Social media has become a crucial part of the average American’s life. As a result, whether they want to or not, attorneys must, at the very least, appreciate the impact of social media on their clients. Failure to understand how social media can impact clients’ cases could lead to serious damage to a case which might result in a malpractice complaint. Further, wise attorneys will take advantage of social media to develop their practices through the networking and marketing opportunities provided by both their own websites and the various social media sites and applications.

The best way to appreciate how important social media has become in people’s day-to-day lives is to look at some statistics for popular sites:

- Facebook – 1.3 billion users
- LinkedIn – 300 million users
- Pinterest – 70 million users
- YouTube – 4 billion views per day¹
- Instagram – 200 million users²
- Google+ - Almost 600 million active users³
- Tumblr – 200.5 million blogs⁴
- Twitter – 550 million users⁵

It is also important to know that the number of people accessing social media sites via mobile technology (smartphones and tables) is increasing to the point where the majority of people (71%) use mobile devices to access social media.⁶ This ease of access means people use social media on the go as a method to locate businesses they plan to hire. It also means people have a tendency to use social media to quickly share intimate details about their lives and

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² http://instagram.com/press/
activities. The former shows the value of social media as a marketing tool. The latter shows the amount of information people are sharing which can be harmful to their cases.

Attorneys who seek to begin using social media should keep in mind that the ethical risks involved with social media, both in terms of evidence collection and marketing, are very real. Therefore a proper understanding of appropriate and ethical behavior is extremely important.

It is also important to understand that in certain areas of practice, it is now verging on malpractice, and the author would argue it is malpractice, to fail to communicate with clients about whether and how they use social media. Failing to warn the client to halt or at least limit social media use could result in that client posting materials that will harm his case. Failure to warn a client about evidence preservation could result in substantial sanctions for spoliation. In addition, it is quite conceivable that the opposing party will post harmful information to his case and failure on the part of the attorney to seek out possible harmful posts can result in loss of a substantially greater bargaining position, or even loss of a case that might have been won.

**Specific Sites and Applications**

Social media essentially includes sites and applications that enable people to share information, pictures, videos, and the like at a rapid rate, and, in return, allows other people to respond to the shared content. In some cases social media is referred to as Web 2.0. Web 1.0 refers to sites that serve to provide one way communication, much like a newsletter or a book. Traditional websites are Web 1.0.

Currently, the most popular social media sites and applications in the United States include Facebook, Twitter, LinkedIn, Google+, Pinterest, YouTube and Instagram. Further, blogs are sometimes considered part of social media and so will be included in the discussion. At this point, there are over 150 million blogs on the web.

**Marketing and Networking**

It is not always easy to understand how social media can increase the potential for bringing in new clients. It is therefore important to think of social media as having uses for practice building.

**Advertising**

Social media includes straight forward advertising. Sites such as Facebook, YouTube, LinkedIn and others provide the opportunity to purchase small ads which appear on the top or side of the page. These ads are controlled through varying means, demographics, keywords, areas of

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7 See Lester v. Allied Concrete Co., et al; order dated September 1, 2011.
interest, and so on. Generally, the cost of the ads is controlled through a bidding process known as pay-per-click. The site provides a suggested fee that its algorithm suggests will be successful. The purchaser identifies the amount he is willing to pay and competes against those who are seeking to advertise to the same individuals. Normally, the purchaser only pays when someone clicks on an ad.

**Networking**

Social media provides substantial opportunities for networking. It simply moves the networking from the bar association or educational program, to networking online. Providing information about interests, sharing day-to-day activities, responding to the posts of others - each of these behaviors is simply a way to connect with other people. Those people, in turn, may need an attorney or may need to refer someone else to an attorney just as in the offline world. Further, people tend to recommend individuals who they know, or feel they know, and social media allows the formation of that kind of relationship.

**Content**

Sharing useful content is a crucial part of social media for attorneys. Providing high quality content that informs users about the areas of law in which an attorney practices is an excellent way to bring attention to that attorney. The content can be as simple as commenting on a case on Facebook, sharing a useful link on Twitter, or providing a detailed analysis of a certain specific issue on a blog. This content shows potential clients that the attorney is knowledgeable in her area(s) of practice. Further, well-written content provides a substantial boost to search engine optimization and online reputation.

**Specific Sites**

Different social media sites provide different tools. Further, some sites are better utilized by attorneys who tend to represent businesses, while others are better utilized by attorneys who represent individuals. It is important to target the correct site or mixture of sites for the best return on investment of time and/or money.

**Content of Posts**

When you post on social media, you need to consider whether you are causing any ethical problems for yourself. Given the open nature of social media, a number of issues can arise when lawyers post. Two important issues to focus on include: Is social media advertising and are you forming an attorney/client relationship by answering questions?
Is Social Media Advertising?

When choosing what to write on social media, it is important to determine whether your post is advertising under model rule 7.2 (or whatever rule applies in your jurisdiction.) If your account is completely private and you share only with friends and family, chances are very good that your posts would not be considered advertising. However, the question becomes cloudier when you open up your account to a larger group. My position is that if you are not certain whether your post is advertising, assume it is and act accordingly as far as your jurisdiction’s rules. Some jurisdictions define advertising very clearly. Others do not.

As noted previously, Twitter is a site that is problematic for states such as Florida, where any posting might be considered advertising. In its guidelines on social media, Florida’s advertising standing committee states about Twitter that Pages of individual lawyers on social networking sites that are used solely for social purposes, to maintain social contact with family and close friends, are not subject to the lawyer advertising rules. Pages appearing on networking sites that are used to promote the lawyer or law firm’s practice are subject to the lawyer advertising rules. These pages must therefore comply with all of the general regulations set forth in Rules 4-7.11 through 4-7.18 and 4-7.21.”

This language means that many posts on Twitter would be considered advertising, simply because most people have their accounts entirely open and it is common for users to discuss a cross section of personal and work-related details of their lives.

