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Social Media Law & Policy Report™

The New Constants – Death, Taxes and . . . Social Media?

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It is hard to believe, but social media only recently arrived on the scene. Today, a large segment of society cannot imagine a world without it. Many of our children have never known what it is like to live in a world without social media.

Social media, including such platforms as Twitter, Facebook, and LinkedIn, has fundamentally changed the way in which we communicate. While once the dream of science fiction writers, today people can be constantly connected to social media through a variety of devices, including computers, tablets, smartphones, and even glasses. People interact with social media at home, at work, during travel—we can have access 24 hours a day, 365 days a year.

Social media is not only a key method of communication for students. Businesses, including some of the largest, are heavily using social media for communication. A recent survey by online social media magazine Social Media Examiner found that 94 percent of all businesses with a marketing department used social media as a part of their marketing platform.[1] The largest companies have jumped in with both feet, with 73 percent of Fortune 500 companies holding an active corporate Twitter account, and 66 percent of Fortune 500 companies running a Facebook account.[2] While the adoption of social media is here to stay, so too are the legal issues it raises.

Social media presents new and challenging information management issues. Many companies not only permit their employees to use social media, but encourage it.[3] Records managers now need to account for social media just as they need to account for other means of communication.

Similarly, those issuing legal holds must consider whether those holds must cover social media. It has been estimated that nearly half of all companies will

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[1] Michael Stelzner, Social Media Examiner, 2012 Social Media Marketing Industry Report (April 2012), *available at* (registration required) http://www.socialmediaexaminer.com/social-media-marketing-industry-report-2012.

[2] Charlton College of Business Center for Marketing Research at the University of Massachusetts, Dartmouth, Social Media Surge by the 2012 Fortune 500: Increase Use of Blogs, Facebook, Twitter and More (Sept. 2012) (the report found that all of the top 10 companies—Exxon, Wal-Mart, Chevron, ConocoPhillips, General Motors, General Electric, Berkshire Hathaway, Fannie Mae, Ford Motors and Hewlett-Packard—consistently post on their Twitter accounts), available at http://www.umassd.edu/cmr/socialmedia/2012fortune500/.

[3] JD Rucker, *Should Businesses Ban or Encourage Workplace Social Media*, Business Insider (Aug. 15, 2011), *available at* http://articles.businessinsider.com/2011-08-15/strategy/30070338_1_social-media-employees-tweet.

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have been asked to produce material from social media websites for e-discovery by the end of 2013.[4] Courts are treating social media just like any other form of electronically-stored information. For example, in *Arteria Property Ltd. v. Universal Funding V.T.O. Inc.*, the court stated that it could see ''no reason to treat websites differently than other electronic files.''[5] And when parties do not preserve social media materials, courts are issuing sanctions similar to those issued when parties fail to preserve email or other more established sources of discovery information. For example, in *Lester v. Allied Concrete Co.,* an attorney was sanctioned $522,000 for having instructed his client to remove photos from the client's Facebook profile, while the client was ordered to pay an additional $180,000 for having obeyed the instruction.[6] The court referred the attorney's misconduct to the Virginia State Bar and the allegations of the client's perjury to the local prosecutor. The attorney had advised the client via email to ''clean up'' his Facebook page because ''we do NOT want blow ups of other pics at trial so please, please clean up your facebook and myspace.''[7] He also advised there were ''other pics that should be deleted.''[8] The attorney had the client deactivate the client's Facebook account so the attorney could ''truthfully'' represent to defense counsel that on the date the answer to the discovery was signed the client had no Facebook page.[9]

Of course, it is easy to say that litigation holds may extend to social media, but it is quite another to actually effect a litigation hold on social media. Preserving social media information can be more challenging than preserving many other sorts of electronic data. First, social media data is most likely maintained by third party service providers such as Facebook, Twitter, and Google. This by itself presents an obstacle. Second, the tools available to preserve the data (and associated metadata) in a sound, defensible way are in their infancy.[10] While litigators, sophisticated clients, and vendors generally know how to preserve, collect, and produce office email and other common file types, this is certainly not the case when it comes to social media. Vendors have made big strides in their ability to collect and preserve social media, but the pricing and features of the software available is still constantly changing.

Social media is not just a concern for those responding to discovery requests. It is also crucial to consider social media in ''affirmative discovery'' (requesting information from the other side). Social media can provide a wealth of information about opposing parties. Take for example, the case of a personal injury plaintiff who claims a certain injury. In the old days an investigator might have been able to videotape the plaintiff engaging in an activity he said he could not do. But this evidence was expensive and hard to get. Today, the plaintiff himself may have posted video or pictures that will destroy his case. And, if not the plaintiff, the plaintiff's children may well have posted such evidence. At the end of the day, the importance of the impact of social media on litigation is enormous. A study recently conducted by e-discovery blog Forensic Focus revealed that social media played a significant role in nearly 700 cases in the past two years alone.[11] And this number is only going up.

Social media can present ethical pitfalls for every participant in the legal process, including attorneys, judges, and juries.

