T create your own Web site or your own blog about your experience.

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The ABA has also added the "electronic communication" facet to its instructions about properly labeling advertising material in Rule 7.3(c): "Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words 'Advertising Material' on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication (...)"

In September 2010, the ABA's Commission on Ethics 20/20 began soliciting comments regarding potential regulations governing attorney use of internet-based client development tools.³⁰ The commission is examining ethical issues arising out of four common online client development tools: (1) social and professional networking services (Facebook, LinkedIn, Twitter, etc.); (2) blogging; (3) "pay-per-click" advertising and (4) lawyer Web sites.³¹ The Commission noted "fundamental questions about the extent to which the Model Rules of Professional Conduct can and should apply to lawyers' use of online client development tools."³² The Commission's goal is to identify those areas of uncertainty and offer proposals to clarify attorneys' ethical obligations consistent with First Amendment protections. The Commission's solicitation of comments is of importance to attorneys utilizing social media as standards developed by the Commission must appropriately divide the blurred lines between pure solicitation and protected speech and commentary associated with legal blogs and other online commentaries.

Missouri's Rule 4-7.3 deals with "(a) In-person solicitation" and "(b) Written Solicitation." However, it is less clear what role Rule 4-7.3 plays with respect to online client contact using social media. Attorneys should be mindful of the Rule's solicitation requirements when attempting to contact potential clients online.

Conclusion

Social media is a viable and valuable tool for aiding individual communication and for promoting business. Social media will only become more important due to its prevalence and ease of use. These same traits can be its greatest weakness, however, when dealing with individuals represented in litigation. Attorneys and clients must be mindful of potential pitfalls when navigating these new waters before an accidental violation occurs committed by a client or the attorney himself.

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¹Jonathan D. Glater, *Financial Crisis Provides Fertile Ground for Boom in Lawsuits*, The New York Times, October 18, 2008.

²Universal McCann's Wave 3 report, July 2009, <http://universalmccann.bitecp.com/wave4/Wave4.pdf>

³Tim Bajarin, *Why Facebook will continue to grow*, PC Magazine, October 2010.

⁴Associated Press, *West Virginia case puts focus on jurors' social networking*, July 3, 2010.

⁵Ohio State Bar Association press release, <http://www.ohioabar.org/Pages/OSBANewsDetail.aspx?ItemID=1200>

⁶David Kravets, *Wired magazine, Jurors: Stop Twittering*, February 8, 2010.

⁷*State v. Corwin*, 2009 WL 2562667 (Court of Appeals of Missouri 2009)

⁸*Id.*

⁹*Id.*

¹⁰*Id.*

¹¹John Schwartz, *As Jurors Turn to the Web, Mistrials are Popping Up*, The New York Times, Mar. 18, 2009.

¹²*Leduc v. Roman*, 2009 CanLII 6838. Ont. SCJ.

¹³*Dawn Beye, et al., v. Horizon Blue Cross Blue Shield of New Jersey, et al. Suzanne Foley, et al., v. Horizon Blue Cross Blue Shield of New Jersey, et al.* Civil Case No. 06-5337, Civil Case No. 06-6219. D.N.J.

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Schuster v. Royal & Sun Alliance Insurance Company of Canada*, 2009 6368. Ont. SCJ.

¹⁸*Id.*

¹⁹*Id.*

²⁰*Id.*

²¹*Id.*

²²Eric Turkewitz, *New York Personal Injury Law Blog, Demand for Facebook Records Rejected by NY Appellate Court*, Nov. 17, 2010, <http://www.newyorkpersonalinjuryattorneyblog.com/2010/11/demand-for-facebook-records-rejected-by-ny-appellate-court.html>

²³*Id.*

²⁴*Id.*

²⁵Los Angeles County Bar Association, *En Banc blog item, Judges on Facebook*, April 5, 2010. <http://labcablog.typepad.com/enbanc/2010/04/judges-on-facebook.html>

²⁶Jeff Gray, *Facebook pokes the limits of personal-injury law; Insurance companies fight for greater access to online data that might prove plaintiffs aren't as helpless as they claim to be*, The Globe and Mail, March 3, 2010.

²⁷*Ibid.*

²⁸Molly McDonough, *ABA Journal, Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches*, July 31, 2009, http://www.abajournal.com/news/article/facebooking_judge_catches_lawyers_in_lies_crossing_ethical_lines_abachicago/

²⁹*Id.*

³⁰ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies, *For Comment: Issues Paper Concerning Lawyers' Use of Internet Based Client Development Tools*, Sept. 20, 2010, <http://www.legalethicsforum.com/files/letterhead-client-development-issues-paper-final-9.20.10.pdf>, at 1.

³¹*Id.* at 1-2.

³²*Id.* at 11.

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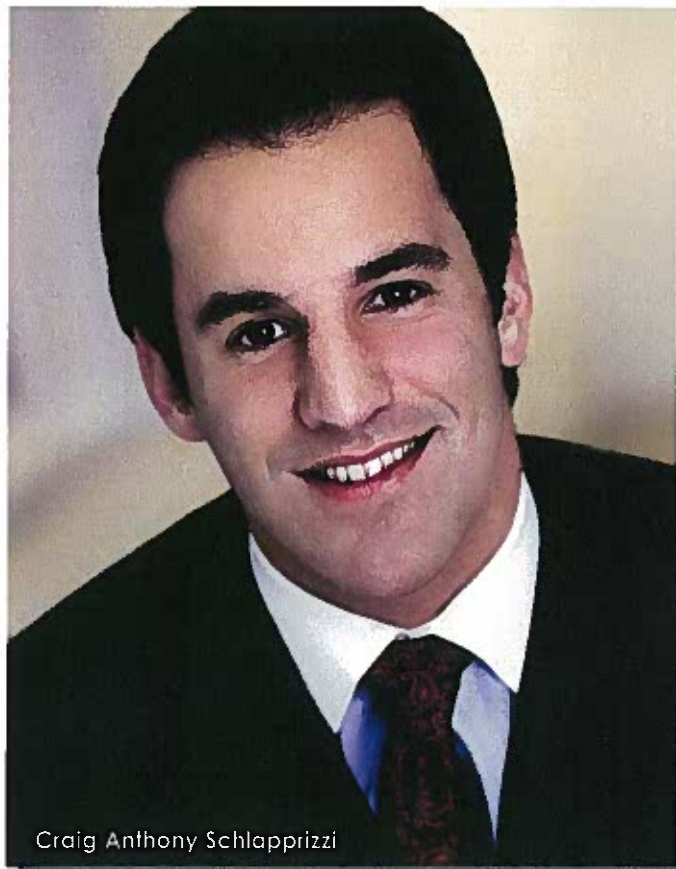
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