Most problematic, given Twitter’s 140 character limit, is that, in Florida, the Tweet must include geographic information as well as “the name of at least 1 lawyer in the firm.” The attorney may use appropriate abbreviations for the geographic requirements which helps, to a degree. However, as soon as the poster puts both the full name of a lawyer and a geographic location, most of the allotted characters will be used up, substantially limiting the value of any tweet. Florida is not the only jurisdiction with special Twitter requirements, so be certain to check your state’s rules before you Tweet. That said, many jurisdictions have not placed onerous requirements on lawyer’s abilities to use Twitter and a well-written tweet can be an excellent way to drive traffic to your website or share useful information.

California’s Analysis

In Opinion 2012-176, the State Bar of California provides an excellent analysis of how to determine whether a post is advertising. While California’s determination of what constitutes

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8 The Florida Bar Standing Committee on Advertising Guidelines for Networking Sites (Revised April 16, 2013.)
advertising is likely to be different from other jurisdictions, many of its rules as to what is acceptable are commonly shared throughout the various jurisdictions.9

In California, a communication is considered to be, “any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present or prospective client.” Under the rules and articles of California, “[a]ny communication or solicitation shall not:

1. Contain any untrue statement; or
2. Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive or which trends to confuse, deceive, or mislead the public; or
3. Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, nor misleading to the public or
4. Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation as the case may be; or
5. Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct.”

The bar, using its Rule and Article as a basis for analysis, next examines several hypothetical posts. They are:

1. “Case finally over. Unanimous verdict! Celebrating tonight.”
2. “Another great victory in court today! My client is delighted. Who wants to be next?”
3. “Won another personal injury case. Call me for a free consultation.”
4. “Just published an article on wage and hour breaks. Let me know if you would like a copy.”

In its analysis, the bar found posts 1 and 4 were not communications (i.e. advertising) but 2 and 3 did meet the requirements constituting a communication and therefore needed certain information that they lacked.

Post 1 was not considered a communication because it did not contain an offer concerning the availability for professional employment. Had the post used “Who wants to be next” as in hypothetical 2, the posting would have become advertising based on the attorney stating that he is seeking additional clients. Post 4 was not advertising because, again, it did not state that he was seeking clients, rather it was simply providing useful information.

Post 2 is a communication because it makes it clear that the lawyer is available for employment. Since the post is advertising, it now has several problems under California’s rules.

9 California Rule 1-400 (Advertising and Solicitation,) California Article 9.5 (Legal Advertising.)
First, it does not contain a disclaimer. Second, it does not state it is an advertisement. Third, it offers a guarantee or prediction of winning. In order to make this particular post appropriate, a lawyer in California would need to add the required language. Such a post would become quite lengthy however, so a question would arise as to whether it would be worth it to share such information in the first place. It also would not be possible to share this particular post on Twitter in California. Post 3 is a communication/advertising for the same reason post 2 is. Asking for readers to call for a free consultation is clearly seeking employment from potential clients.

Remember, the rules in your jurisdiction(s) might be very different from California. However, the analysis in the bar opinion is one that you can apply to your posts. The first question is always going to be, is it advertising? The second question will be, if it is, does the post meet the ethical requirements. Be certain to give your posts the appropriate consideration.

Is a Social Media Post Legal Advice?

The line for what is and what is not legal advice is a bit blurry. Given this, it is important that you stay on the right side of the line to make certain you are not inadvertently creating an attorney/client relationship. An attorney/client relationship is formed when a client has reason to believe that the attorney is handling his legal interests. The relationship can be formed expressly or it can be implied. The implied relationship is the one that can cause trouble online. The standard in determining whether an attorney/client relationship has been formed is based on what is the objectively reasonable belief on the part of the client. If you answer questions online, make certain there is an appropriate disclaimer, such as can be found on sites like Avvo and Quora. In addition, limit yourself to providing broad answers that are educational in nature as opposed to providing specific advice that directly answers the asker’s question. At this point, there have been no lawsuits involving attempts to claim a lawyer has formed an attorney/client relationship through an ask/answer site. Keep in mind, not only could you inadvertently form an attorney/client relationship, but if you provide legal advice in a state in which you are not licensed, you could be engaging in the unauthorized practice of law.

Recommendations/Testimonials

The rules around recommendations and testimonials vary greatly across the United States. As a result, it is difficult to provide specific guidelines. Given this, it is crucial that you refer to the state(s) in which you are licensed to make certain you follow the rules. In most states, it is perfectly acceptable to ask for testimonials. However, those testimonials must follow all relevant rules. When clients write recommendations, those recommendations must not create false expectations and they must be correct. If a client writes a recommendation that violates the rules, it is the attorney’s obligation to correct it. In some cases, for example LinkedIn, the
attorney will be able to control whether an improper testimonial is posted. In other cases, for example Google+, Avvo and Facebook, the attorney is not able to approve the testimonial. In such cases the attorney must ask the client to remove the recommendation, or provide a correction in the comments.

Negative reviews are a serious problem on social media. A negative review can be very harmful to a law firm. That said, no matter how negative the review, it is crucial that lawyers respond appropriately if a past client attacks them online. Most importantly, attorneys may not share confidential information about the client in a response to a negative review. For example, a lawyer from Illinois responded to a negative review on Avvo by providing confidential information about her client. The Hearing board found that she engaged in misconduct which included:

1. Revealing information relating to the representation of a client without the client’s informed consent, in violation of Rule 1.6(a) of the Illinois Rules of Professional Conduct (2010);
2. Using means in representing a client that have no substantial purpose other than to embarrass, delay, or burden a third person, in violation of Rule 4.4 of the Illinois Rules of Professional Conduct (2010); and
3. Conduct which is prejudicial to the administration of justice or which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute.10

The complaint against the attorney also involved a bounced check. For both the check and the comment on Avvo, the attorney was reprimanded by the disciplinary commission.11 The best way to deal with a negative review is to provide a polite response. If you are too angry to give a polite response, the best response is none at all.

