

The Coming Tide- Social Media Use in Litigation
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Facebook had 845 million *monthly* active users at the end of December 2011. That's impressive, but not as impressive as the fact that it had 483 million *daily* active users on average in December 2011. See <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22>. That means that roughly 483 million people use Facebook *every* day. This includes parents, siblings, partners, employers, employees, plaintiffs, defendants, investigators and lawyers.

Not surprisingly, Facebook is becoming a hotbed for litigation. According to a 2009 Harris Interactive Survey 45% of 2,667 Human Resource Professionals use sites like Facebook to research job candidates. 35% said they decided not to hire someone because of something on his or her Facebook page. The leading culprits:

- Have indiscreet photos and info? 53% of employers won't hire an employee because of that;
- Have drugs/and or alcohol show up in pictures or posts? 44% of employers won't hire an employee because of that;
- Talking trash on former employers? 35% of employers say they won't hire an employee because of that; and
- Poor communication on your page? 29% of employers say they won't hire an employee because of that.

See

<http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr519&sd=8%2F19%2F2009&ed=12%2F31%2F2009>

However, many businesses that are using social media to research candidates are finding themselves exposed to discrimination lawsuits. See, Facebook pages provide a lot more information than can be obtained in an interview. Facebook pages can show your sex, your race, your age, your marital status, your religion, your political affiliations and even your national origin. All of these things can be the basis of discrimination in various states.

Still think social media networks seem like a great place to mine information on perspective candidates? Facebook is recently took to combating, "a distressing increase in reports of employers or others seeking to gain inappropriate access to people's Facebook profiles or private information." See <https://www.facebook.com/notes/facebook-and-privacy/protecting-your-passwords-and-your-privacy/326598317390057>. Many jurisdictions are taking the stance that social media postings are private and immune from disclosure in litigation. See *Crispin v. Christian Audigier, Inc.* (C.D. Cal. 2010) 717 F.Supp.2d 965, 991. However, at least one other Court found that "cleaning up a Facebook" page amounted to spoliation of evidence, warranting a \$542,000 sanction against a lawyer and a \$180,000 sanction against a client. See *Lester v. Allied Concrete Company*, Circuit Court of the city of Charlottesville, Virginia, Case No. CL08-150, and CL09-223. At the very least, who wants to litigate all that? Isn't an ounce of prevention better than a pound of cure?

Ideally, your client won't have any social media accounts like Facebook. But, chances are, your client does. So if you can't advise your client to "clean up" his or her Facebook page, what can you do? Advise your client to lock it down. Contrary to popular belief, Facebook has awesome privacy protections, if you use them.

In helping your client "lock it down", you should:

- *Advise your client to think before they act.* Your client doesn't have to be "friends" with everybody, and, in fact, shouldn't be. That suspicious guy that your client met at the bar is not your client's friend. He's probably a private investigator. That employee that keeps asking your client questions about the business and sending friend requests is not your client's friend. He's probably a spy. Your client doesn't have to post every thought that comes to mind. In fact, many thoughts he or she has about the case are probably things that he or she talked to you about, and, in so posting, your client has waived the attorney/client privilege. Your client doesn't need to tell every "friend" about his or her present condition. Similarly, your client doesn't need to post all those pictures from that recent, "awesome party." Just think how great those would look blown up in front of a jury.
- *Advise your client to review their privacy settings and adjust accordingly.* Your client should make sure that only real friends and family are "friends" on Facebook. It only takes one "friend" who can see a post, to torpedo your client's case. Your client should make sure that privacy settings are high enough so that people cannot tag your client in pictures, check them in at places, or post inappropriate comments on their wall.
- *Google your client from time to time.* I know this sounds silly, but you'd be amazed at how much you can find out about your own client just by Googling his or her name. You can find everything from Amazon reviews to news articles.

Like it or not, social media is here to stay. As trial lawyers, we can adapt and advise our clients accordingly, or we watch as the opposition blows up huge pictures of our clients for all the jury to see. Social media can make or break your case. It really depends on how you look at it.