

SOCIAL MEDIA IN LITIGATION:

The Pitfalls and Opportunities for Litigation in a Social World

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SOCIAL MEDIA:

MANAGING BUSINESS RISKS & MAXIMIZING OPPORTUNITIES IN A SOCIAL WORLD



**KILPATRICK
TOWNSEND**

ATTORNEYS AT LAW

- Ethics of “Friending” Judges
- Using Social Media to Investigate Witnesses and Jurors
- Maintaining the Attorney-Client Privilege When Using Social Media
- Using Social Media During Litigation
- Juror Use of Social Media

Ethics of “Friending” Judges



- Judge B. Carlton Terry Jr. “friended” an attorney in a pending child custody case
- Facebook Conversation 1:
 - Attorney: “how do I prove a negative”
 - Judge: “[I have] two good parents to choose from”
 - Attorney: “I have a wise judge”
- Facebook Conversation 2:
 - Attorney: “I hope I’m in my last day of trial”
 - Judge: “You are in your last day of trial”
- North Carolina Judicial Standard Commission issued a public reprimand

- Ethical Considerations:
 - Judges should uphold and promote the independence, integrity, and impartiality of the judiciary, and must avoid impropriety and the appearance of impropriety;
 - Judges should not initiate, receive, permit, or consider *ex parte* communications;
 - Judges should not investigate facts in a matter independently; and
 - Judges should not make any public statements that might affect the outcome or impair the fairness of matters pending in court.

- “Friending” judges is permissible in California*, Kentucky, New York, Ohio, South Carolina
 - “Friending” does not create the impression that attorney is in special position to influence the judge
 - Kentucky recognizes that judges should not be completely isolated from the community
 - * California requires counsel to “defriend” the judge if appearing in his/her court

- Florida bans attorneys from “friending” judges
 - “Friending” conveys impression that lawyers “are in a special position to influence the judge.”
 - “Friending” impermissible even if judge includes a prominent disclaimer on his Facebook page that “friend” is just an acquaintance.

- Except in Florida, it is permissible to “friend” judges (but be mindful if you have a case pending before the judge).
- Do NOT post, comment, or Tweet about a pending case if you are “friends” with a judge.
- A judge who is your “friend” could use social media websites to gather information about you or your case.

Ethics of “Friending” Witnesses & Jurors



- Ethical Considerations:
 - Cannot communicate with a person represented by another attorney;
 - Cannot make a false statement of material fact or law to a third person; and
 - Cannot engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

- Permissible to view public portions of witnesses' social media sites
- If witness is represented, cannot “friend” the witness, particularly without disclosure
- If witness is NOT represented,
 - Can “friend” but must disclose reason
 - Cannot “friend” under false pretenses

- Can view public portions of jurors' social media websites (just as if researching a juror using other research techniques)
- Cannot “friend” a juror
- Must avoid *ex parte* communications with jurors

Maintaining the Attorney-Client Privilege When Using Social Media



- Attorney Kristine A. Peshek Allegedly Violated the Attorney-Client Privilege
 - Assistant Public Defender for 19 years
 - Blogged about her cases
 - “Judge Clueless”
 - “This stupid kid is taking the rap for his drug-dealing dirt bag of an older brother because ‘he’s no snitch.’”
 - “Huh? You want to go back and tell the judge that you lied to him, you lied to the presentence investigator, you lied to me?”
 - Fired and charged with violating ethics rules

- Attorney-client privilege is narrowly and strictly construed
- Party asserting the attorney-client privilege bears the burden of proving that it applies:
 - Must prove that privilege has not been waived through disclosure to a third-party
 - Waiver can occur even if disclosure is “unintentional”

Lenz v. Universal Music Corporation, No. 07 03783, 2010 U.S. Dist. LEXIS 119271 (N.D. Cal. Oct. 22, 2010)

- Defendant sought certain categories of information in discovery; plaintiff asserted attorney-client privilege
- Plaintiff waived privilege:
 - Blogged about her motives for litigation
 - Disclosed specific legal strategies

