"Tweet" Me Your Status: Social Media in Discovery and at Trial

By Christopher E. Parker and Travis B. Swearingen

In 1996, the Georgia Court of Appeals declared that a facsimile transmission was not a "writing," because it consisted only of "an audio signal via a telephone line containing information from which a writing may be accurately duplicated, but the transmission of beeps and chirps along a telephone line." *Dept. of Transportation v. Norris et al.*[1] Soon thereafter, Judge Samuel B. Cant of the Southern District of Texas rendered his decision in *St. Clair v. Johnny's Oyster & Shrimp*,[2] in which he cautioned against relying on information from the Internet, which he characterized "as one large catalyst for rumor, innuendo, and misinformation" and "voodoo information" that is "adequate for almost nothing." Does that sound like the type of information about which you now routinely have evidentiary debates when a case comes to trial? Increasingly, the answer to that question is, "yes." Times have changed, and the way in which we prepare for and try cases must take into account the types of communication media now in use. Simply put, trials involve witnesses, and it is likely that the modern witness has an electronic trail or history that may be relevant and/or persuasive when making your case or trying to break down your opposition.

The world's population now spends more than 110 *billion* minutes on social networks and blog sites. This equates to one in every four and a half minutes, or 22 percent of all time spent online.[3] As of July 31, 2011, Facebook.com boasted that the site had *more than 750 million* active users, at least 50 percent of whom log on to Facebook on any given day.[4] As of this same date, Twitter had more than 200 million registered users, with 460,000 new users joining every day, and an average of *one billion* "tweets" per week.[5] LinkedIn claims it had more 100 million users as of March 2011 and in excess of two million businesses with company pages.[6] The average Facebook user adds 90 pieces of "content" every month, be it a status update, photograph, or blog post. Some estimates place the number of Internet blogs at more than 150 million.[7] And it's not just computer-savvy kids fueling these numbers; the fastest growing demographic for social networking websites is individuals who are 35 years old and older.[8]

Based on these statistics, it is inevitable that at least one important player in your lawsuit will have potentially relevant (or at least discoverable) information located online. To harvest this information, it is now common practice for trial lawyers to conduct online research on their own clients, opposing parties, third-party witnesses, experts, and even jurors. Some might even argue that failing to do this online research is a serious error in light of the prevalence of information spread over the digital universe. This article explores how this information can be helpful to your case, provides suggestions on how to harness the information, and suggests some of the steps you should consider taking to have the information authenticated and admitted into evidence in court.

Social Media Provide Useful Snapshots of Data

The average online social networking profile contains a wealth of potentially discoverable knowledge. Profiles can include a person's hometown, date of birth, address, occupation, ethnicity, height, relationship status, income, education, associations, "likes," and a limitless array of comments, messages, photographs, and videos that resides in the "public" domain and is not likely to be filtered by opposing counsel. All this information may be helpful, but it is often the messages and photographs that are the focus of a search related to litigation. Although not scientifically verifiable, anecdotal evidence suggests that a user's social filter—that buffer that tells us what not to say

and do at a dinner party—often stops working the moment a person sits down in front of a computer screen without the surrounding social constraints experienced in everyday life. During political races, Facebook photographs have emerged of candidates or their influential staff performing sexually suggestive acts while dressed up like Santa Claus,[9] groping cardboard cutouts of their candidate's opponent,[10] and violently vomiting after overindulging on alcoholic beverages.[11] Social media have fueled discoveries about public figures previously thought unimaginable (at least in public) based on their private nature.[12]

With increasing frequency, courts are finding that what you do and say on Facebook can and will be held against you in a court of law. What you tweeted often has relevance and can show your state of mind. Profile information can be used to impeach or possibly to rehabilitate. Information exchanged via social networks has assumed a prominent role in a variety of litigation contexts and has taken on particular importance in family law, personal injury cases, criminal law, business torts, and employment matters. Many litigators will now attest that their first step in many cases is to try and seize key witnesses' computer hard drives (or mirror images) and attempt to catalog and gain access to posted content on social media outlets in an effort to gain background information—a task that was once left to costly private investigators. Social media may be the electronic corollary to the once kept secret diary.