Specific Rules

7.1. Honest Communication & 8.x Integrity

The first two rules for online behavior should be considered an umbrella under which all behavior is judged. First, attorneys should never be misleading in their communications in relation to their services. No communication should contain a material misrepresentation of either fact or law, nor should any statement omit facts necessary to make the statement appropriate under rule 7.1. This concept flows throughout all communications by attorneys when discussing their services. The second set of rules, 8.x, involve maintaining the integrity of

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10 In the Matter of Betty Tsamis, Commission No. 2013PR00095 (August 26, 2013.)
http://www.iardc.org/13PR0095CM.html
11 http://www.iardc.org/HB_RB_Disp_Html.asp?id=11221
the profession; in other words, not holding the profession up to ridicule through one’s behavior.

7.2. Advertising

The first rule of which attorneys need to be aware relates directly to advertising and it is Model Rule 7.2. One of the issues that can be a problem under Rule 7.2 is that various states require attorneys to keep all ads for a certain period of time. In Pennsylvania, for example, attorneys must keep copies of ads for 2 years. Other states have longer requirements. It is also important to note that a specific attorney must take responsibility for the ad and its placement, so make certain that a specific attorney is responsible for every action, even if performed by a non-attorney. Fortunately, the various accounts are meant to stay intact, so it is easy to keep records. If a post needs to be deleted, grab a screenshot of it and store it where it will be easily located. Make certain to identify the attorney responsible for the item.

Various states have other requirements, so attorneys should check Rule 7.2 in every state in which they are licensed.

Rule 7.3. Solicitation of Clients

Also implicated by use of social media for communication with potential clients is Model Rule 7.3. Attorneys may not solicit potential clients through real-time communication. This aspect of the rule does not apply to family members, current clients or other attorneys. Real-time communication includes telephone, in-person and real-time electronic chat. There is disagreement as to whether attorneys may solicit new clients through large chat rooms in which a large number of people are present, versus instant messages which are more personal and direct. Given this, it is safe to assume that starting a chat on Facebook is real-time communication and should be avoided. E-mail is considered written communication. To obey the rule, at a minimum, attorneys must label advertising as such and comply with Rule 7.1.

Attorneys may not solicit a client who has already made it clear he does not wish to be contacted, or if, “the solicitation involves coercion, duress or harassment.” This means if someone has made it clear through social media that he desires not to be contacted, it would be a violation of the rule to contact him. The tone of writing matters as well. If the content is seen as inappropriate, it violates the rule.

Multi-State Practice – Rule 8.5

An area in which it is easy to get in trouble, due to the vast and multi-jurisdictional nature of the internet, is multi-state practice. Attorneys must comply with their home states’ rules in relation to:
• Where the office is located
• Where the attorneys’ are admitted
• How they are seeking clients
• How they engage in advertising
• All states’ rules in which they market

Additional Ethical Issues

Aside from advertising, communication with potential clients, and inappropriate use of social media in discovery, there are other ways in which legal professionals have gotten themselves in trouble using social media.

Confidentiality and Honesty

One potential area of trouble involves confidentiality, Rule 1.6. An attorney got herself in trouble by sharing share confidential information about a case in such a way as to make it possible to identify her client. She also provided information that suggested that she knew her client had lied on the stand and did nothing about it. In addition to Rule 1.6, the attorney was accused of violating other rules involving honesty, fraud, and more.12 In the end, the attorney lost her job of 19 years13 and was suspended for 90 days by two different jurisdictions.1415

Another serious consequence the attorney suffered is that when searching her name online; page after page of results show her disciplinary problems. Though she has since opened her own firm, it is difficult to find anything positive about her on the web in a Google search.

While it is perfectly acceptable to discuss one’s life, and even one’s professional activities, it is important to obey the ethical rules while doing so. Discussing a case on a blog while it is going on, outside of appropriate PR, is a bad idea. Failing to protect a client’s confidentiality is even worse. And, of course, failing to properly inform the court of inappropriate conduct by the client was a serious mistake. Judgment is a critical part of both practicing law and posting online.

Jokes & Satire

12 In the Matter of Kristine Ann Peshek, Commission No. 09 CH 89, Illinois Attorney Registration and Disciplinary Commission (2009.)
14 Illinois Supreme Court disbars 12, suspends 26, http://iln.isba.org/2010/05/18/illinois-supreme-court-disbars-12-suspends-26
Jokes can also be a serious problem online. It is impossible to see body language or hear the tone in a person’s voice. Something one person might find amusing might not be so funny to another. As a result, joking through social media can be problematic, especially on a politically charged topic. An Indiana deputy attorney general learned this the hard way when he tweeted an unfortunate joke surrounding protests in Wisconsin in 2011. His tweet led to an argument with the editor of Mother Jones Magazine. In turn, the magazine researched the attorney and found similar comments on his blog. In the end, the price of the attorney’s online behavior was his job. The attorney general’s office stated that it chose to fire the attorney after a “thorough and expeditious review;” noting that it respects First Amendment rights, but expects civility from its public servants.

Personal v. Private

Sometimes attorneys will develop both a private and public persona on the web, believing the two will remain separate. Unfortunately, this is simply not the case. It takes very little effort to perform research on the web and to connect the public and private behaviors of someone who has written something offensive or upsetting. In an infamous case, an assistant Michigan attorney general was fired due to his online (and perhaps offline) behavior surrounding the student body president of the University of Michigan. The attorney argued that his speech was political and also had nothing to do with his work as an assistant attorney general. But in the end, the public and private became much too intertwined, and the attorney general was left with no choice but to fire him. Recently the student won a verdict of $4.5 million for invasion of privacy, defamation, abuse of process, and intentional infliction of emotional distress.

The attorney in this case did not hide who he was, but he did try to argue that his actions had nothing to do with his work. However, as a public servant and as an attorney, it was simply impossible to separate the public employee from the (not so) private behavior, and that cost him his job. He was fired for, “violat[ing] office policies, engag[ing] in borderline stalking behavior,” and more. The attorney sometimes posted his online attacks while at work, and engaged in behavior that was, “not protected by the First Amendment...” Much of his behavior was offline, but it was his online behavior that brought an incredible amount of

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16 Indiana state prosecutor fired over remarks about Wisconsin protests (2011.)
17 Kevin Dolak, Attorney Andrew Shirvell Ordered to Pay 4.5 Million for Attacks on Gay Student (2012.)
18 David Jesse, Andrew Shirvell fired from job at Michigan Attorney General’s Office (2010.)
attention to what he was doing, so much so that he ended up on TV shows including *Anderson Cooper* on CNN.\(^{19}\)

It is unwise to believe that anyone can live two separate lives online. If one engages in controversial behavior, the result will be a magnifying glass of attention. In turn, it is virtually impossible for the individual to keep his private and public online lives from colliding.