- To protect privilege and prevent inadvertent waiver:
 - Avoid privileged correspondence through social media
 - Avoid blogging or commenting about case strategy or other mental impressions/advice
 - Warn client about loss of privilege through comments/postings on social media websites

SOCIAL MEDIA:

MANAGING BUSINESS RISKS & MAXIMIZING OPPORTUNITIES IN A SOCIAL WORLD

Using Social Media in Litigation

facebook Search Home Profile Account

Tour Your New Profile [Start Tour](#)

Dave Taylor

Lives in Boulder, Colorado Born on August 3 Add your current work information Add your education information Edit Profile

Share: Status Photo Link Video

Jeannine Lee
Hey Dave. Any idea how to get my \$ back from Ning? Since I decided to cancel that group I've written them 4 times asking them to stop charging my credit card. They're ignoring me. Ideas?
about an hour ago · Like · Comment · See Friendship

Dave Taylor
Upgraded my 16GB iPhone 4 to a 32GB iPhone 4 and now have the 16GB iPhone 4 (pristine condition, with original box, charger, etc) for sale. Asking \$600. Anyone interested? Let's talk!
13 hours ago · Like · Comment

Dave Taylor Actually, after doing some research, I think \$550 is more reasonable for what I'm offering, based on Craigslist listings, etc. It's not jailbroken or anything because I'll wipe it before I sell it. Then you can install whatever iOS version you want. :-)
13 hours ago · Like

Write a comment...

People You May Know See All

- Dan Gillmor** 10 mutual friends Add as friend
- Joseph Jaffe** 138 mutual friends Add as friend

Sponsored Create an Ad

New Flight Simulator proflightssimulator.com
Offers 'Real Life Flying' with accurate scenery based on actual Mapping, over 20K of the World's Airports and 80 different Planes.

The Judds - Dec. 8th tickethorse.com
The Last Encore Tour: The Judds 2010 live at 1STBANK Center just off HWY 36. Tickets on sale now through TicketHorse.com.

Wall
Info
Photos (105)
Notes
Friends

Friends (1449)
Greg Bulmash
Angela Bowman

Discovery of Contents of “Private” Facebook Pages

- Opposing parties may be granted FULL access to Facebook and MySpace, even “private” sections
 - *Romano v. Steelcase, Inc.*, 30 Misc. 3d 426, 907 N.Y.S.2d 650 (2010)
 - “In light of the fact that the public portions of plaintiff’s social networking sites contain material that is contrary to her claims and deposition testimony, there is a reasonable likelihood that the private portions of her sites may contain further evidence.”
 - “Indeed, as neither Facebook nor MySpace guarantees complete privacy, plaintiff has no legitimate reasonable expectation of privacy.”
 - Defendant was granted full access to “current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information.”

- *Largent v. Reed*, No. 2009-1823, 2011 WL 5632688 (Pa. Com. Pl. Nov. 8, 2011).
 - “There is no reasonable expectation of privacy in material posted on Facebook.”
 - “And making a Facebook page ‘private’ does not shield it from discovery.”
 - “Only the uninitiated or foolish could believe that Facebook is an online lockbox of secrets.”
 - Ordered Plaintiff to disclose Facebook log-in information and gave Defendants 21 days to review her Facebook page before Plaintiff could change her password.

Discovery of Contents of “Private” Facebook Pages

- *Zimmerman v. Weis Markets, Inc.*, No. CV091535, 2011 Pa. Dist. & City. Dec. LEXIS 187 (May 19, 2011) (granting motion to compel and ordering plaintiff to “provide all passwords, user names and log-in names for any and all MySpace and Facebook accounts” and preserve existing contents)
- *McMillan v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 Pa. Dist. & City. Dec. LEXIS 270 (Sept. 9, 2010) (ordering plaintiff to provide Facebook and MySpace user names and passwords to defendants)

- Facebook self-description used to contradict witness testimony
 - Child custody case
 - Father denied allegation that he had a bad temper on the stand
 - Cross-examined with his Facebook self-description: “If you have the balls to get in my face, I’ll kick you’re a\$\$ into submission.”