The importance of social media has been demonstrated in several recent decisions. In an Ohio family law case, a divorcing husband and wife were contesting custody of their five-year-old daughter. The trial court found that its primary concern was a determination of what would be in the "best interests of the child."[13] During the proceedings, the husband's counsel located the wife's online blogs, in which she admitted that she practices sadomasochism, that she was on a hiatus from using illicit drugs during the pendency of the proceedings, and that she planned on using drugs in the future. The wife also admitted in her blogs that she would use drugs in her home while the child was sleeping. It came as no surprise that the court found that the wife's lifestyle choices would have a detrimental effect on the child and awarded full custody to the husband.[14]

In another family law case, a husband was charged with criminal contempt for violating a domestic relations order of protection by sending multiple communications to his wife's MySpace account.[15] In a case heard in Texas, the court declined to award custody of a couple's two children to the father, after he had posted "I don't want kids" on his MySpace account two weeks before trial.[16] Timing is everything, as the father learned. In the U.S. District Court for the Northern District of Ohio, a judge overseeing multidistrict litigation related to welding injuries dismissed a plaintiff's claims of permanent and severe disability after defense lawyers uncovered Facebook photographs of the plaintiff racing motor boats.[17]

In *Mai-Trang Thi Nguyen v. Starbucks Coffee Corp.*,[18] the plaintiff sued her former employer for sexual harassment, religious discrimination, and retaliation after having been fired for threatening violence toward co-workers and for inappropriate conduct. The summary judgment path for the employer was made easier when paved with the plaintiff's MySpace page, in which she stated the following: "Starbucks is in deep sh[#]t with GOD!!!... I thank GOD 4 pot 2 calm down my frustrations and worries or else I will go beserk [*sic*] and shoot everyone ... ." Apparently, legitimate nondiscriminatory reasons for her discharge became self-authenticating thanks to her posting on MySpace.

Courts Are Allowing Parties to Introduce Information Found in Social Media as Evidence in Trials

Courts are weeding out arguments surrounding expectations of privacy in a variety of ways. Courts are increasingly willing to allow opposing counsel access to a client's Facebook and MySpace accounts, regardless of privacy settings. In the case of *Romano v. Still*, the New York Supreme Court ordered the plaintiff to grant the defendant access to current and historical Facebook and MySpace pages and accounts on the basis that information on the social networking sites was inconsistent with the plaintiff's claims in that action concerning the extent and nature of injuries, especially claims for loss of enjoyment of life.[19] In order to convince the court to grant their motion, the *Still* defendants produced public portions of the plaintiff's MySpace and Facebook pages, which revealed an active lifestyle that included travel to Florida and Pennsylvania during the time period in which she claimed her injuries precluded such activity. The court was particularly intrigued by the plaintiff's public profile page on Facebook showing her smiling happily in a photograph outside the confines of her home in a case in which the plaintiff had claimed significant permanent injuries that had kept her bedridden. The court found that the information sought by the defendant was "material and necessary to the defense of this action and/or could lead to admissible evidence."[20]

In *Ledbetter v. WalMart Stores Inc.*, the U.S. District Court for Colorado ordered defendants in a personal injury suit to produce information posted on their Facebook, MySpace, and Meetup.com pages.[21] The court found that, because the plaintiffs had called into question their physical condition as well as their relationships with their spouses, they had waived any privileges related to that type of information and that the subpoenas to Facebook and MySpace were reasonably calculated to lead to the discovery of admissible evidence.[22]

Similarly, in *Murphy v. Perger*, the Superior Court of Justice for Ontario held that a defendant was entitled to production of the plaintiff's Facebook page.[23] The plaintiff had claimed damages for pain and suffering and loss of enjoyment of life arising out of a motor vehicle accident. The defendant had successfully accessed another website that contained a photograph of the plaintiff engaging in various social activities and suspected that her Facebook site had additional photographs. In finding that the plaintiff did not have a right to privacy that extended to protecting Facebook photographs, the court held that "a party who maintains a private, or limited access, Facebook profile stands in no different position than one who sets up a publicly available profile," and that "any invasion of privacy is minimal and is outweighed by the defendant's

need to have the photographs in order to assess the case." The judge further found that the plaintiff could not have a "serious expectation of privacy," because her "private" profile still granted access to 366 people.[24]

