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SOCIAL MEDIA – WHAT WILL PRIVATE INVESTIGATORS DO NOW?

Presented by

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SOCIAL MEDIA – WHAT WILL PRIVATE INVESTIGATORS DO NOW?

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I. RELEVANCE – WHAT STAYS IN VEGAS IS ON FACEBOOK

With the amazing explosion in people using social media in just the past five years, there is much that is unknown, undecided, and unexplored with this tool. "Smart Phones" are common place and allow us to remain in contact with clients, co-workers, and friends the world over instantly. Nevertheless, many continue to be naïve in understanding the lasting impact of their "posts", "blogs", and "tweets." The confusion has spread to the courts and resulted in varying decisions with respect to the discoverability and privacy of certain social media pages and posting.

This paper is not designed to explore all of the recent court decisions or ethical considerations, but, rather, to discuss some of the applications this author has utilized in discovery, mediation, and trials over the past three years. Once considered the playground of youth, the largest growing segments of Facebook are adults in the 55-65 age groups. This past year, Facebook boasted that it had 500 million users worldwide. Twitter claims that it has over 100 million users. It is reported that one-third of adults now have a social media site. Over ninety percent of Millennials communicate through social media and consider email "old school." Social media has played an increasing, important, and significant role in investigating claims, obtaining information on lay and expert witnesses, serving subpoenas, conducting voir dire, preparing for depositions, and use in mediations and trials. This paper will not deal with the "old" Twentieth Century technology of email and discovering one's web browsing history. While such information was and is helpful, a wider world exists. Social media can make personal information available in an instant and with little to no cost. What once took many hours to develop is available literally at the push of a button.

II. SERVICE OF SUBPOENA

Recently, we needed to file suit on behalf of a corporate client. We could not find the potential defendant for many months. One day, while checking his Facebook account, the defendant posted a notice as to where he would be spending a Saturday evening in Milwaukee and what time he planned to arrive. Our process server was waiting for him at the

appointed time and place. This individual had his privacy settings set so that anyone could view his postings or “Status” as it is known in the Facebook world.

In a current case, a former employee was essential to interview. This individual possessed personal knowledge surrounding the use of a medical device which was the subject of the lawsuit. Plaintiff’s attorney claimed that he could not find the witness. We put the name into Facebook and within five minutes obtained the witness’s cell phone number and immediately contacted the witness.

III. DISCOVERY- “FREE SURVEILLANCE”

A. “I Cannot Hike Or Walk Long Distances”

In a recent case, a plaintiff complained of back pain following a truck-car accident. We were representing a major trucking company for the defense. The plaintiff was a young woman at the University of Wisconsin. I emailed my niece, who attended the same school to ask if she knew her. I never thought I would receive a response with a link to the plaintiff’s Facebook page. Plaintiff claimed that she was unable to ride her horses, nor participate in any activity that requires long walks or hiking. Facebook allows one to list hobbies and favorite activities. In her case, she listed horseback riding, hiking, running and gymnastics. As I viewed the link, I saw photographs that were posted to her page by others that “tagged” plaintiff performing with the gymnastics club and horseback riding. I made screenshots of these pages and posts.

On the day before her deposition, I again looked at her Facebook page. Plaintiff had photographs of herself hiking at Devil’s Lake, a Wisconsin State Park popular for camping, hiking, and rock climbing. These photos were posted by others and “tagged” with her name. This action of “tagging” put the photos on the plaintiff’s Facebook page. The posted photos showed plaintiff hiking on one of the more grueling and challenging paths located on the western bluffs of the lake.

At the deposition, I allowed her to discuss all of her limitations. When asked about things she enjoyed doing, she discussed camping with her family. She truthfully testified that she had been camping, over Labor Day weekend, at Devil’s Lake. She then testified:

A: It was a frustrating time for me because I could not enjoy myself. When my family went on a hike, I had to stay back at the campsite.

Q: You mean that your family went on a hike without you?

A: Yes, they went on a long hike and I had to stay behind at the campsite to rest my back.

Q: So, it must have been very frustrating for you to have to stay behind while your family went on their hike?

A: Oh, it was very frustrating.

Q: So you were unable to participate in any hiking over the weekend?

A: That's right.

Q: I have been to Devil's lake myself. Did they do that large hike on the western bluff?

A: They did. I love that path and I could not go which made me sad.

At the close of the deposition I asked her if she had a MySpace page. She did not. I then asked her if she had a Facebook page. She admitted that she did. I then made a formal request of her attorney to obtain a screenshot of her Facebook page as it existed on the day of the deposition.

Subsequent to the deposition, plaintiff counsel told me that his client did not know how to make a copy of her Facebook page. I responded that, if I knew how to make a copy of a page, she should know how to do so and that if she did not do so, we would take the matter up with the court and/or subpoena the records from Facebook.

Plaintiff did copy her page; however, the photographs were not included in the discovery response. The failure to include the photograph helped us since we already had printed them off on the day of the deposition.