- Duty to preserve all electronically stored information (ESI) that is relevant to the subject matter of the litigation includes social media sites.
- Privacy settings should be set to disclose minimal information to non-“friends”
- During litigation, avoid accepting “friend” requests unless identity is clearly known

- Permissible to view public portions of the social media website to gather relevant information
- Request social media contents directly from party; do not use “self-help”
- Use subpoenas (when needed) to gain access to social media websites
- Limit requests for social media contents to specific information needed to avoid “fishing expedition” claims

- Expand definition of “document” to include not just ESI but specify all social media accounts or profiles (current and historical)
- Include specific request for information from social media websites, including “all profiles, postings, walls, comments, pictures, videos, blogs, messages, and other sources of social media information likely to contain relevant information”

- Evidentiary Hurdles to Admitting Information from Social Media Websites
 - Relevance: Fed. R. Civ. P. 401
 - Authenticity: Fed. R. Civ. P. 901
 - Hearsay: Fed. R. Civ. P. 801, 803, 804, 807
 - Original Writing: Fed. R. Civ. P. 1001-08
 - Probative > Unfair Prejudice: Fed. R. Civ. P. 403

Jurors and Social Media



SteveMartinToGo Steve Martin

REPORT FROM JURY DUTY: I'm cracking up defense with my jokes. Judge not pleased. Defendant finds me funny. Nice guy!

21 Dec



SteveMartinToGo Steve Martin

REPORT FROM JURY DUTY: Prosecuting attorney. Don't like his accent. Serbian? Going with INNOCENT. We're five minutes in.

20 Dec



SteveMartinToGo Steve Martin

REPORT FROM JURY DUTY: guy I thought was up for murder turns out to be defense attorney. I bet he murdered someone anyway.

20 Dec



SteveMartinToGo Steve Martin

REPORT FROM JURY DUTY: defendant looks like a murderer. GUILTY. Waiting for opening remarks.

20 Dec Unfavorite Retweet Reply



SteveMartinToGo Steve Martin

The sing along is not now! I'm in the middle of jury duty!

20 Dec



SteveMartinToGo Steve Martin

Hoping for one more sing-along before the 25th. 12 Days of Christmas, using modified Fibonacci sequence to shorten song: 1, 2, 3, 5 & 8.

20 Dec

- Juror “tweeting” during trial:
 - “Oh and nobody buy Stoam. Its bad mojo and they’ll probably cease to Exist, now that their wallet is 12m lighter”
 - “So Jonathan, what did you do today? Oh nothing really, I just gave away TWELVE MILLION DOLLARS of somebody else’s money”
- Jurors doing online research:
 - One juror admitted that he had been doing online research
 - Judge questioned the rest of the jurors: **eight** other jurors were doing the same thing

- Jurors blogging while serving on jury duty
- Frank R. Wilson posted details of the case on his blog
- Consequences:
 - Criminal conviction set aside and sent back to lower court;
 - Wilson received 45-day suspension;
 - Wilson paid \$14K in legal fees
 - Wilson lost his job.

- Jurors may publish information regarding the trial while trial is still pending;
- Jurors may contact or “friend” judges, attorneys, parties, witnesses, etc.
- Jurors may engage in premature deliberations on Facebook, Twitter, MySpace, amongst themselves and with outsiders (polling their friends about the facts)

- Jurors do not feel that they have been provided with sufficient explanation for why they cannot use their electronic devices;
- Jurors do not fully grasp the nature of their role;
- Jurors feel that they are not being provided with all the necessary information

- Identify tech savvy jurors:
 - “Do any of you routinely use Blackberries, iPhones, iPads, laptops?”
 - “Do any of you have an e-mail account?”
 - “Do any of you have Facebook, MySpace, LinkedIn, Twitter, Blogger, or any similar social networking account?”

- Explain restrictions on communications to include social media:
 - Cannot use any of the social media websites to conduct own investigation (look up witnesses, parties, etc. on Facebook, etc.)
 - Cannot use social media websites to inform others about the case
 - Explain WHY

Include Social Media Limits in Jury Instructions

- Seek instruction from the Judge about social media use, such as: “I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, e-mail, Internet chat or chat rooms, blogs, or social web sites such as Facebook, MySpace, or Twitter.”

Thank You

QUESTIONS?

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