In *Barnes v. CUS Nashville LLC*,[25] a Tennessee court showed a willingness to use a hands-on approach to evaluate information. The plaintiffs opposed the defendant's efforts to view information on the plaintiffs' Facebook accounts. The magistrate judge resolved the dispute by suggesting that the plaintiffs "friend" the magistrate judge for the sole purpose of reviewing the content of the account and assessing its relevance, after which the court would close the Facebook account it had created for this purpose. It's hard to imagine that this approach was covered in judges' training.[26]

How to Gain Access to Information Found on Social Media

Because it appears that courts are becoming more amenable to allowing information found on social media into a case, the next question is: How do attorneys go about gaining access to the information? However you decide to go about accessing the information, the authors caution against setting up a fake user name to "friend" the opposing party or asking your paralegal or assistant to do so. Courts frown upon such actions.[27]

In the world of electronic discovery and electronically stored information, when a case first lands on your desk, it is common practice to prepare and submit a spoliation letter to opposing counsel. In preparing such a letter, be sure to specifically mention social networking sites, online blogs, and any other accounts that the opposing party may have. Individuals who have potentially damaging information stored on their social media website may be quick to alter or destroy that information after becoming party to a lawsuit, and Facebook has asserted that, once that information is deleted, there is no way to recover it.[28] Colleges and universities now routinely advise students to scrub their accounts in order to avoid embarrassment in the future.[29]

The arguments over spoliation are gaining increased importance. Catching someone in the act of spoliation may be enough to win your case. In *Torres v. Lexington Ins. Co.*, a plaintiff sued a hotel chain alleging that a sexual assault she had suffered at the hotel had caused her to become socially isolated and that she suffered intense humiliation and mental anguish as a result of the incident.[30] Defense counsel located the plaintiff's online account, which contained photographs "depicting an active social life, and an aspiring singing and modeling career."[31] Defense counsel was able to download and print much of the information and subsequently sent the plaintiff's counsel a spoliation notice and a request for the remaining data to be produced. Two days later, the plaintiff deleted the account in its entirety. The court sanctioned the plaintiff's spoliation by dismissing her claims for mental anguish.[32]

After sending a spoliation letter, litigation counsel can pursue information found on social media through traditional discovery. Interrogatories should ask the respondent to identify all websites that he or she uses to communicate with other individuals; the name, account, or user name information associated with that website; the names of all individuals who have access to that account; the last time the account was accessed; and the individual's e-mail addresses, phone number, home address, and other typical biographical information. The requests for production of this information can seek printouts evidencing each account and copies or screen shots of all photographs and messages included within the account.

A typical interrogatory may read something like this: "Identify all social media or social networking accounts that you have (including but not limited to any and all Facebook accounts, Twitter accounts, MySpace accounts, and LinkedIn accounts) and identify any posts to any such accounts that relate to ... [the subjects of inquiry in your case or whatever background information you are seeking]." Similarly, a request for production may seek media as follows: "Produce a copy of all accounts identified in interrogatory no. ____. If you have a Facebook account, please produce a copy of all information and documents you have posted. You can retrieve this by going to your Facebook account, clicking on 'Account' in the upper right, choosing 'Account Settings,' and then, toward the bottom of that page, there will be instructions to 'Download Your Information.' Follow those instructions and provide a copy of that download." Similar instructions may be developed for other social media sites.

You may also wish to consider even broader discovery requests seeking the identification and related production of documents and media reflecting all online accounts, profiles, postings, messages (including forwards, replies, tweets, retweets, wall posts and comments, status updates, and blog entries or comments), video, pictures, and other online or digital communications that (1) relate to the allegations in dispute; (2) reflect, demonstrate, refer to, or relate to any mental status or injury relating to the dispute or otherwise; or (3) reflect or relate to events of sufficient significance to produce a significant emotional response or mental state.[33] In reviewing responses to such discovery, pay particular attention to accounts identified, claimed privileges, and references to third-party hosting sites so that you can act quickly to track down potential evidence.

