

Technology

Social Media Opens a New Can of Legal Worms

Understand the Ethical and Practical Issues of What Clients Post Online Sooner Rather Than Later

BY DANIEL J. SIEGEL

Clients can have big mouths and can do some really dumb things. No matter how much you warn them, there are times when they say and do things that can hurt their cases. Similarly, attorneys can have big mouths, and can do things that not only jeopardize their clients' cases, but also their own licenses.

This isn't earth-shattering information. Yet, with the advent of social media – networking websites like Facebook, Google+, LinkedIn, YouTube and others, it seems that we are now dealing with a new level of stupidity.

Consider the plight of Matthew Murray, former president of the Virginia Trial Lawyers Association, who gave up his law license after it was revealed that he had instructed his client to remove photos of himself partying, à la Casey Anthony, from Facebook and then withheld them from a defense discovery request. Even worse, Murray ordered a paralegal to withhold the “stink-bomb” email that instructed his client to get rid of the pictures; when the paralegal refused to comply with the request, Murray withheld the email himself and later blamed the omission on another paralegal.

With the advent of social media, a panoply of issues has arisen, particularly in personal injury, family and criminal cases. Yet at its heart, the issue remains a classic one: the preservation of information of relevance to a legal matter.

So if the issue of social media/social networking – and how to advise clients with posting on these websites – has not arisen yet in your practice, rest assured it will. And when the issue rears its head, you need to understand the ethical and practical issues, and how to respond.

The reality is that clients love to post information – including photos, videos and other information – on social

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media websites, and some or all of the information may be inconsistent with the injuries they claim to have suffered in an accident, or their testimony during a divorce case, or the testimony in their criminal case.

Still don't believe me? Consider these tales from the Tennessee Bar Association:

- A Facebook page on which an individual explained to friends how she had an accident that “totaled” her car on the way home from a bar.

- A client who boasted on Facebook about going to Canada to see a rock concert and smoke dope. The client then wondered why he was facing a probation revocation and how the probation officer learned about this international travel and narcotics use.
- A recent murder case that resulted in an acquittal after the state's “eyewitness” posted on Facebook that she was not really at the crime scene but was just trying to help out her dead boyfriend by fingering his worst enemy.

There is nothing illegal about you, me, the government, or opposing counsel going to a publicly accessible web page on Facebook, or any other website, and reviewing the information posted there. Those pages are the equivalent of leaving open the doors and windows to a home, and then wondering why all of the neighbors knew what was happening inside. Even if your clients restrict who can see their postings, that does not mean that the information will remain private. Consequently, attorneys must provide appropriate advice and comply with the Rules of Professional Conduct.

First, remember that social networking websites are not “private.” Just read part 6 of the Facebook Privacy Policy, “How We Share Information,” and how the site responds to legal requests:

Facebook is about sharing information with others – friends



and people in your communities – while providing you with privacy settings that you can use to restrict other users from accessing some of your information. We share your information with third parties when we believe the sharing is permitted by you, reasonably necessary to offer our services, or when legally required to do so. For example: ...

To respond to legal requests and prevent harm. We may disclose information pursuant to subpoenas, court orders, or other requests (including criminal and civil matters) if we have a good faith belief that the response is required by law. This may include respecting requests from jurisdictions outside of the United States where we have a good faith belief that the response is required by law under the local laws in that jurisdiction, and are consistent with generally accepted international standards. We may also share information when we have a good faith belief it is necessary to prevent fraud or other illegal activity, to prevent imminent bodily harm, or to protect ourselves and you from people violating our Statement of Rights and Responsibilities. This may include sharing information with other companies, lawyers, courts or other government entities.

It is also becoming common for defense

App Tracks Criminal Records

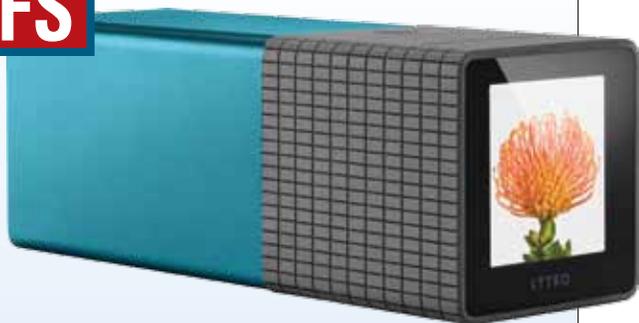
Matt Haindfield was thinking about his two young daughters when he developed the Docket in Your Pocket (DYP) app.

“I wanted to ensure that when they’re living away from home or are out on the dating scene, they’ll be better able to make informed decisions about the people they’ll encounter,” the Iowan says.

Initially, however, Haindfield’s motive was strictly professional. He needed quick, reliable information about a witness’s criminal history. So, he reached for his smartphone, accessed the Iowa Supreme Court’s website, and was frustrated to discover that the database was prohibitively difficult to navigate in a mobile environment. After researching the availability of other mobile-based options, and finding none, he opted to create his own. DYP is available via the Android Market and the Apple App Store.

Why would an Iowa lawyer develop an app for Pennsylvanians? “We wanted to launch our app in a state with a large percentage of smartphone users and where there was an existing database of criminal records,” Haindfield says. “Pennsylvania fit the bill.”

With a database of Pennsylvania’s 32.5 million criminal records going back to 2000, DYP can provide background information in a matter of seconds. It covers everything from parking tickets and speeding tickets to robberies, drug charges, assaults, rapes and murders. ■



Living Pictures Lets Users Explore Scenes

Lytro’s new light field camera is not your basic point-and-shoot model.

