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Issues to Consider in the Evolving World of Social Media

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Special to the Legal

In the late 1970s, when I first started practicing law, I remember the confusion and anxiety created by the newly born Discovery Rules. Since then, there have been dozens if not hundreds of books covering nearly every possible case scenario regarding the rules of evidence.

As I prepared to write this article, I remembered my very first social networking experience. It was 1984, and I had just purchased an Apple 2e that came with 64K of memory. I remember that neon green glow that emanated from the hardly discernable text on the screen and my first experience with the use of a modem. I sat around the computer with my children and sent a message into cyber space. Suddenly, a return text began to develop on the screen letter by letter, sentence by sentence. Edison, Marconi and Bell had no idea how the landscape of communication would change over the next century.

In 1791, the Bill of Rights was conceived, which included the Fourth Amendment defining our rights to privacy. Nearly 200 years later, in 1986, U.S. Congress passed the Stored Communication Act, which is part of the Electronic Communications Privacy Act.

Consider that the “worldwide web” did not really get off the ground until the early- to mid-90s. The Stored Communications Act (SCA) was created to limit the government from gaining access to private messages, mostly in the form of e-mail. The act makes an important distinction between what it calls an ECS (electronic communications service) and a RCS (remote computing service).

One’s expectation of privacy is diminished in a situation in which electronic communications are maintained



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and stored. The law is no more capable of dealing with the current social networking structure than my old Apple 2e would be in allowing me access. For a full and complete discussion and excellent history of our courts struggle to apply the act in today’s world, see *Crispin vs. Audigier*.

Since the act aims to limit Internet service providers from disclosing electronic communications and limits the government’s right to compel disclosure, the criminal evidentiary tools are through search warrant or subpoena duces tecum. Courts such as the *Crispin* court have extended these protections to civil litigants through a motion for protective order or motion to quash.

Crispin is also one of the few cases to deny defendants access to social networking sites or accounts without a determination of the privacy settings of the user. Certain information exchanged in these sites is private and not intended to be public or viewable by all of your “friends,” and thus would have a greater expectation to privacy than those more freely published. Most social networking analysts use the word “published” to denote the permanency of such an electronic communication, in order to emphasize the lack of any expectation to privacy.

Most courts (unfortunately we do not have much appellate precedent) have

determined that social networking sites like Facebook, Twitter, YouTube and MySpace fall under both categories of ECS and RCS, as they provide both storage and communication of content.

Who uses these sites? It is not just our clients but, according to a *New York Times* article published Sept. 12, 2009, 86 percent of lawyers ages 25 to 35 and 66 percent of those over 46 are members of social networks.

Social networking is not only uncharted ground for litigators, but also for the courts. Jurors have caused mistrials across the country for conducting and sharing internet searches and postings on their Facebook Walls or Twitter accounts. The next time you pick a jury make sure your voir dire includes questions about their use of these sites and an advance admonishment that being a juror means being “out of touch” figuratively and literally. They must be prepared to stay completely disconnected regarding anything about the trial during its pendency.

A litigator’s natural instinct is to leave no rock unturned during discovery. Keep in mind that there are ethical considerations associated with garnishing social network information. Popping onto someone’s Facebook or MySpace sites may only tempt you to want to obtain more information by “friending” the target.

The Philadelphia Bar Association Professional Guidance committee recently provided an advisory opinion on the ethical issues associated with attempting to access a Facebook account of a potential witness by asking to become the witness’s “friend.” The committee ruled that proceeding without advising the witness of why you wanted to be their friend would violate Ethics Rule 8.4, as such contact would be considered deceitful.

Now, how do we as attorneys use this

knowledge about social networking to advocate and protect our clients?

First, an attorney has to stay informed. The law dealing with social networking is in a state of growth and change. Therefore, in order to properly counsel clients you must be diligent and pay attention to articles and cases dealing with social media. Social networking itself is a constantly changing and growing organism. Do your best to be informed about the various types of social networking. Make yourself aware of what the different sites offer in the way of privacy controls. You need to know how these sites work so that you can adequately advise your clients on protecting themselves and their privacy.