Finally, you should submit an authorization to be signed by the respondent that specifically includes the account information detailed above. Information contained on Facebook, MySpace, and any other social media website is protected from disclosure under the Stored Communications Act, 18 U.S.C. § 2701 et. seq. As a result, absent an authorization from the user, the most that Facebook or MySpace can produce is basic subscriber information from a particular account.[34] To access photographs, messages, and other account content stored on Facebook or MySpace, you will need to have the user authorize the social media website to release the specified account information. The authorization should include the user's account and pertinent biographical information. Undoubtedly, as with most avenues of discovery, the opposing party may refuse to sign the authorization based on privacy or relevancy grounds. Facebook and other social media sites have demonstrated extreme reluctance to provide account-specific information, even with a consent form signed by

the account holder. In such cases, it may become necessary to have a subpoena issued and to obtain direct involvement by the court. With the liberal breadth of discovery afforded by the Federal Rules of Civil Procedure and the recent trends toward disclosure discussed above, you should be in a strong position, if necessary, to convince the court to order access to the information.

Once you have the signed authorization and pertinent account information, you can prepare a subpoena to the social media entity. Any Facebook request should be sent to Facebook, 1601 South California Ave., Palo Alto, CA 94304, Attention: Security Department, fax number: 650-644-3229. Facebook will accept service by fax or mail, but MySpace requires personal service on its registered agent, located at 2121 Avenue of the Stars, Suite 700, Los Angeles, CA 90067; all subpoenas should be addressed to the custodian of records for MySpace.com. The subpoena should include the user's full name, full URL to the Facebook or MySpace page, school or network in which the person is included, the person's date of birth, known e-mail addresses, account number, telephone numbers, mailing address, and expected period of activity. Pay particular attention to the jurisdiction of the court you select to issue the subpoena and compel production. Both MySpace and Facebook will accept subpoenas only from out-of-state civil litigants who have been properly domiciled through a California court. Even though Facebook and MySpace cannot provide content that has been previously deleted, if a Facebook or MySpace user has terminated his or her account, the social media entities can restore access to allow the user to collect and produce information to the extent possible.[35]

How to Get the Information Into Evidence

Once you have the information, the next step is to get it admitted into evidence in court. Information gathered from the Internet is usually opposed on authenticity grounds. Federal Rule of Evidence 901(a) requires that a party attempting to admit evidence be able to authenticate it by showing that the evidence is what it is purported to be. Federal Rule 901(b) provides a nonexhaustive list of 10 methods the party can use to make show authenticity. Even though the opposing party can always raise preliminary questions about the evidence under Rule 104 as well as questions about relevancy under Rule 401, the most likely hurdles for a party attempting to introduce information found on social networking sites are the requirements found in Rule 901.

Under Rule 901, counsel is required to make a prima facie showing of authenticity. However, Rule 901 does not address how to authenticate electronically stored evidence. Using a conglomerate of the 10 methods available under 901(b)(1), however, counsel can piece together a method of authenticating the data found on social media. First, under 901(b)(1), counsel can call on an authenticating witness who can provide factual specificity about the process by which the electronically stored information was created, acquired, maintained, and preserved without alteration or change or about the process by which the information was produced as a result of the system or process that does so.

Even though Facebook and MySpace cannot provide content that has been previously deleted, if a Facebook or MySpace user has terminated his or her account, the social media entities can restore access to allow the user to collect and produce information to the extent possible.

Trial counsel may have a legal assistant or paralegal print off screen shots from someone's Facebook account, then submit an affidavit or otherwise testify about the method in which the information was procured and produced. The affidavit or testimony of the person who made the copy of the website should include the Internet address of the website, the date the content was printed, the method of printing, and the way the printout has been stored.

Second, as set forth in *United States v. Siddiqui,* courts will often allow for electronic information to be authenticated by the content itself under Rule 901(b)(4).[36] If a Facebook account contains the contact information, name, date of birth, and other personal information about a particular witness, that information itself may be used to authenticate the ownership of the account as well as the individual using the site. Often the documents can be self-authenticating by providing distinctive characteristics of the website that reveal that a particular party authored the document. Counsel proffering the document must establish that the person was one of a few individuals—or the only individual—who knew the information at the time that it was posted on the Internet or the only individual who had access to the account on which the content was published. Each of these issues should be considered and addressed through the discovery process via deposition testimony or written discovery responses.

Next, a party can take advantage of Rule 902(11), which allows electronic information to be self-authenticated when it complies with the business record exception. If you have successfully subpoenaed information from Facebook, that information will be accompanied by an affidavit of the custodian of records.[37] A representative of Facebook is likely to decline to appear in person as a witness, but using the affidavit will generally be enough to overcome any objections to the business record exception. A deposition by a third party can probably resolve the issue if needed; however, it is likely that many courts will not require the litigant to bear the expense and burden of a deposition if a proper custodial affidavit is obtained.