**Discovery of Social Media**

Given the value of the information contained within social media accounts, it is no surprise that attorneys desire to obtain access to the information. It is not at all uncommon, for example, for an individual to say one thing in person to her attorney or a judge and to post completely contradictory information on Facebook. An individual might claim in court or interrogatories that she cannot leave her home due to emotional harm from an injury, but in turn post a video on Facebook showing her dancing at a party. In the past, it was necessary to hire a private investigator to prove someone was lying about his injury for a workers’ compensation claim; now the plaintiff frequently posts a picture of himself chopping wood or carrying a heavy couch, the exact evidence the defense attorney needs to prove her case.

**Privacy Settings Are Important**

Privacy settings control what an individual shares on social media sites. However, many users never change their privacy settings, or simply find the settings too complicated to alter. Many social media sites barely have any privacy settings at all. Twitter, for example, is either open, limited or private.\(^{20}\) Facebook’s settings are extremely complicated and confusing.\(^{21}\) Blogs are meant to be open, and people frequently believe they are private when they are not.\(^{22}\) Since many people do not change their settings, attorneys should and do look through the social media sites in an ethical manner and view and preserve the information they can find.\(^{23}\) Keep in mind, if the attorney does the preservation, and authentication becomes an issue, the

\(^{19}\) Anderson Cooper: Andrew Shirvell Responsible For His Firing Not ‘Liberal Media,’ http://www.huffingtonpost.com/2010/11/09/anderson-cooper-andrew-sh_n_780874.html  
^{20} https://support.twitter.com/entries/14016#  
^{21} Approximately 13 million US users never change their Facebook privacy settings. Of those that do, the majority are unaware that their privacy settings can be compromised by allowing additional applications access to their accounts and do not take the steps necessary to further protect their data. 13 million US Facebook users don’t change privacy settings, http://www.zdnet.com/blog/facebook/13-million-us-facebook-users-dont-change-privacy-settings/12398  
^{22} Natalie Munroe was a teacher in Pennsylvania who blogged about her students. She believed her blog was only being read by a few people, apparently unaware that it could be widely read. http://tinyurl.com/8hx95c6. Munroe was suspended, brought back, and eventually fired. She claims she was fired due to the blog. The District claims she was fired for incompetence. Munroe has since brought a lawsuit against the district. Blogging Central Bucks Teacher is Fired, http://www.philly.com/philly/blogs/bucksinq/160413996.html  
^{23} New York State Bar Association, Committee on Professional Ethics, Opinion 843, (September 10, 2010.)
attorney could be forced to become a witness in her own case. It is best to have someone else in the firm do the preservation.

**The Client’s Social Media**

The first step when a new client walks through the door is to ask if he uses any social media. The next step, in some cases, is to inform the client that he must stop posting immediately. Unfortunately, the addiction and use of social media can be so great that the client will be unwilling to stop. As a result, the attorney should also advise her client that if he does post, he should not post anything that deals with the case. The attorney must be clear about what “deals with the case” means, since many clients will simply think it means specifics about how the case is going, as opposed to comments about giving money to his mistress, lifting a heavy couch, attending a party, and so on. Make certain to ask the client not only about his own accounts, but his comments on blogs and websites that might be relevant to the case. Social media and other online surprises can be very harmful. It is also important to remind the client that he may not delete any content from his account, even if it is potentially harmful to his case.

The first meeting with a client is also the time to speak with him about changing his privacy settings to make certain that his account is secure. Providing instructions on how to change privacy settings in written form or a video can be very helpful. It is also a good idea to have the client sign a document making it clear that he was told not to delete any content. This will protect the attorney from accusations of spoliation later on. In some cases it might be wise to ask for access to the account(s). Asking to friend the client is not enough, the password is necessary for a complete review of the client’s online conduct. You will have to make a decision as to whether connecting with the client and reviewing his account is wise. Remember, if you become aware of any content which shows the client is lying or will lie before the court, you will be in an ethical quandary.

Also, if the client has a personal relationship with the opposing party, ask about whether he is connected to the other side’s social media, for example as a friend on Facebook. In addition, ask the client if any potential witnesses are using social media. Find out if the client is connected to those witnesses and therefore has access to private areas of the accounts.

Last, it is important that attorneys speak with not only with their clients, but other relevant individuals about their online conduct. In a recent case, the daughter of the plaintiff caused an $80,000 settlement to be overturned because she posted about the result on Facebook.24 In

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the end, what matters is proper communication with the client in order to protect both the client’s case and your ethical obligations.

**Opposing Party and Witnesses**

Immediately view the opposing party’s accounts and witness accounts if they are freely accessible. It is permissible to view the accounts if the client has access. It is also permissible to ask witnesses to provide access to their accounts, though the attorney or other individual asking for access must be honest about her relationship to the case.

Also send a Notice of Preservation to opposing Counsel. Fortunately, the amendments to the federal discovery rules from 2006 allow for discovery of electronic data to begin very early in the litigation process. Make it clear to opposing counsel that all data must be preserved. Do not just name specific social media sites, but be clear in the preservation that it means all sites and all accounts. Unfortunately, exactly what preservation is required is not yet clear. Does preservation mean keeping the privacy settings as is, so if an account was open it remains such? Does it simply mean that data may not be deleted? Be clear about expectations and do not be surprised if the matter ends up before a judge.\(^\text{25}\)

Send out the Interrogatories relating to social media as quickly as possible and ask the right questions. Again, do not give the opposing client a chance to wiggle out by asking simply for Facebook when the client might have a Plaxo Account. Ask for everything. Ask for all e-mail addresses as well, because the opposing party might have several accounts under various e-mail addresses. Further, keep in mind that with strict privacy settings the opposing party can all but hide the existence of his account(s).

