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Tech Corner

Using Social Media in Pre-Litigation Investigation: Tips for the Employment Practitioner

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Are you fully utilizing social media to your client's benefit? Once a place for high school and college students to post pictures of friends and share stories of weekend exploits, now everyone from your nephew to your grandmother says "Facebook me." In January 2009, Facebook had over 42 million registered users in the United States, 40% of whom were between the ages of 18-24. By January 2010, registered U.S. Facebook users had increased by 145% to over 103 million, almost 30% of whom were between 35 and 54 years of age.

A wealth of often-overlooked information is voluntarily disclosed via social media. Chances are your opposing party, counsel, and witnesses have social media presences. Your clients, witnesses, and you probably do too. This article proposes a few practice pointers for locating and obtaining social media content pre-litigation.

1) Search the Public Record: The "public record" is no longer limited to publically-accessible court files. A great deal of social media content is publicly available on the Internet. Log on to Facebook, for example, and you may find information that a party or witness has left open to the public. Courts consistently hold that this information is accompanied by no reasonable expectation of privacy when made publicly available. That said, what is publicly available one day may be private or deleted the next, so it is wise to record any important information in case the poster changes her privacy settings or later deletes the information.

Practice Pointer: Don't covertly seek private information. In most jurisdictions, an attorney may not "friend" or direct another to "friend" an adverse party or witness for the purpose of accessing private social media content. The same may be true for requests to follow private Tweets or blogs of an opposing party, especially if the request does not reveal your true identity and intent.

Practice Pointer: Do understand the social media use of your own clients and witnesses. What has your client or witness already made publicly available? How may it be used to help, or hinder, your case? Do you have an obligation to retain it? While it may be appropriate for your client or witness to adjust her privacy settings when heading into litigation, or to refrain from actively creating new social media content during litigation, she must not delete potentially relevant information. Deletion of even non-relevant

information may cause a jury to question the user's credibility or, worse, lead to a finding of spoliation by the presiding judge.

2) Search Your Client's Hardware: What information does your client already have stored on its/his own hardware? An employer often has access to much information about a former employee that is already stored on an employee's workplace computer or other employer-owned equipment (e.g., Blackberries, laptops, etc.). Similarly, an individual can have extensive relevant information on his or her own laptop, tablet, smartphone, or other electronic devices. A close review of this hardware can yield important evidence at a very early stage, which can facilitate early, and often highly productive, settlement discussions. It is important, however, to avoid--and that you counsel your client to avoid--spoliation; that is, destruction or modification of information that will be discoverable once litigation commences.

Practice Pointer: Can my employer look at that? Some jurisdictions presume that an employee retains an expectation of privacy in personal information stored on his or her employer's computer. However, to the extent that an employer has clearly advised employees that it will monitor information transmitted via its hardware, any expectation of privacy may be reduced. *See, e.g., Holmes v. Petrovich Dev. Co., LLC*, 191 Cal. App. 4th 1047 (2011). What are the employer's policies for use of electronic devices? Are those policies clearly communicated to employees? If your client, an employee, is using his employer's computer or email to communicate with you, his attorney, or to update his social media status, you may have a duty you have to warn your client. *See* ABA Standing Committee on Ethics and Professional Responsibility, [Formal Opinion 11-549](#) (Sept. 7, 2011).

Practice Pointer: What can I delete? Where a case is likely to implicate electronically stored information--which is likely considering the use of email, instant messaging, and social media in the workplace--an important first step is preparing a litigation hold letter. This process should carefully identify all individuals who have access to documents, databases, and other electronic information that are relevant to the litigation. When the potential areas for retention are broad, either as to time and/or scope, it may be helpful to collaborate early with the opposing side to ensure that retention is sufficiently inclusive but not overly burdensome for either party.

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