Concerns about the authenticity of electronic information become even more nuanced when dealing with judges and jurors who may not be technologically savvy enough to understand the intricacies of social media websites. These obstacles are diminishing over time as society becomes

more technically literate, but they must be anticipated. Jurors will undoubtedly have heard of computer "hacking" or may harbor a general distrust for the concept of cyberspace and digital media. Opposing counsel may prey on these fears by suggesting that someone other than the alleged author may have gained access to the social media account and posted a particular message or status update. In some cases, the witness will simply deny having posted the content at issue. In the case of *In re K.W.*, a plaintiff admitted that the proffered MySpace page was hers but claimed that her friend posted the answers to the survey questions that the defendant sought to introduce as impeachment evidence with respect to her claims of rape.[38] The court ruled that such statements were admissible for impeachment purposes.

When evaluating what method to use in introducing and authenticating social media evidence, counsel should be aware of all potential hurdles in gaining acceptance with the jury beyond the precursor problems with admissibility. Counsel should analyze the social media content as though it were a traditional "writing," paying particular attention to the source, chain of custody, and all arguments relating to its potential authenticity in light of the purpose for which its use is sought at trial. Questioning the opposing witness and forcing him or her to authenticate a pseudonymous social networking profile, based on admission, may be the most convincing method. If the witness refuses to acknowledge the source of the "writing," counsel should be prepared to establish its origin to the degree needed for the purpose for which it is authored. As with all evidentiary issues, admissibility is one hurdle, whereas relevance and impact on your case are the ultimate challenge.

Finally, once the information has been found to be relevant and authentic, the electronic information found on social media must overcome any potential hearsay objections. In particular, any messages that have been sent between users of Facebook or MySpace, postings on a blog, or other postings on a website will have to overcome typical hearsay objections for both sides of the communication. In the interest of brevity (and the authors' intellectual limitations), this article will not delve into the various facets of the hearsay rule and its application to these types of statements, except to note that, under Rule 801(d)(2), the messages that are being created and sent by opposing parties on their Facebook, MySpace, Twitter, and other accounts or on blogs may often be considered admissions by an opponent. The context of the surrounding dialogue may assist in the introduction of third-party statements.

Conclusion

The intent of this article is to highlight the increasing significance that information found on social media may have in protecting your client's interests and to provoke thought regarding its significance in the litigation process. Diligent and responsible counsel must comprehend the breadth of electronic information that is potentially available and account for its role in litigation. As soon as a new file hits your desk, you should start doing research on your own client, opposing parties, witnesses, experts, and possibly even jurors so that you can find all leads and information that they have deposited in cyberspace. Rest assured, opposing counsel is going to be taking these same steps to investigate all the players on your side of the table. Rather than hiring an investigator, do a Google search on the key witnesses in the case and see where the trail begins. With the increasing numbers of individuals routinely posting information on social media websites, it is inevitable that someone involved in the case you are preparing is going to be directly or indirectly involved in communications through social media outlets. The question is: How do you go about getting that information and how can you use it to your best advantage? We hope that this article has provided some guideposts for starting the process. **TFL**

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Endnotes

[1]474 S.E.2d 216 (Ga. App. 1996) *reversed on other grounds,* 268 Ga. 192 (Ga. July 14, 1997).

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[21]*Ledbetter v. Wal-Mart Stores Inc.*, No. 06-CV-01958-WYD-MJW, 2009 WL 1067018, *1 (D. Colo. Apr. 21, 2009).

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[23]*Murphy v. Perger*, [2007] 67 C.P.C. (6th) 245 (Can.).

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[35]*Id.*

[36]*United States v. Siddiqui,* 235 F.3d 1318, 1322–23 (11th Cir. 2000).

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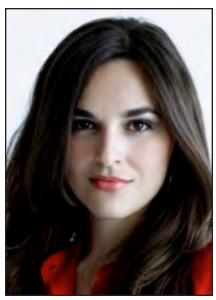
such online source is a website entitled *The Jury Expert*, which is produced by the American Society of Trial Consultants (www.thejuryexpert.com). **TFL**



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