**Trouble for Failure to Preserve**

In the past, some have believed that it is acceptable to delete posts from social media accounts. A Virginia decision from 2011 puts the debate to rest. It is spoliation to delete relevant posts. In the case, the attorney instructed his client to “‘clean up’ his Facebook because we don’t want blowups of this stuff at trial.” The attorney further instructed the client to delete or deactivate the account, and then responded to discovery requests by informing opposing counsel that his client had no Facebook account. The client deactivated the account instead of deleting it. Upon reactivating the account, the client deleted 16 photographs, following his attorney’s instructions. Based on the spoliation, the court held that sanctions should be granted against

\(^{25}\) In a recent opinion, the Philadelphia Bar Association made it clear that not only is it acceptable to change privacy settings, but to delete content, as long as that content is properly preserved prior to deletion. In addition, the lawyer must “make reasonable efforts to obtain a photograph, link or other content about which the lawyer is aware if the lawyer knows or reasonably believes it has not been produced by the client.” The Philadelphia Bar Association Professional Guidance Committee, Opinion 2014-5, July 2014.
both the attorney and the client. The sanctions amounted to $722,000 in legal fees, over $500,000 of which was payable by the attorney. In addition, the judge in the case reported the attorney to the Virginia State Bar. In the end, the attorney agreed to a five year suspension of his license and ultimately left the practice of law.

A recent New Jersey case shows the serious consequences of deleting content from Facebook. In that case the plaintiff claimed that he deactivated his Facebook account and did not restore it quickly enough, resulting in deletion of his account. Leaving aside that this is not how Facebook deactivations and deletions actually work, the end result was that the court found that deletion of the account was spoliation of evidence and granted an adverse inference against. Given the cases and the trend, it seems to be straightforward that deleting posts, pictures or videos is unacceptable and likely to lead to serious sanctions.

**Ethical Pitfalls in Research, Discovery and Communications**

There are a number of relevant guidance opinions from the New York City and State Bars, the Philadelphia Bar and the San Diego County Bar Associations surrounding issues related to performing research utilizing social media.

**General Research**

First, as already noted, it is perfectly acceptable to search and access social media sites that are freely accessible. The New York Guidance Opinion states, “[an attorney] may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation.” On the other hand, the 2009 Philadelphia Opinion makes it clear that an effort to obtain access to the account through deceptive or illegal means is unacceptable.

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26 See Lester v. Allied Concrete Co., et al; order dated September 1, 2011.
27 “On July 17, 2013, the Virginia State Bar Disciplinary Board suspended Matthew B. Murray's license to practice law for five years for violating professional rules that govern candor toward the tribunal, fairness to opposing party and counsel, and misconduct. This was an agreed disposition of misconduct charges.” VSB Docket Nos. 11-070-088405,11-070-0884222.
28 In the author’s experience, when a Facebook account is deactivated it is not deleted. When the owner logs into his account again, it is restored. In order for a Facebook account to be deleted, specific actions requesting deletion must be taken on the part of the account owner.
31 Philadelphia Bar Association Guidance Opinion 2009-02 (2009.)
32 SDCBA Ethics Opinion 2011-2 (May 24, 2011.)
33 New York State Bar Association Guidance Opinion 843
34 Philadelphia Bar Association Guidance Opinion 2009-02
Friending a Witness

In the 2009 Philadelphia opinion, the attorney asked whether it would be acceptable for the attorney to have a third party request a witness to “friend” the opposing client. The third party did not intend to lie, but neither did he intend to reveal his relationship to the attorney.

The opinion noted that such behavior would violate several rules of ethical conduct. The lawyer would be “procuring conduct [and be] responsible for [that] conduct” in violation of Pennsylvania Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants.) Also, the lawyer would be violating rule 8.4 (Misconduct) by engaging in “deceptive” conduct. In addition, the attorney would be encouraging a third party to violate Rule 4.1 (Truthfulness in Statements to Others) by having the third party “omit a highly material fact.” Based upon the Philadelphia Bar Association’s 2009 Guidance Opinion, it is very clear that having a third party (or the attorney herself) friend a witness without revealing her relationship to the case would be highly inappropriate.

A real world example of what can happen when an attorney lies to potential witnesses comes from a lawyer who is learning a hard lesson in negative publicity. This attorney, a prosecutor in Ohio, posed as the ex-girlfriend of a murder defendant on Facebook. The attorney’s stated goal was to convince the two female alibi witnesses to change their stories. In the end, the prosecutor was fired and has seen numerous stories written about this conduct online. The lesson from this case is that lawyers may not lie when communicating with anyone through social media, including witnesses.

Communicating with a Represented Party

The San Diego County Bar Association took on the issue of communicating with a represented party. In short, as is the case offline, it is inappropriate to communicate with a represented party online. In the instant case, the attorney did not identify himself as the attorney, which made the effort to communicate all the more grievous. An additional issue, of concern for those

35 Friend is Facebook’s term for two people who are connected to each other on the service. Different social media providers use different terms. For example, LinkedIn uses “contact” and “connection.” Friending someone requires the affirmative action of a request on the part of the individual seeking the connection and an affirmative action on the part of the individual accepting the connection. See Facebook, “How do I add a Friend?” http://www.facebook.com/help/?faq=12062.
36 Philadelphia Bar Association Guidance Opinion 2009-02 (2009.)
37 Martha Neil, Prosecutor fired after posing as ex-girlfriend in Facebook chat with defendant’s alibi witnesses (June 2013.) http://www.abajournal.com/news/article/prosecutor_is_fired_after_posing_as_woman_in_facebook_chat_with_murder_defe/
involved in employee cases, includes an analysis of whether the contacted employees were represented parties.\textsuperscript{38}

In 2012, the issue of friending represented parties came up in New Jersey where two attorneys are likely to face sanctions due to their paralegal friending the opposing party in a case.\textsuperscript{39} The issue came to light during a deposition when it became clear that the attorneys had access to the private areas of the plaintiff’s Facebook account. The attorneys denied responsibility because they asked the paralegal simply to perform a general search of the web. The issue with this defense is that attorneys are responsible for the behavior of their staff. The attorneys are charged with violating New Jersey rules 4.2 (communications with represented parties,) 5.3(a), (b), and (c) (failure to supervise a nonlawyer assistant,) 8.4(c) (conduct involving dishonesty and violation of ethics rules through someone else’s actions or inducing those violations,) and 8.4(d) (conduct prejudicial to the administration of justice.) In addition, the more senior of the two attorneys is charged with RPC 5.1(b) and (c) (ethical obligation in relation to supervising another attorney.) These are all very serious charges, and regardless of the outcome, the publicity, which will spread rapidly through social media, will no doubt be very harmful to the two attorneys in question.