Second, you **MUST** discuss social networking with your clients at your first meeting. Make them understand the implications of social networking and the potential pitfalls of their online chatter. Clients must be advised that their online comments have legal ramifications. Clients must post with caution as everything they publish could be fodder for cross-examination, seen by a judge, and presented to the jury. Clients likely do not consider a post on their social networking site to be something that is akin to taking out a billboard on the information highway, the busiest highway in the universe.

Furthermore, this is a billboard that can be updated by your clients at any time from any place. It is your obligation to provide your clients with the best legal advice you can. Sometimes this is as simple as reminding them to “think before they post.” If your clients use a Smartphone to enter the publishing business, they carry that ability to publish with them in their pockets at all times. Clients will be tempted to post in situations where their emotions run unchecked or when they are less inhibited than normal. Discuss with clients the implications of what you might call PWI (posting while intoxicated).

Third, clients must be told that they do not need to be “friends” with everyone. Social networkers all too often have no process of evaluation when it comes to accepting requests for access to their pages. If clients indiscriminately allow access their pages as an attorney you will have a difficult time arguing that they are entitled to any expectation of privacy. The

more “friends” or “followers” a client has, the more people with whom he or she is sharing intimate details. Your client’s “friends” have the ability to share that information with even more people. Scary. In addition to being selective with friends, clients must also constantly review and update their privacy settings as some sites change what is covered by various settings. What was private today may not be private tomorrow.

Know what is already out there in cyberspace so that you can fully represent your client. All attorneys will agree that a potential problem is much easier to deal with the earlier they learn of its existence. Your clients will be hesitant to tell you everything they publish online if they feel they have something to hide. If there is something of concern, they will be better served to tell you now rather than have to explain it for the first time at a deposition. Be cautious, though, because if you are effective in discussing social networking with your client, you might scare them. This is fine if you also scare them into thinking before they post. This may not be fine if you scare them into running home and attempting to erase, delete or otherwise dispose of online content.

If your client attempts to delete or erase any postings after meeting with you and discussing the case, you could be setting the table for a nice big helping of spoliation motion in the future. As an attorney, you know that statement against interest made by a party can certainly be used against your client. Even if the information sought is inadmissible, the request may be upheld if it “appears reasonably calculated to lead to the discovery of admissible evidence.” Pa.R.C.P. No. 4003.1(b). Educating your client that certain material may be discoverable is advised. Once the information is published, it leaves the control of your client. Any attempt to destroy or cover-up evidence will be revealed and your client will be punished.

Finally, along with continuing to research the legal aspects and the ever-changing social network environment, attorneys are advised to research their clients. Investigators are routinely hired to surveil plaintiffs and claimants. Despite the ethical concerns that may arise from an investigator deceptively obtaining access to a social networking site under

the guise of “friendship,” it is something of which clients and attorneys must be aware. Regardless, if your client is not diligent in protecting their privacy on these various sites, an investigator or opposing attorney will have easy access to your client and his or her innermost thoughts.

This is just the tip of the social networking and litigation iceberg. As attorneys we have a duty to stay informed and this is one topic that we cannot afford to ignore. Our clients are sharing intimate details of their lives with hundreds, even thousands, of people. Information about our clients that we think is personal and private is just a few simple keystrokes or mouse-clicks away. Our client’s published billboard online paints a picture on the information superhighway available for possibly anyone with internet access to see.

Instant unfettered access to anyone who is willing to publish their “current status” carries consequence and responsibility. I remember as a young man in the military writing letters to family and friends. Carefully proofreading, signing and addressing the envelope before I stamped it and dropped it in the mail. Now I can work on my blog at the same time as I receive e-mail and Facebook connects. No turning back now.

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