Lytro cameras feature a light field sensor that collects the color, intensity and direction of every light ray flowing into the camera, capturing a scene in four dimensions. To process this additional information, Lytro cameras contain a light field engine that allows camera owners to refocus pictures directly on the camera. When the Lytro’s living pictures are shared online, the light field engine travels with each picture so anyone can interact with them on nearly any device, including web browsers, mobile phones and tablets – without having to download special software.

The Lytro light field camera is accompanied by Lytro’s desktop application, a free software download that easily imports pictures from camera to computer. Currently available for Mac OS X, the desktop application lets people view, interact with, organize and share their light field pictures. Lytro pictures can then be uploaded to Lytro.com to be shared via Facebook, Twitter, blogs or as links in email messages. A Windows version of the software will be available in early 2012.

Once shared, Lytro’s living pictures allow viewers to live the moment with the photographer and explore a scene like never before. Viewers can continually interact with Lytro pictures – focusing them over and over – expanding the creative possibilities of each and every shot.

The pocket-sized camera, which offers a powerful 8x optical zoom and f/2 lens in an iconic design, is available in two models and three colors, starting at \$399. ■



counsel to inquire about a plaintiff's use of social media – and plaintiff's counsel can and should do the same for defendants. How counsel obtains that information, however, raises ethical issues.

The Philadelphia Bar Association Professional Guidance Committee addressed one aspect of the problem in Opinion 2009-2. In that inquiry, a witness revealed during a deposition that she has Facebook and MySpace accounts. The inquirer further learned that access to the pages was limited to persons who obtained the user's permission, but believed that the pages might contain information relevant to impeach the witness's trial testimony. As a result, counsel wanted to ask a third person, i.e., "someone whose name the witness will not recognize," to go to Facebook and MySpace and try to "friend" the witness in order to gain access to the information. The Committee ruled that such pretextual "friending" violated the Rules of Professional Conduct:

... the Committee believes that the proposed course of conduct contemplated by the inquirer would violate Rule 8.4(c) because the planned communication by the third party with the witness is deceptive. It omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony. ...

Although the Committee ruled that pretextual "friending" violates the Rules, the trend is similarly clear that this information is discoverable through subpoena and other traditional discovery requests. Thus, in *Romano v Steelcase Inc.*, the court outlined why such information is discoverable:

- Both Facebook and MySpace are social networking sites where people can share information about their personal lives, including posting photographs and sharing information about what they are doing or thinking.
- Facebook's policy states that "it helps you share information with your friends and people around you," and that "Facebook is about sharing information with others."

The Rules of Professional conduct make it clear that a lawyer may not advise, or allow, a client to delete or alter truthful information posted on a social networking site.

- Likewise, MySpace is a "social networking service that allows members to create unique personal profiles online in order to find and communicate with old and new friends" and is self-described as an "online community" where "you can share photos, journals and interests with your growing network of mutual friends," and as a "global lifestyle portal that reaches millions of people around the world."
- Both sites allow users to set privacy levels to control with whom they share their information.
- The information sought was both material and necessary to the defense of this action and/or could lead to admissible evidence.

Numerous other cases have now reached similar conclusions. So, as an attorney, what should you do once you ask and learn that your client is on Facebook? First, your obligation

to be candid to the tribunal is critical. Pa.R.P.C. 8.3 ("Candor Toward the Tribunal") provides that an attorney shall not knowingly make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. The Rule further prohibits attorneys from offering evidence that the lawyer knows to be false. Thus, if a lawyer knows about a social networking posting, he or she must be guided accordingly.

The Rules of Professional Conduct make it clear that a lawyer may not advise, or allow, a client to delete or alter truthful information posted on a social networking site. On the other hand, a lawyer should advise clients to, at a minimum, refrain from posting any information relevant to a case on any website, and to refrain, unless absolutely

essential, from using these websites until the case is concluded. Such advice may prevent a client from making disclosures that not only damage his or her case, but also may preclude opposing counsel from using any such postings to distract the judge or jury and damage the case permanently.

Clients talk too much, and clients do dumb things. As lawyers, we may not be able to prevent them from doing so, but at a minimum, we have an ethical obligation to explain the issues to them and to attempt to protect them from themselves. ■

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Amazon Kindle Fire



Nook Color

Both Amazon and Barnes and Noble have upgraded their presence in the **TABLET/E-READER MARKET** with their Android-powered offerings. Both feature 7-inch color touchscreens and Wi-Fi Internet access (no 3G connectivity is available). Both hope to undercut Apple's wildly popular iPad by coming in at less than \$300. You can check email, play games, watch movies, check the web and yes, read books.

FEATURES	AMAZON KINDLE FIRE	NOOK COLOR
DISPLAY	7" MULTI-TOUCH DISPLAY WITH IPS (IN-PLANE SWITCHING) TECHNOLOGY AND ANTI-REFLECTIVE TREATMENT, 1024 X 600 PIXEL RESOLUTION AT 169 PPI, 16 MILLION COLORS.	7" TOUCHSCREEN 1024 X 600 PIXEL RESOLUTION AT 169 PPI, 16 MILLION COLORS
OPERATING SYSTEM	CUSTOMIZED ANDROID 2.3	ANDROID 2.2
DIMENSIONS	7.5" X 4.7" X 0.45"	8.1" X 5" X 0.48"
WEIGHT	14.6 OUNCES	14.1 OUNCES
ON-DEVICE STORAGE	8GB INTERNAL (APPROXIMATELY 6GB AVAILABLE FOR USER CONTENT).	16 GB
BATTERY LIFE	8 HOURS	8 HOURS
WI-FI CONNECTIVITY	802.11B/G/N	802.11B/G/N
USB PORT	USB 2.0	USB 2.0 HIGH SPEED
PRICE	\$199	\$249