At this point it seems well-settled that the action of friending someone or seeking to access their accounts through some form of communication, is contact. Therefore attorneys should never seek to friend or obtain access to the account of an opposing party through any form of communication with a represented party. If seeking to friend a witness, the attorney or individual assisting the attorney must make clear her relationship to the case.

**How to Obtain Access**

If an attorney believes that there is useful information contained within a social media account, she should seek to obtain access to the information hidden therein. There are a number of ethical ways to do so, aside from just looking to see what is freely available.

**See if the Client or a Friendly Witness has Access**

In family law cases especially, the parties or witnesses might have access to each other’s accounts. It is perfectly acceptable to view and use any information that is freely available through this method. Be cautious though where it looks like a witness might be sharing the information under duress. For example, in an employer/employee case, if another employee is friends with a plaintiff on Facebook, he might feel he has no choice but to share the

\textsuperscript{38} SDCBA Ethics Opinion 2011-2, May 24, 2011

\textsuperscript{39} Eric Meyer, Ethics charges for two lawyers over Facebook friending a litigant (2012.)

information. If that employee complains later and says he was forced to share the access, it is uncertain how a court will look upon it.

*Ask for Access to the Account*

During the discovery process, unless there is a reason not to do so, ask for access to any and all social media accounts. In terms of Facebook, it is possible to download an entire account, so request that the opposing party do so and provide a copy. Be sure to ask for continuing access as well. The opposing party will likely refuse this request, and wisely so. Social media postings can provide a plethora of private information, some of which may be harmful to a case. It is possible to simply ask the opposing party to adjust privacy settings so the account is viewable, but again, it is likely this request will be refused. It is always best to ask though because during the discovery process the judge will certainly ask if the request was made.

*Send a Subpoena to the Site*

Though generally the social media sites will not cooperate with a civil subpoena, from time to time they will be surprisingly helpful. As a result, it never hurts to send the subpoena. Even if the site won’t provide content, citing the Stored Communications Act, it will normally provide assistance in connecting an account with an e-mail address. This can be helpful if ownership of the account will be in issue. For example, in a criminal case the prosecution’s verdict was overturned when it was shown that prosecution had failed to tie the account in question to the defendant’s girlfriend. Proof of ownership could have been shown with MySpace’s assistance.

*Compel Discovery*

This is where things get tricky. Different judges tend to have different responses to the request to compel discovery of a social media account. The best approach, and the one that has shown the most results, is to capture what is already viewable (through appropriate ethical means) and to show it to the judge. If the judge can see that the account has relevant and contradictory information, she is likely to provide access to the account. If the judge has concerns about the privacy of those other than the account holder, request that the court review the data first to help resolve the issue. Some judges do not feel that there are any privacy rights in social media content.

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40 Facebook’s “Download your information” tool is located under Account Settings.
41 See Won’t the Social Media Provider Help, *infra*.
Case Law

There are a number of opinions related to discovery of social media when the account itself is not a part of the case, in other words when opposing counsel believes that she might find useful data in the account but the online behavior is not at the center of the dispute. At this point the trend in such cases is to provide access to social media accounts only when the opposing party can show that there is relevant and/or contradictory information contained therein. For example, in McMillen v. Hummingbird Speedway, Inc. a review of the public areas of McMillen’s Facebook page revealed information contradictory to what he was claiming in terms of his injuries. The judge provided access noting specifically that the Facebook information was not privileged.

Another case is simply the paragraph long Piccolo v. Paterson. The judge denied access to the Facebook pages the defense desired. The judge noted that the defense already had many pictures, and that no pictures or other data were freely available that showed contradictory information to what the plaintiff was claiming. It is interesting to note that the plaintiff actually changed her privacy settings early in the case, to preclude anyone other than a friend viewing her pictures.

In Zimmerman v. Weis Markets Inc., the judge granted discovery due to the public availability of pictures that contradicted the plaintiff’s claim that he did not wear shorts due to his embarrassment about a scar. The plaintiff posted pictures on his MySpace profile which clearly showed him wearing shorts after his injury (the scar was visible.) Due to the public availability of this contradictory information the judge found that there was clearly relevant data to be found within the MySpace account and therefore access to the account was properly compelled.

Another important case comes from Judge R. Stanton Wettick. Judge Wettick is known as a discovery judge in Pennsylvania, so his view on the discovery of social media was quite welcome. Judge Wettick denied mutual requests for access to Facebook accounts in the case of Trail v Lesko because he was not going to allow a fishing expedition when there was no evidence that contradictory or useful information could be found in either Facebook account. Therefore Judge Wettick used the same reasoning as in many of the other cases on this issue.

45 Gina Passerella, Facebook Postings Barred From Discovery in Accident Case (2013.)
http://www.thelegalintelligencer.com/id=1202493920630/Facebook-Postings-Barred-From-Discovery-in-Accident-Case#ixzz3COUstMur
47 Trail v. Lesko, No GD-10-017249.
In a Florida case, the Judge granted in part and denied in part the request by defense in a personal injury case for complete access to the plaintiff’s social media network. He held that the plaintiff must provide copies of all pictures depicting her since her injury, rather than provide access to the entire social media account in question. He further held that in requesting that the plaintiff provide every device on which she accessed her social media accounts, the defense had overreached. In reaching his decision the judge noted that social media sites are “neither privileged nor protected by any right of privacy.” He also noted though that the discovery request must be properly tailored, and to support both assertions, he cited the decision in Tompkins v. Detroit Metropolitan Airport.