B. Mediation

At the court ordered ADR, I brought the copies that we had made of the Facebook page as well as my laptop, so that we could go directly to the page. By the time of the mediation, plaintiff had activated privacy controls that would not allow us to view her page. I did show the mediator the photos we had as well as what was produced. We never disclosed to plaintiff's counsel what we had and did not authorize the mediator to do so either. However, the mediator cautioned the plaintiff's counsel that we were prepared to go to trial and that what we possessed would severely hurt plaintiff's credibility and case. The matter was eventually dismissed.

C. You Tube Video

In a case involving a claim of a severe rotator cuff injury, we played the plaintiff's video deposition on one laptop while, on the other; we had a You Tube video of the plaintiff demonstrating how to build an addition on his home. On You Tube, he was lifting 4x8 sheets of plywood out of his pickup truck and lifting them over his head to move them. In the deposition, plaintiff stated and demonstrated that he could not lift his right arm higher than 45 degrees and could no longer do work around his home. Demand prior to the mediation was \$675,000. The case settled for significantly less (subject to a confidentiality agreement).

IV. BLOG RESULTS IN DISMISSAL OF EXPERT

A search of an expert witness turned up a web page designed to inform the readers of the dangers of Ritalin. The expert sold bumper stickers, buttons, articles, promoted seminars and other material designed to generate income. He also discussed his availability as an expert witness. However, the best nugget of gold was his blog in which he went on a rant about how a particular drug company was out to "get him." This part of his blog was deleted a few days after its discovery.

We contacted the general counsel for the drug company on the hunch that this expert had past experiences with the company. The general counsel provided us with a large amount of material that would prove very useful in cross-examination of the expert at the trial. During cross, we were able to produce many materials from the expert's own society which branded him as one with no experience with the drug in question, nor had he done any controlled studies to support his theories.

At trial, the trial judge struck the witness as being a fraud and lacking in even a basic scientific understanding of the drug and its uses. His disqualification was a direct result of a careless blog out on the internet.

V. VOIR DIRE

Since reportedly one-third of Facebook users allow anyone to see their profiles, it is essential for an attorney to run the names of potential jurors for information. Even if one's jurisdiction does not provide one with prospective juror names before jury selection, some attorneys use the internet in the courtroom to run a search of potential jurors while in the courtroom. Some court houses now have wireless; however, it is not required given that, with an internet card from your cell phone provider, one can be connected to the internet while in court. In some cases, post selection searches have uncovered information that was not disclosed either on jury information data sheets or during actual voir dire. I submit that it has become "standard of care" for the reasonable trial attorney to do a search of potential jurors to uncover information that is readily available concerning court records, businesses owned, past lawsuits, and even some mundane postings on Twitter or Facebook.

Many jurors have their own web pages, businesses, or blogs that can give a great deal of insight to their bias or prejudices that may influence the case. If you are not seeking the information, your opponent probably is doing her homework. (See, *Social Networking Sites Help Vet Jurors*, Nat'l L.J., Aug. 18, 2008, cited in *A New "Must Use" Tool in Litigation?*, For the Defense, August 2010.)

VI. OTHER SOCIAL MEDIA SITES – DISCOVERY REQUESTS

Facebook, LinkedIn, YouTube, Twitter, Texting, MySpace, Blogs, and My Sugar Daddy.com are just some of the sites that are available to obtain information. It is important that counsel propound early discovery requests:

- What social media do you use or frequent?
- Produce screen shots of one's current Facebook/My Space page including wall comments, photographs, and profile.
- What profile or screen name do you use?

- Is your profile private?
- What level of privacy do you maintain?
- Have you blocked anyone in particular? Who? Why?
- What status have you posted since the date of the accident in question?
- Are you in any YouTube/internet videos?
- What Videos have you posted to Facebook or You Tube?
- Do you have a personal blog?
- Where have you posted resumes?
- Do you belong to any dating sites such as Match, eHarmony, Yahoo Personals?
- Are you listed on Monster or other employment sites?

VII. DISCOVERY USING OTHER SOCIAL MEDIA

A. My Sugar Daddy.com

Use of medical records, particularly nursing notes has for many years produced information helpful to determining the level of claimed disability. In one case, the plaintiff claimed that she could no longer enjoy a normal sexual relationship with her husband. She further stated in medical records that she did not use alcohol, tobacco or drugs. In a personal blog, she listed, post accident that she had been drinking to the point where she thought she was going to the hospital. In Tweets that were obtained, she discussed having sex with someone not her husband. In a YouTube video, she is seen with a bottle of imported beer and bragging that she only “drinks the good stuff.” The best part of the discovery was finding that she had posted on My Sugar Daddy.com. This is a web site for women looking for wealthy male companionship in exchange for lavishing attention and affection on the Sugar Daddy. Plaintiff had her own account and in her profile described herself as very sexually active and looking for a rich guy to take care of her. In return, plaintiff promised to take very good care of her “Daddy.” What was left out was the fact that she was

married. The information about Sugar Daddy came from her sister who was upset that she was attempting to defraud our defendant company and, further, she was upset to find her sister using her computer to be on this web site. It was the family that gave our investigator access to the computer which also contained her password and allowed us access to this interesting web site.

