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Litigation in the Web 2.0 Era

By Stephen A. Weigand

As a young lawyer, chances are that you are very familiar with Web 2.0 technologies, such as Facebook, MySpace, Twitter, LinkedIn, blogs, and other collaborative Internet applications. But as a litigator, are you taking special care to consider how those technologies may affect your client's case? Web 2.0 technologies can affect litigation at several different stages, especially discovery. Below is a basic guide for the mindful litigator in the Web 2.0 era.

Service via . . . Facebook?
What if you could complete service of process by posting a message on an adversary's Facebook page? In the United States, Web 2.0 technologies have not yet been approved for use in serving court filings. But that could change if U.S. courts follow the lead of other countries.

Judges in Australia and New Zealand have permitted service of process via Facebook. For example, an Australian court approved using Facebook to serve a notice of judgment on borrowers who defaulted on their mortgage (after other attempts to complete service were unsuccessful). Australian courts have also permitted service via text message. More recently, the United Kingdom's High Court permitted service of an injunction via Twitter. Maybe U.S. courts will someday permit service via Web 2.0 technologies. U.S. courts must find first that this manner of service would be reliable, or adverse parties might be able to consent in writing to service via Web 2.0 technologies under Federal Rule of Civil Procedure 5(b)(2)(E), which permits service "by electronic means."

Discovery
Web 2.0 websites can be a treasure trove of information about opposing parties and potential witnesses, particularly given the propensity of some individuals to disclose significant amounts of personal information on the Internet. Information from these sites is frequently the subject of discovery requests and may be admissible as evidence. If your opponent posted information on the Internet that is relevant to your case, during depositions ask the deponent if she has discussed issues relating to the case on any websites. If so, request that the content of the site(s) be preserved and produced.

Yet formal discovery is not always necessary to gain an understanding of your opposing party's activities on Web 2.0 sites. As a practical first step, you should "Google" the opposing party and potential witnesses to discover their Internet activities, such as postings on blogs or registration with a social networking site. You could send a "friend" request to a witness of the opposing party to gain access to the witness's Facebook page. But doing so or asking a third party to send a friend request to the opposing party's witness to obtain information for you may violate your state's ethical rules. *See* Martha Neil, *Attorney Can't Ask 3rd Party to "Friend" Witness on Facebook, Opinion Says*, www.abajournal.com (May 5, 2009).

Before requesting that the opposing party's Web 2.0 content be preserved and produced, familiarize yourself with *your* client's Internet usage. After all, the opposing party is likely to reciprocate your discovery requests. In addition, you should notify your client—in writing—of his duty to preserve content on Web 2.0 sites. Judge Shira Scheindlin, the author of the *Zubulake v. UBS Warburg* opinions, held that "the failure to issue a written litigation hold constitutes gross negligence." *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC* (opinion entitled "*Zubulake* Revisited: Six Years Later").

Trial
Consider using information from Web 2.0 sites during direct and cross examinations to impeach or corroborate a witness's testimony. Similar to a personal diary, Web 2.0 content could provide a significant amount of information about what a particular witness was thinking or doing at a relevant point in time.

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To introduce Web 2.0 content for admission as evidence, your two primary hurdles are hearsay and authenticity. Web postings are out-of-court statements that cannot be admitted to prove the truth of the matter asserted unless a hearsay exception applies or the statements are nonhearsay (e.g., party-opponent admissions). The proponent of the Web 2.0 content must also offer direct or circumstantial evidence as to the content's authenticity. Some federal courts have expressly held that documents produced by an adverse party are authentic when the documents are being used against the adverse party. The rules of evidence apply to electronic evidence to the same extent as tangible evidence. But courts are cautious about electronic evidence because it can be altered easily. For more information, consult Magistrate Judge Paul W. Grimm's helpful analysis on authentication and admissibility of electronic evidence in *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534 (D. Md. 2007).

Web 2.0 technologies are likely to affect litigation strategies, particularly in the discovery stage. Web 2.0 content may significantly benefit your client's case. But your client must be notified about the duty to preserve potentially relevant website information under her control. Of course, caution your client about his or her online activity during the duration of the case. Lastly, make sure you follow your own advice.

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