In Tompkins the court found that while social media is discoverable, and “generally not privileged,” the opposing party still may not, “have a generalized right to rummage through information that Plaintiff has limited from public view.” The court required a “threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence.” As in the other cited cases, the court wanted to see some evidence that justified the defendant, “delving into the non-public section of [plaintiff’s] account.” The court noted specifically that if the public segment of plaintiff’s account had “contained pictures of her playing golf or riding horseback,” that the defendant would have had a better case to access the private portions of her account.

The conclusion to be drawn thus far about the majority of social media discovery decisions is that, while courts are willing to provide access to private sections of social media accounts, they are not willing to allow fishing expeditions simply based on the view that the accounts might have useful information. Some evidence showing that relevant information can be found in the account must be offered before discovery will be granted.

Won’t the Social Media Provider Help?

Social media providers will not provide content from a social media account in civil cases. As recently as 2007 some providers did respond to civil subpoenas with content, but now the providers state unequivocally that due to the Stored Communications Act, 18 U.S.C. § 2701 et seq, they may not provide content. The providers will respond to a subpoena only with information about who owns the account, perhaps dates and times of connections, IP addresses, etc. This means the only way to get the data is to have the owner of the account cooperate. In criminal cases, most social media providers will assist when provided with an

49 Tompkins v. Detroit Metropolitan Airport, Case No. 10-10413, 2012 WL 179320 (E.D. MI. 2012)
50 Facebook states, “Federal law prohibits Facebook from disclosing user content (such as messages, wall posts, photos, etc.) in response to a civil subpoena.” http://www.facebook.com/help/?faq=17158
51 For Facebook this requires the e-mail address that the attorney desires to connect to the account. https://www.facebook.com/help/?page=211462112226850
appropriate subpoena or warrant. On occasion a social media site will be surprising, go against its stated rules, and provide the evidence. Therefore, it never hurts to ask with a subpoena in a civil case. Just be prepared for a no.52

The various social media sites generally have details on the subpoena process, and what they will provide. Review each site to learn the appropriate steps.

*What Happens if the Owner of the Account Deletes the Data?*

Most social media providers claim that when a user deletes information from his account, it is gone forever. Facebook, for example, explains that its deletion system works much like a recycling bin. In essence, when a user deletes data, that data is stored on Facebook’s server briefly until the system writes over it; this means, unfortunately, if someone is savvy and starts deleting harmful data, there is nothing that can be done to bring it back, once it is overwritten. Facebook does state, “[i]f a user cannot access content because he or she disables or deleted his or her account, Facebook will, to the extent possible, restore access to allow the user to collect and produce the account’s content. Facebook preserves user content only in response to a valid law enforcement request.”53 Of course, if there is nothing to find because it has been deleted and destroyed, than the site cannot restore the data. And outside of criminal cases, it must be the account’s owner who requests the data be restored.

*Authentication*

Authentication is another troubling issue when it comes to social media. Facebook states that the owner or someone familiar with the account can authenticate it. The issue however is that it is impossible to know whether the user deleted something in the account, leaving only helpful items. This is why it is extremely important to perform research early in the process, and to take screen shots of any evidence discovered immediately. Be certain to keep records as to how the evidence was preserved.

In terms of proving who owns the account, remember, it is very easy to create a fake social media account. Just because an account looks like it belongs to someone does not mean that it does. That is why it might be important to at least subpoena the account identifying information from the social media site, if there is any question as to ability to prove ownership of an account.

The case law on authentication and admissibility of social media sites is contradictory. In *State v. Bell* the court found that the level of admissibility is low and accepted as good enough

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52 See Send a Subpoena to the Site *supra*.

testimony from a witness familiar with the MySpace account and e-mail address of the party the information was to be used against. Also the evidence showed that the defendant used certain code words and that those words were contained within the account. The court also noted that the witness agreed that the provided print-outs seemed to be an accurate reflection of the MySpace account in question.\textsuperscript{54}

On the other side, in \textit{Griffin v State}, the court was concerned about how easy it is to create a fake account and noted that information such as birthdate, picture, and residence were not enough to prove ownership.\textsuperscript{55}

\textbf{The Other Side – Responding to Social Media Requests}

It is important to be prepared to respond appropriately to requests for social media content. All businesses (including law firms) should have a social media policy that controls who may (and may not) speak on behalf of the company. The policy should also consider addressing whether supervisors may be connected to employees on the more social sites (as opposed to professional sites liked LinkedIn,) and remind employees about the fact that policies online are the same as policies off line; specifically in relation to sexual harassment and other such issues. Employees should also be reminded not to discuss private information and/or litigation on their social media accounts. Employers should train employees on social media privacy settings to assist in security. As already explained, individuals should be warned not to post anything that can be harmful to their cases on social media.

Social media evidence needs to be preserved appropriately. For a business with a great deal of social media evidence to preserve, it is wise to involve a company that can help in the preservation process during litigation. An individual can simply print out the pages or download the account. If the account is large (and is not on Facebook where it can be downloaded) and it is likely the history of the account will enter into the lawsuit, it might be wise to arrange for preservation of the account through a third party, to avoid any accusations of spoliation later on.

In the end, it is crucial for clients, indeed for everyone, to remember that any content posted on a social media site, even back in 2004 when Facebook was first created and the client might have been in college, could come up later during litigation. Therefore everyone needs to be careful to think before they post. This does not mean that people should go back and clean up their accounts just because some day they might, by chance, be sued. But it does mean they might want to give some thought to their online reputations due to their past and current postings.

\textsuperscript{54} \textit{State v. Bell}, 882 N.E.2e (2008.)

Other Issues: Judges and Juries

Judges

Many judges enjoy having an online presence as well. This has led to questions over whether judges should be friends with attorneys, and what happens if a judge is a friend with a defendant.