Similarly, an investigator was able to discover that plaintiff enjoyed doing “tests” on Facebook answering weighty existential questions such as:

- How many times a week do you like to have sex? A: 20
- What is your favorite stripper song? A: Pussy Liquor
- What movie is your life? A: Footloose.

B. Employment Issues

LinkedIn provides a current resume and work status of individuals. In a number of cases, we have found false information in LinkedIn pages which undermined the witness’s credibility before the jury.

An expert testified that he did not advertise himself for hire as a medical expert. He was unable to explain three websites that advertised his services for hire. Nor was he able to explain why he stated that he was on the faculty at the University Of Chicago Medical School, when he never was on the faculty. He changed his LinkedIn profile the day after the trial.

Another plaintiff who claimed he could not work was presented with his LinkedIn profile describing the many jobs he had held and how he was not taking in more referrals as he had no time for new projects.

C. I Can’t Come To The Deposition As I Am Out Of Town

Recent articles have also described interesting ways to get information on plaintiffs. In one case, a plaintiff who stated that he could not work due to depression following an accident and could not be deposed because he was going to be out of the country, posted in a publicly accessible profile that he was working as a movie extra and enjoying vacationing in New Orleans. When the information was given to plaintiff counsel, the claim was dismissed. (Litigation, Mining Social Media Sites for Litigation Gold, 10/1/10.)

VIII. FRIENDS AND JURORS – CAN WE TRULY EXPECT TRIALS TO BE FAIR IN THE INTERNET AGE?

Jurors have been caught using Facebook posts, doing research on Google, and Twittering about trials as they are ongoing. This has led to judges issuing instructions to the effect of:

You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, I-phone, 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, My Space, LinkedIn, and You Tube

In Michigan, a juror was fined \$250 for posting on her Facebook page that she believed that the defendant was guilty, even before the case was given to the jury for deliberation. The 20 year old juror wrote on Facebook, “gonna be fun to tell the defendant they’re GUILTY.” The post was discovered by the defense attorney’s son while checking juror names on the internet.

In Fort Lauderdale, a juror sent the judge a note indicating that she had overheard a juror talking about doing research on the case. The judge interviewed each juror asking if they had done any research. Eight of the 12 jurors had Googled the defendants’ names and medical terms. A mistrial was immediately ordered. (*St. Petersburg Times*, October 29, 2010)

In Florida, a rape trial had not ended and the foreperson updated her Facebook account calling the testimony “boring, boring, boring.” A fellow juror posted a comment to a local newspaper, after the trial, accusing the foreman of having outside information. A motion for new trial is currently pending.

In New York, a juror sent a “friend request” to one of the witnesses in the trial in which he served, during the trial.

In Maryland, a group of jurors posted messages about their jury service despite being told by a judge not to do so.

In the United Kingdom, a juror was dismissed from the jury for polling her friends about whether to convict the defendants in a criminal case.

Judges have confiscated cell phones, Blackberries, I-Touch, and I-Pads from jurors during a trial and only allowed access to them if there is an emergency or child care issue. This does not stop what a juror does after hours and, short of sequestration, in this age of instant news and information, it is difficult to stop jurors from making comments, research or connecting with others about the trial. This really is no different than in the past. Attorneys had no idea if a juror was going to read the paper, call a friend, discuss the case with a spouse or friend, or go to the library and do research. As one author has opined, the good news is that we now have the ability to find out what a juror has done by a search of social media. The information is “out there to actually find and see.” (Jack King, Director of Communications and Public Affairs at the National Association of Criminal Defense Attorneys. Cited in Litigation, 10/1/10)

IX. POST SETTLEMENT USES

The terms of a confidential settlement were violated when one of the attorneys discovered that a party Tweeted that a settlement had been reached. In other cases, a personal blog posted detailed information concerning a confidential settlement.

X. USE IT OR LOSE

To those of us who have been trial attorneys for many years, the vast array of social media and internet sites available for information appears daunting. Consider that in actuality accessing this information is far easier than the days of a private investigator having to search court records, interviewing neighbors, or hiding in a van while waiting to capture surveillance photos or video. Anyone can learn how to use the tools available and literature is growing daily with instructions for use and suggestions for innovations in the use of the internet. Social media is here to stay and the means to use it becomes easier each day. You owe it to your clients to make full use of the information that is available and you may even have fun doing so. Happy Hunting.

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Joe has been named a Wisconsin Super Lawyer for the past six years and is Board Certified in Civil Trial Law by the National Board of Trial Advocacy. He is licensed in Florida and Wisconsin. Joe is a past DRI board member and is active in the FDCC. He has lectured and authored articles on Trial Advocacy and Ethics internationally.