

**Litigation Considerations
in Social Media**

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PBI Facebook, Blogging and Twitter . . . Oh My Space!
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Considerations

- Pretrial
 - Service of process – generally not favored yet
 - Research facts, witnesses, parties, judges, attorneys, jurors, public opinion – but must do so ethically
 - Formal discovery (party v. third-party)
- Trial
 - Must continuously monitor these same individuals
 - Issues of admissibility and authentication
 - Jury instructions
 - Potential of a mistrial

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Social Media Research: Ethics

- Philadelphia Bar Assoc. Professional Guidance Committee Op. No. 2009-02 (March 2009) – *Can I “Friend” an Opposing Party or Witness?*
 - deposition of the witness revealed that deponent had “Facebook” and “Myspace” accounts
 - lawyer asked a third party (his paralegal) to contact the witness attempting to “friend” her to obtain the information, but not revealing connection with attorney

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Social Media Research: Ethics

- Philadelphia Bar Assoc. Professional Guidance Committee Op. No. 2009-02 (March 2009) – *Can I “Friend” an Opposing Party or Witness?* (continued)
 - Opinion found conduct inappropriate under Rules 5.3 (responsibilities re: non-lawyer assistants), 4.1 (truthfulness in statements to others), and 8.4 (misconduct)
 - In short: cannot use deception - false/deceptive statements are inappropriate, and use of third-party made it even worse
 - Does not address truthful situation

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Social Media Research: Ethics

- Other states:
 - N.Y. State Bar Assoc. Ethics Op. 843 (Sept. 10, 2010)
 - Follows Phila. Bar Op. reasoning
 - Also states that an attorney may only obtain publically available information and may not “friend” represented litigants or witnesses
 - *But see* Association of the Bar of the City of N.Y., Op. 2010-2
 - Attorney/agent can “friend” an unrepresented party if truthfully identifies self/agency relationship

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Social Media Research: Ethics

- Other states:
 - San Diego County Bar Legal Ethics Committee, Op. 2011-2 (May 24, 2011)
 - Follows reasoning of Phila. and NY State Bar
 - An attorney – even using his or her true name – may not friend a represented party, as such conduct would constitute impermissible direct contact with a represented party
 - Confirmed any public social media postings are fair game
 - Attorney’s client can friend witness/opposing party

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Discovery of Social Media

- All litigators – and litigants - need to keep social media in mind when conducting discovery
 - Especially important in certain areas such as employment, family law, but can come up in any type of case
 - Who can you get the discovery from and how?
 - The party/user themselves
 - Is “private” use by employees in employers’ possession, custody or control?
 - The sites, via subpoena

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Discovery of Social Media

- Every party discovery request should include:
 - Request for information contained in social media
 - Include in definitions, in description of electronic media
 - May also want to request username/password or have other specific requests depending on case
 - Request written user consent to obtain from site if necessary
 - Some sites have their own forms – e.g., LinkedIn

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Discovery of Social Media

- Sites
 - Stored Communications Act
 - Applies, at least, to email type of communications and likely “private” postings
 - Burden, other types of objections
 - Sites usually will require written user consent or court order in order to produce
- Users
 - privacy
 - has universally not been upheld, even for emails

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Discovery of Social Media

- Site objections – ability to get court order
 - *Crispin v. Chirstian Audiegier, Inc.*, Case NO. CV 09-09509, 2010 WL 2293238 (C.D. Ca. May 26, 2010).
 - Private messages sent through social email sites akin to email, thus production barred under Stored Communications Act, 18 U.S.C. § 2701 *et seq.*
 - Also held that wall postings and the like *could* be subject to SCA bar, if privacy settings precluded ready access by general public – remanded for further findings
 - No other case has yet addressed this

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Discovery of Social Media

- User objections
 - In several cases, users have contended that their right to privacy bars discovery of social media information
 - This has been universally rejected – it is not likely that there is an expectation of privacy in all information and, even if there is, the need for the information outweighs privacy concerns
 - *See, e.g., Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010); *but see McCann v. Harleysville Ins. Co.*, 910 N.Y.S.2d 614 (N.Y. App. Div. 2010) (access to Facebook account denied as mere “fishing expedition”).

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Discovery of Social Media

- Pennsylvania Courts have issued several opinions recently on social media discovery:
 - *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010, 2010 WL 4403285 (Pa. Com. Pl. Sept. 9, 2010).
 - *Zimmerman v. Weiss Markets, Inc.*, No. CV-09-1535, 2011 WL 2065410 (Pa. Com. Pl. May 19, 2011).
 - *Piccolo v. Paterson*, order by Judge Cepparulo of Bucks County Court of Common Pleas (reported in *Legal Intelligencer* on May 17, 2011).

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Discovery of Social Media

- *McMillen*
 - Plaintiff sustained injuries that allegedly caused him physical impairment and curtailed his activities
 - Plaintiff's public Facebook page suggested otherwise
 - Defendant moved to compel production of his username, password, etc.
 - Plaintiff objected on grounds the information was confidential and protected against disclosure
 - Court disagreed, using reasoning articulated in *Romano*, also noting that the terms and conditions of the social media sites warn against potential disclosure

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Discovery of Social Media

- *Zimmerman*
 - Followed reasoning in *McMillen*, as well as *Romano* and others
 - "Based on a review of the publicly accessible portions of [plaintiff's] Facebook and MySpace accounts, there is a reasonable likelihood of additional relevant and material information on the non-public portions of these sites"
 - Ordered production of usernames, log-in names and passwords and prohibiting alterations/deletions of information/posts on the accounts

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Discovery of Social Media

- *Piccolo*
 - Plaintiff had sustained extensive facial injuries, resulting in permanent scarring
 - Plaintiff had provided defendant with numerous photographs of the injuries over time
 - Defendant sought access to the Facebook account, but nothing in public posts suggested that the private areas might contain contradictory information and no other explanation for need was given
 - Court summarily denied the request

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Discovery of Social Media

- How can you physically obtain the discovery?
 - Potentially electronically
 - Facebook now allows download of *all* of a user's posts for all time (Download Your Information)
 - By third-party, user or site?
 - Printouts
 - Actual access to site
 - Given to opposing party or possibly even to judge. See, e.g., *Barnes v. CUS*, 2010 WL 2265668 (M.D. Tenn. June 3, 2010) (judge as "friend").
 - Production of log-in information

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Admissibility of Social Media

- Federal and state rules of evidence still apply
- Must demonstrate authenticity
 - Prove it is from/by user – toughest issue
 - Trace searches – lawyer as witness?
- Must be relevant (FRE 401)
- Probative value must outweigh danger of unfair prejudice (FRE 403)
- Must be prepared to overcome hearsay objection (not hearsay, admission, present sense impression; or use for impeachment only)

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Authentication of Social Media

- Recent cases have addressed authentication. Best example is *Griffin v. Maryland*, 19 A.3d 415 (Md. App. Ct. 2011).
 - Murder case
 - Error to admit pages from the defendant's girlfriend's social media profile
 - Authentication evidence insufficient because it relied upon publicly known biographical information to try to establish that it was the girlfriend's profile
 - Such information did not have sufficient "distinctive characteristics"

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Authentication of Social Media

- Court offered suggestions on proper authentication methods, including:
 - Ask creator if she created the profile and the posting
 - Search the computer of the alleged creator for evidence proving that computer was used to originate the profile and posting
 - Obtain information from the social media site linking the profile and post to the person who allegedly initiated it
 - Use FRE 104(b) to weigh the reliability of the evidence against the possibility it was generated by an imposter

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Other Trial Considerations

- Use by judges
 - Inappropriate *ex parte* communications and other similar behavior – examples:
 - *Stengle v. Office of Dispute Resolution*, 2009 WL 1138119 (M.D. Pa. Apr. 27, 2009) (hearing officer terminated for blogging about topics before her)
 - N.C. Judicial Standards Comm. Inquiry No. 08-234 (judge admonished for *ex parte* communications on Facebook with counsel for party during trial)

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Other Trial Considerations

- Use by judges
 - Independent research by judges – may or may not be appropriate – examples:
 - N.C. Judicial Standards Comm. Inquiry No. 08-234 (judge admonished for viewing defendant's website, which had not been offered at trial)
 - But see: *Purvis v. Comm. of Social Security*, No. 09-5318, 2011 WL 741234 (D.N.J. 2011) – in remanding to ALJ for further evaluation/findings, district court judge conduct own research and saw photos on plaintiff's Facebook page which made her credibility suspect

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Other Trial Considerations

- Unauthorized use by jurors
 - On March 15, 2009, it was reported that a juror in the corruption case of state Sen. Vincent Fumo had posted updates about the trial on his Facebook page, prompting the defense to move for a mistrial, which was denied.
 - Other such incidents have been reported around the country, and jurors have admitted to conducting independent research on the Internet.

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Preventing Unauthorized Use

- Jury Instructions:
 - Litigants should ask for clear instructions that the jurors not conduct any research on the Internet and not blog or otherwise post information about the trial
 - Ideally, jurors will be warned earlier, perhaps even as early as in juror questionnaires/prior to voir dire
 - Federal Judicial Conference Committee on Court Administration and Case Management has proposed the following model jury instructions <http://www.uscourts.gov/newsroom/2010/DIR10-018.pdf>

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Jury Instructions - Opening

- Before Trial
 - You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, *you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case.* Please do not try to find out information from any source outside the confines of this courtroom.

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Jury Instructions – Closing

- **At the Close of the Case:**
 - During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. *You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.*

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Consequences of Juror Misuse

- **Mistrial?** Even when jurors use social media:
 - a mistrial will not be granted when the conduct is found harmless, if it can be remedied by dismissal of the misbehaving juror or if it can be remedied with a curative instruction
- **Juror personally may face consequences – e.g.,**
 - New California state law specifically authorizes jail time for contempt of court for posting information on social media about a trial or deliberations
 - Research could also result in civil/criminal contempt

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