In attempting to resolve the first issue, the Florida Supreme Court Judicial Ethics Advisory Committee determined that judges may not be friends on Facebook with attorneys who appear before them. In turn, a defendant sought to disqualify a judge based on his Facebook friendship with the prosecutor. The trial judge denied the request, but upon appeal the motion was granted. The court held that the Facebook friendship “conveys the impression that the lawyer is in a position to influence the judge.” Ohio came down on the other side, noting that it is acceptable for judges to friend lawyers who appear before them. However the judges must comport themselves properly, follow all ethical rules, and must be careful to disqualify themselves should the online friendship cause a bias.

Other states have seen issues arise when the judge learns he is Facebook friends with a defendant. Two cases occurred in Pennsylvania. In the first, the judge was asked to recuse himself, and eventually did so when it turned out he knew the defendant’s father. He was, however, unaware of the Facebook friendship prior to being alerted to it. Like many people, the judge simply friended anyone who asked and thought nothing of it. Another controversy arose when a judge suppressed evidence against a defendant resulting in dismissal of the case. After the fact the prosecution realized that the judge was Facebook friends with the defendant, though the defendant and the judge did not know each other. The prosecutor asked the judge to reverse the suppression and recuse himself. The judge decided not to recuse himself due to concern about setting a dangerous precedent.

On February 21, 2013, the American Bar Association released Formal Opinion 462, Judge's Use of Electronic Social Networking Media. It offers a new acronym, ESM, meaning electronic social media. Judges are allowed to participate in ESM so long as they "comply with the relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity or impartiality, or create an appearance of impropriety."

56 Florida Supreme Court Judicial Ethics Advisory Committee, Opinion Number 2009-20 (November 17, 2009.)
57 Domville v. State, No. 4D12-556 (Fla. 4th DCA 2012).
58 Supreme Court of Ohio Disciplinary Board, Advisory Opinion: Judges May ‘Friend’ ‘Tweet’ if Proper Caution Exercised. (December 8, 2010.)
60 Judge refuses to recuse himself from Parker DUI case, state plans an appeal (2011.) http://www.newsworks.org/index.php/neighborhoods/mt-airychestnut-hill/-item/30248-hayden-denial-story-
In the end, the best advice for judges is that they be careful who they friend, and also, be aware of who they friend. Friending everyone is not a good idea for a judge, since it is easy enough, as shown above, for the judge to end up being friends with a defendant, and to be completely unaware of their online relationship. Judges who have many friends on social media sites might want to take a look at who those friends are, and determine whether they should remain friends. On the other hand, judges who prefer to have many friends online might find it wise to be certain they know who those friends are and at the least make both sides aware of the Facebook friendship prior to the trial beginning. If necessary, perhaps the judge could have a clerk make a quick check of his account to make certain that he is not friends with defendants who appear before him.

**Jurors**

These days it is extremely common to look over to the seats behind the prosecution, plaintiff or defense, and see individuals hard at work on their computers during the *voir dire* process. 61 This is because jurors, like almost everyone else, provide an immense amount of information about themselves online. Some of this information might well disqualify an individual from serving on a jury, or simply show a particular side that it would be unwise to seat a potential juror.

While there are currently no conclusive decisions on the issue of researching jurors via social media, there is guidance on the subject. 62 A New York opinion, quite reasonably, makes it clear that it is acceptable to research jurors online, including viewing their social media accounts under several conditions. First, the accounts must be accessed appropriately, i.e. only looking at accounts and information that have been left freely accessible by the jurors. Also, it remains impermissible to communicate with the jurors in any fashion. That means no friending (or having a third party friend) a juror in order to obtain access to the private sections of an account. 63 However, the American Bar Association does not bar visiting the public portions of a site even if it makes the juror aware that an attorney looked at a profile. Such contact might include using LinkedIn to look at a juror’s profile. Unless set properly, LinkedIn will show the name of a person who looks at a profile, under certain circumstances.

62 NYCLA Committee on Professional Ethics, Formal Opinion 743 (May 18, 2011.)
63 The American Bar Association Standing Committee on Ethics and Professional Responsibility released an opinion, Lawyer Reviewing Jurors’ Internet Presence, Formal Opinion 466, 2014, which agrees with previously stated guidelines from other states.
Of late, jurors have been engaging in social media or other Internet use that has caused serious trouble for the court system. Judges, prosecutors and defense attorneys frequently find themselves throwing their hands up in the air due to the frustration caused by jurors who refuse to follow the instructions. While it might seem beyond belief that a juror would choose to engage in social media discussion or Internet research after being specifically told not to do so, the reality is that they do.\textsuperscript{64} In response to juror behavior, many judges and court systems are developing instructions to provide to jurors to warn them away from social media use. For example, the Judicial Conference Committee on Court Administration and Case Management recently created, “Proposed Model Jury Instructions [on] The Use of Electronic Technology to Conduct Research on or Communicate about a Case.”\textsuperscript{65} Regardless of the language, it is crucial that judges warn the jury right at the outset of a case of the serious ramifications, and potential punishments, for violating court orders on use of social media during a trial.

\textsuperscript{64} Social Media’s Clout Worries Legal System (2012.)

Conclusion

Understanding how the public uses social media is important for attorneys so they can appreciate the types of evidence they might find online to help their cases, and so they can appropriately warn their clients about social media use. Knowing the benefits and risks of social media in terms of networking and marketing can help an attorney grow her firm without harming her hard-earned reputation through improper online activities. Being aware of how judges and juries use social media and how that use might affect a case is important, so attorneys can be prepared to respond accordingly.

There is no doubt that social media can be a serious minefield in terms of day-to-day practice and ethical requirements. On the other hand, the substantial benefits available in terms of evidence, research, marketing, and networking cannot be overstated. With the number of people using social media increasing every day, social media will continue to impact the legal profession in every imaginable way, and perhaps some unimaginable ways too. As a result it is crucial for attorneys to embrace the technology and determine how they can use it both in their practice of law and in their efforts to grow their client base.