Grappling With Social Media as a Legal Practitioner

by Jaelynn Jenkins

Social media outlets allow individuals to create custom online identities, foster relationships, and participate in online communities of users sharing similar interests. For the rising generation, online communication is crucial to connecting with the world.

All social networking sites allow users to create personal profiles, veritable treasure troves of personal information. It is no wonder that the abundance of personal information available through these sites has caught the attention of the legal community. Legal practitioners are discovering that the use of social media sites as sources of information is giving rise to some novel legal issues.

The type and amount of information which can be gleaned from social networking sites – photos, videos, personal statements – can be useful in all kinds of cases including criminal, personal injury, employment, and family law. The viable use of such information in a legal setting has not, however, been seamless. Social networking sites, and the information found through them, raise issues surrounding attorney conduct, discovery methods, and the admission of evidence.

Applying the Standing Rules

A legal practitioner should keep in mind that information gathered from social networking sites is no different from any other relevant information historically gathered for legal action merely because it is gathered from a new source – social media. Practitioners should look to existing rules and frameworks as guides to the appropriate use of information found through social media.

Content taken from social media sites easily fits into the existing definition of electronically stored information which includes "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations," Fed. R. Civ. P. 34(a)(1)(A), which means it is discoverable under Rule 26(b) of both the Federal and Utah Rules of Civil Procedure.

The Rules of Civil Procedure also serve to temper and guide the discovery of information found on social networking sites. A broad discovery request for access to the opposing party's entire Facebook profile or Twitter feed may be inappropriate as beyond the scope, for example, where the relevant events took place in 2012 but the party's profile extends as far back as 2006. Legal practitioners seeking information from social media sites should tailor their requests accordingly. Additionally, any discovery requests should be sent directly to the opposing party and not the hosting social media site. Discovery requests regarding personal profiles sent to sites such as Facebook have proved to be less than productive and are quite possibly overreaching and a waste of time.

Legal practitioners will find that existing discovery rules and procedures are more than adequate to address any information that may be available and obtained through social media sites.

Once information has been successfully collected from social media sites, parties must then consider how such information holds up under the rules of evidence. Information gleaned from social networking sites may face challenges regarding relevance, authentication, and hearsay. All of these issues, however, may easily be addressed by the standing rules of evidence. Consider, for example, Rule 901of the Utah Rules of Evidence used for authenticating or identifying evidence.

Legal practitioners may wish to note two different schools of thought regarding the authenticity of and therefore the admissibility of evidence obtained via social media sites. On one hand, information posted on such sites is generated by the individual and intended for an audience selected by the poster, leading to the belief that the poster has no reason or motivation to fabricate the information. On the other hand, social media users may carefully choose what they post in order to orchestrate their own image.

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Harvesting Social Media

A vast and various amount of information can be gleaned from social media sites: profiles, postings, messages, photographs, and videos. Postings, specifically, include status updates, wall comments, tweets, retweets, comments, etc.

A practitioner, however, should not stop at the obvious – consider a person's friends or "tweeps" who could be possible witnesses. Some social media sites incorporate "mood indicators," a feature that indicates the user's mood at a certain time. Timelines can be established by tracking a user's post and status updates like virtual footprints and later used to refute the user's testimony of events. Social media can also assist in investigating the credibility of opponents and expert witnesses.

When gathering information from social media sites, first collect information from publicly accessible pages. Be sure to preserve any findings by taking screen shots and printing your findings at the time you find them as entries can be altered or deleted.

Consider strategically timing social media discovery requests. A practitioner may choose to make such a request after the opposing party's deposition is taken, creating an opportunity to use information found through social media for impeachment purposes. Another option is petitioning a court for a "freeze" order, thereby preserving information.

From a defensive stance, legal practitioners may contemplate raising privacy defenses. Privacy defenses, however, may be difficult to sustain where a social media user intentionally publishes information to hundreds of "friends." One of the most ironic aspects of social media is the universal expectation of privacy among users who simultaneously post highly personal data. The very action of posting is in essence the act of publishing – akin to pinning a message on a bulletin board in a public well traveled hallway.

Nevertheless, a practitioner who wishes to make privacy arguments should examine the privacy settings on the relevant account. Did the user in question publish to the entire network or only to "friends?" Evaluate the type of communication; was it a private message or a status update? Potentially the most successful arguments can be made in regards to the least public of social media interactions or "user-to-user messages."

Recognizing the virtual crop of personal information available through social networking sites, legal practitioners need to inform themselves of different types of social media, the likely information available, and how to collect that information.

Use of Social Media by Attorneys

Social media has a role in a legal practice outside of its potential as evidence. It can be used as a marketing tool and a means of communication between members of the legal community. Practitioners should keep the rules of ethics in mind when using social media. Such rules will dictate the way attorneys and judges communicate and interact with society from a both a personal and professional standpoint. To that end, communication through social networking sites is no different from communicating via traditional means.

If a legal practitioner would be prohibited from using a specific means of communication in real life, he or she cannot utilize similar means virtually via social media. For example, attempting to "hook" an opposing party by creating a false Facebook profile is just as unethical as an attorney developing a relationship in real life with the opposing party.

Practical Application

Not only do legal practitioners need to be prepared to seek out relevant information from social media sites, but they also need to protect themselves and their clients from harm that may arise from using social media.

Any restraints placed on in-person attorney communications apply to online communications. Legal practitioners should also avoid posting about clients or the status of a pending case.

Upon retaining a client, make sure to investigate the client's social media habits and discuss the impact of social media postings. Clients should understand the impact postings can have on their case especially if postings can be interpreted or actually are conflicting with testimony. Be sure to highlight the effectiveness, or lack thereof, of privacy settings on social media sites and the potential for the opposing party to access the client's page through a mutual friend.

Both judges and attorneys should be aware that jurors may potentially post regarding trial – an action that can result in mistrials and overturned verdicts. Jurors could potentially try to friend parties or lookup definitions or additional information during deliberations. Legal practitioners need to seriously consider the use of social media jury instructions guiding and reminding jurors of appropriate social media behavior throughout the process.

Social media can be a great asset, but may foster a multitude of problems for the uneducated legal practitioner. All levels of legal professionals should take care to learn the ins and outs of social media in order to utilize it and protect themselves, clients, and the legal process.