Every day it seems another attorney gets into ethical hot water by trying to obtain social media through improper means. It is certainly appropriate to conduct sweeping web searches for public social media sites of adverse parties or adverse witnesses. Many individuals do not lock profiles or use privacy settings on their social media, making all postings, photos, messages, comments, and other materials available to anyone on the internet. But trying to obtain ''private'' data other than through formal discovery requests in the litigation is risky at best. Many jurisdictions have held that attorneys may not ''friend'' people to gain access to their private social media content, though the ethics opinions are not always consistent. For example, the New York City Bar Association concluded that ''an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request.''[12] By contrast, the Philadelphia Bar Association concluded that it would be deceptive for a lawyer to ask a third party to request access to a potential witness' social networking site without first revealing the connection to the lawyer or the true purposes for seeking access.[13]

It is not just attorneys who are seeing new rules place new restrictions on them. When judges use social media, there are a whole different set of concerns at play. To help, the ABA Committee on Ethics and Professional Responsibility issued Formal Opinion 462, which provides guidance for the use of ''electronic social media'' (ESM) by judges.[14]

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[4] Gartner Report, Social Media Governance: An Ounce of Prevention (December 2010), *available at* (registration required) http://www.gartner.com/id=1498916.

[5] *Arteria Prop. Ltd. v. Universal Funding V.T.O. Inc.*, No. 05-4896 (PGS) (D.N.J. Oct. 1, 2008). *See also German v. Micro Electronics Inc.*, No. 2:12-cv-292 (S.D. Ohio Jan. 11, 2013) (finding that production of social media and blog excerpts pasted into an email was not ''in a reasonably usable form,'' because the production stripped ''the entries of their original and complete text, formatting, images, and likely the source.'')

[6] *Lester v. Allied Concrete Co.*, Nos. CL08-150, CL09-223 (Va. Cir. Ct. Sept. 16, 2011).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Social media collection solutions that purport to be cutting edge include X1 Social Discovery (http://www.x1discovery.com/social_discovery.html), PageFreezer (http://www.pagefreezer.com), and NextPoint (http://www.cloudpreservation.nextpoint.com/solutions/social-media-discovery/).

[11] John Patzakis , *689 Published Cases Involving Social Media Evidence (with full case listing)*, Forensics Focus Blog (April 16, 2012), *available at* http://articles.forensicfocus.com/2012/04/16/689-published-cases-involving-social-media-evidence-with-full-case-listing/.

[12] New York City Bar Assoc. Formal Ethics Opinion 2010-2 (Sept. 2010), *available at* http://www.nycbar.org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02.

[13] Philadelphia Bar Assoc. Professional Guidance Committee Opinion 2009-02 (March 2009), *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf.

[14] ABA Formal Opinion 462, Judge's Use of Electronic Social Networking Media, (Feb. 21, 2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/

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The good news for judges is that the ABA agrees that judges may participate in social media and that an online friend does not necessarily connote a relationship that would result in judicial basis for recusal or a de facto need for recusal. However, the opinion also found that judges must remain very cognizant of their duty to remain impartial and avoid the appearance of impropriety. The ABA opinion notes that when an individual who is a Facebook or LinkedIn contact with the judge appears before the judge, he or she should evaluate the need for recusal in the same manner as when someone with whom the judge is personally familiar appears in the courtroom.

The opinion concludes that social media is not something that judges should be discouraged from utilizing in their profession and states that ''[j]udicious use of ESM can benefit judges in both their personal and professional lives. As their use of this technology increases, judges can take advantage of its utility and potential as a valuable tool for public outreach. When used with proper care, judges' use of ESM does not necessarily compromise their duties under the Model Code any more than use of traditional and less public forms of social connection such as U.S. Mail, telephone, email or texting.''[15]

The rise of social media has also had a large impact on our courtrooms and has presented challenges for our jury system. For generations, our courts have directed jurors not to seek out information about cases outside of the evidence that is presented at trial, and jurors are directed by judges not to communicate with anyone before a verdict is reached. It is not difficult to see how challenging it can be to enforce such instructions, when, thanks to smartphones, within a few clicks, jurors can look up definitions of confusing legal terms, view crime scenes using Google Earth, or just gripe about their situation and their fellow jurors on Facebook or Twitter. When jurors refuse to follow the court's directions and make inappropriate use of social media during a trial, mistrials can occur, and the posting of sensitive information on social media platforms have led to charges of contempt of court.[16]

States and local courts have taken different measures to try to keep jurors from being tainted by their use of social media and the internet. Some judges now confiscate all phones and computers from jurors when they enter the courtroom. Florida courts have added a jury instruction, which states that jurors using the internet ''must not disclose your thoughts about your jury service or ask for advice on how to decide a case.''[17] In addition, the Judicial Conference Committee on Court Administration and Case Management for the U.S. Courts recently issued a model set of jury instructions for federal trials which explain to jurors the consequences of social media use during a trial, along with recommendations for repeated reminders to jurors of the ban on social media usage.[18]

From records managers to judges, from in-house counsel to juries, everyone involved in the legal process is affected by social media. Since social media has joined death and taxes as constants in our lives, lawyers need to take account of it.

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professional_responsibility/formal_opinion_462.authcheckdam.pdf.

[15] *Id.* at 4.

[16] Emily M. Janoski-Haehlen, *The Courts Are All a 'Twitter': The Implications of Social Media Use in the Courts*, 46 Val. U. L. Rev. 43 (Fall 2011), *available at* http://scholar.valpo.edu/cgi/viewcontent.cgi?article=2222&context=vulr.

[17] Florida Supreme Court Committee on Standard Jury Instructions, Florida Standard Jury Instructions in Criminal Cases, Qualifications Instruction (2012), *available at* http://www.floridasupremecourt.org/jury_instructions/instructions.shtml.

[18] U.S. Judicial Conference Committee on Court Administration and Case Management, Proposed Model Jury Instructions; The Use of Electronic Technology to Conduct Research on or Communicate about a Case (June 2012), *available at* http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf.