

# How Social Media Are Transforming Litigation

ANDY RADHAKANT AND MATTHEW DISKIN

The authors are with Heenan Blaikie, Toronto.

Few transformations have affected litigation and litigators as swiftly and as profoundly as social media. In five short years, we've seen a sea change in the way people live, connect, and do business across the Internet. "Web 2.0," a term referring to Internet use that goes beyond merely retrieving information from websites, includes entirely new ways to create content and share information through online social networking. In addition to pervading most of our lives, the social media phenomenon is having a profound effect on every stage of litigation and in virtually every area of practice.

Social media have become a big part of the way litigators do business, and they pose problems in the litigation process from the first time lawyers meet with their clients until after judgment is rendered. They affect criminal, civil, and family law litigators alike. They are brimming with potential and fraught with danger for both the unwary lawyer and client.

We read about a New England Patriots cheerleader fired for being seen in a Facebook photo posing with an unconscious man covered in offensive graffiti, a Canadian sportscaster whose contract was terminated after he tweeted his opposition to changing the definition of marriage, and British flight attendants who were sacked for posting unflattering comments about passengers on their blog. We have heard about employers demanding that interviewees surrender their Facebook login names and passwords—and their private lives. The reality of being fired for something you've posted,

blogged, or tweeted has entered the popular consciousness to such an extent that there's now a word for it: getting "dooced." We have read news reports about rights holders, especially trademark owners, whose policing and enforcement activities have backfired badly when their tactics were picked up on social media and went viral.

Social media can offer both powerful and risky tools for litigators. We provide some vignettes based on our experience, the news, and reported cases that we hope will give litigators some guidance as they try to navigate the uncharted and potentially treacherous waters that social media present.

The rise of Web 2.0 saw the explosion of social networking via Facebook, Twitter, YouTube, MySpace, LinkedIn, Pinterest, Google+, Tumblr, and other platforms. Facebook, for example, reached one billion users in 2012. Our profession, many of whose members were just becoming familiar with e-discovery and metadata, now faces what we call "Litigation 2.0." Before we explore how social media can play a role during trial, we ask: What role do social media play even before there is litigation?

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## Troves of Personal Information

Many social media users publish vast amounts of personal information (often apparently without much reflection beforehand). As a result, online profiles often provide treasure troves





of information about parties, lawyers, witnesses, experts, and even judges. The openness of social media—and users’ willingness to tweet and post things they would never dream of saying in a letter or an email—means that social networks offer rich repositories of potential pre-litigation intelligence and fodder for cross-examination.

*Marcus and his former common-law spouse, Maria, were locked in a custody battle over their son, Mitchell. The key issue in the litigation was whether it is in Mitchell’s best interests to live with his mother or father. Although Maria was well advised before the start of litigation that she should check her privacy settings, she made a blunder in reviewing her list of contacts and failed to restrict access by Marcus’s sister, Agnes, to her Facebook page. Mistakenly believing that she had secured her social media presence, Maria was less guarded with her posts than she should have been. Upon being retained, Marcus’s attorney learned that Agnes still had access to Maria’s Facebook page and asked her to print all of Maria’s online posts since her split with Marcus, which he then*

*used to demonstrate that Maria “hated kids,” was actively using illegal drugs, had been kicked out of a nightclub for her intoxicated behavior, and was planning a move out of state in the near future that she had not disclosed to Marcus or the court. Marcus succeeded at trial and won full custody of Mitchell.*

We believe that running a social media search of clients, opponents, and witnesses is now part of the minimum level of due diligence expected of a competent litigator. Indeed, some courts have questioned whether lawyers who have not run Google searches on a defendant but are asserting that the person cannot be found have in fact made reasonable efforts to locate the defendant. In our view, it’s just a matter of time before malpractice claims begin to surface based on a failure to use information publicly available on the Internet.

*Attorney George is a senior and highly respected member of the defense bar and has been in practice for more than 40 years. He was retained by one of his large insurance clients to defend an action brought by Rhonda, who alleged a series of injuries and*



substantial damages from what appeared to be a minor fender bender. The action followed the normal course, and despite George's skillful advocacy, the jury delivered a substantial verdict in favor of Rhonda, based on conflicting expert reports. Of course, George had warned his client, a sophisticated litigant, of this possible outcome. However, in the course of the insurer's review of the file after the verdict, a young insurance adjuster decided to look into Rhonda's Internet presence. He discovered that Rhonda had posted a number of photos of herself on MySpace making it clear that she was in far better condition than she alleged at trial. George was removed from the insurance company's list of preferred counsel and is now facing a possible malpractice claim for his failure to perform an adequate investigation of Rhonda.

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## Ethical Minefields

Social media sites are ethical minefields that many lawyers are only now beginning to grapple with. We are probably on safe ground when we access information that users have knowingly made available to the public. Unsurprisingly, courts have accepted that there is no reasonable expectation of privacy in that kind of information. However, it is ethically problematic for lawyers to "friend" people just to get access to information in their social media profiles.

Attorney David represented the famous musician Baby La-La in a case about alleged cyber-defamation against her former musical collaborator and producer, Dr. Mae. Before the litigation started but after a flurry of correspondence by both parties' lawyers, David created a false Facebook identity to "friend" Dr. Mae on Facebook and follow his Facebook posts. Although this effort bore some fruit and additional defamatory comments about Baby La-La were discovered, after the trial Dr. Mae contacted the state bar and filed a professional misconduct complaint against David. He alleged David had made false statements, communicated with a represented person, misrepresented his role in the litigation process, and engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation. The complaint was upheld, and David's law license was suspended for two months. During that time, he defaulted on his mortgage, became depressed, and developed a drinking problem.

We have a duty to warn our own clients about the risks of social media. Clients can jeopardize privilege and, in some cases, have been held to have waived it by tweeting, blogging, or posting information about their cases. Some lawyers in areas like family, employment, criminal, and personal injury litigation have made it part of their client intake practice to sit down with each new client and conduct a social media audit that covers explaining the importance of maintaining the lawyer-client privilege

and changing all passwords, advising against certain types of new online activity (especially if an employee-client is using an employer's network or device to do it), and giving advice about whether any past activity can be safely deleted. Giving advice on the removal of information carries with it the very real risk of a spoliation allegation.

Attorney Myron represented a young widow, Wendy, in a wrongful death lawsuit brought against her late husband's employer, a municipal waste disposal company. In a tragic accident, Wendy's husband, Andrew, was fatally injured by an improperly maintained hydraulic lift on his garbage truck. Wendy retained Myron to represent her in court. During their preparations for discovery, Myron asked Wendy if she had any social media pages. When Myron reviewed the pages, he discovered that a number of posts did not fit with the grieving widow image. For example, within a week of Andrew's death, Wendy changed her status to "single" and was tagged in various photographs showing her to be attending wild parties. Myron did not want the jury to see this side of his client, so he directed Wendy to "tidy up" her social media accounts to remove these types of posts. Unfortunately for Wendy, defense counsel was able to find cached versions of her posts containing some, but not all, of the materials that Myron wanted removed. Although Wendy won a verdict at trial, the judge reduced it substantially because of Wendy's and Myron's spoliation of evidence. Wendy has now commenced litigation against Myron claiming damages equal to the reduction in the verdict.

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## Perils of "Friending" Judges

Lawyers "friending" judges is an issue on which legal regulators are all over the map. Some jurisdictions see no particular problem with this, provided the rules of professional conduct are otherwise observed—notably the rules that forbid intemperate criticism of the judiciary and undignified communications in general. Other jurisdictions take a stricter view, holding that a social networking relationship between a judge and a lawyer is impermissible because it conveys the impression that a lawyer in that position has a special ability to influence the judge. Regardless of your own jurisdiction's view, it is worth carefully considering whether you would ever want a judge to be able to see photos of your anniversary dinner or your sister's bachelorette party. It is possible to use privacy settings to prevent this from happening, but the available settings change frequently and many users are unfamiliar with them. Best not to have anything out there that can hurt you professionally.

Even though Marta practices in a state where judges are allowed to "friend" lawyers, she was a bit uncomfortable when Judge

Jennifer sent her a friend request. Marta didn't want to give Judge Jennifer access to her personal life; however, she also did not want to risk offending a judge, so she accepted. Then she appeared before Judge Jennifer on a motion, and she needed an adjournment because of a death in the family. Judge Jennifer granted the adjournment. Later, Judge Jennifer mentions that she saw Marta, obviously intoxicated, tagged in a photo taken on the evening of the funeral, at what appeared to be a party. Marta explains that in her culture, family members are expected to drink and put on a happy face at the post-funeral wake. However, Judge Jennifer, herself a teetotaler, is left feeling that Marta lied to her and that she lives an intemperate lifestyle.

Even if you are aware of the potential problems of friending judges and witnesses, information you post to your social networking profiles could be accessible to members of the judiciary or others involved in the justice system. This engages other ethical rules, including those that require us to treat tribunals with candor.

On the eve of a two-week trial, attorney Steven won tickets to an all-inclusive resort in the Bahamas that had to be redeemed during the second week of trial. In desperate need of a vacation, Steven asked the judge for a continuance, advising that his elderly sister in Phoenix had fallen gravely ill. The court granted the continuance and the trial was rescheduled. Steven was elated and enjoyed a relaxing vacation sipping cold drinks on the beach. Being the type-A workaholic that he is, Steven decided to post a few legal news items on his blog and his social media accounts to help maintain his professional profile and online presence. Upon his return, he was summoned to the judge's office and sternly rebuked for lying about his sister's illness. Apparently, opposing counsel follows Steven's Twitter page. When he saw the geotags on Steven's posts identifying that he was on the beach in the Bahamas, he reported Steven to the judge. Steven's credibility before the court and professional reputation have been compromised.

## The Role of Social Media During Litigation

Social media are fundamentally tools for communication. In the world of Litigation 2.0, even the mundane task of service of process has social media dimensions. Information from social media can assist lawyers in tracking down individuals to be served. Orders for substituted service have long been available where counsel satisfies the court that the traditional means of service cannot be used or have failed. Courts in the United Kingdom, Canada, and Australia have now validated service of originating documents through Facebook and Twitter. However, a New York court recently rejected service through social media, in part because of the risk that profiles can be faked. This

is likely to be an area of significant development in the very near future. The key issue will be satisfying a court that service through these electronic means will provide effective notice to the party being served.

Paul is a washed-up musician whose 1970s band, the Gutter Cats, was moderately successful before he faded into obscurity. Paul was introduced to television producer Michael and convinced him to fund a 12-episode television show called *The Rebound* featuring Paul and his former band mates as they interview celebrity musicians from the 1970s. Unfortunately, however, Paul simply pocketed the \$150,000 advance for making the show and now cannot be found despite Michael's best efforts. All investigations of Paul come up short; however, Michael's tech-savvy attorney has discovered Paul's Twitter account. With information gleaned in real time from Twitter, Michael's lawyer was able to serve Paul 20 minutes after he raved about the Kobe beef and lobster tacos he was having for lunch—a quick Google search revealed only one restaurant in town serving the dish.

## Social media are brimming with potential and fraught with danger.

Although the utility of social media as a source of information is fairly obvious, lawyers must remember that the rules of evidence still apply. Litigators are all familiar with the routine for proving documents at trial, but social media raise certain evidentiary difficulties. Valuable and relevant evidence may be unusable if counsel cannot meet the requisite foundational elements of authentication. The rules of evidence give little guidance on how such information should be tendered. It is important for counsel to consider carefully how social media evidence will be proved. Is it sufficient to tender such evidence through an individual who accessed the information? It is necessary for the service provider to become involved? Is the identity of the account holder admitted? These issues are not yet settled, and litigators ignore them at their peril. For a recent helpful consideration of the evidentiary issues posed by social media, see B. M. Democko, "Social Media and the Rules on Authentication," 43 *U. Tol. L. Rev.* 367 (2012), and Josh Gilliland, *The Admissibility of Social Media Evidence*, LITIGATION, Vol. 39, No. 1 (Winter 2013), at 20.

Defense attorney Annette has been preparing for her big cross-examination for weeks. Today is her shot at the prosecution's main witness, Johnny Muscles, in the gang-related murder trial in which



she is representing the defendant, Frankie Dillon. Annette's careful investigations have identified a Twitter account under the name @imjohnnymuscles52. Annette is convinced that this is Johnny Muscles's account based on the posts that describe his date of birth, his love of a certain sushi restaurant in his gang's territory, and a posted picture of his motorbike. Given @imjohnnymuscles52's tweets about "Frankie taking the fall," Annette is also convinced that her client is innocent. During her cross-examination of Johnny during the trial, with great drama and panache, Annette confronts him with the tweets, but Johnny denies even having a Twitter account. The prosecutor immediately calls for a voir dire and moves to have the tweets excluded. The judge concludes that anybody could have created the Twitter account and, given the prejudicial nature of the tweets in question, grants the motion. Annette's cross-examination falls flat on its face, and her client is convicted.

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## Jurors Online

Social media have been a significant problem in relation to juries. Although they provide attorneys with potentially valuable information about jurors, they are open to abuse in the form of improper contact between lawyers and juries. For example, in New York it is permissible to obtain public information about a juror or potential juror, but it is not permissible to communicate with the juror, including by the mere act of friending the individual. At the same time, judges routinely caution jurors about the importance of their not discussing the case with anybody, including on social media. But jurors routinely disobey the court's directions, significantly increasing the risk of mistrials and undermining the public's faith in jury trials.

*Juror Allison is 20 years old, a literature student, and a social media addict. Although she was initially excited to serve as a juror, it is now the third week of a high-stakes civil fraud trial and Allison is bored to tears. Sitting in the second row of the jury box, Allison has been able to surreptitiously use her smartphone throughout the trial. Allison heard and understood the numerous warnings by the trial judge about not discussing the case. She decided not to tweet anything about the case; instead, she tweets about the experience of being a juror, from the lack of air-conditioning in the courtroom to the salty food in the courthouse cafeteria. Her humorous posts about the trial have been picked up by news media interested in the outcome of the trial, leading to daily speculation about the jurors' view of the case based on Allison's posts. At the conclusion of trial, the jury grants a massive judgment in favor of the plaintiffs; however, the defendants now move for a mistrial, putting at risk the plaintiffs' hard-won victory and hundreds of thousands of dollars of legal fees that may have to be incurred again because of Allison's social media addiction.*

We have all heard the stories of plaintiffs in personal injury cases being confronted with their social media posts establishing that they are either making up or embellishing the degree of their injuries. Likewise in defamation disputes, counsel routinely issue litigation hold letters demanding that alleged defamers preserve social media evidence. These are obvious examples of how social media can play a role in lawsuits. But social media can have great impact in a wide range of disputes. Lawyers will not always know what they are looking for when they engage in the hunt for publicly available electronic evidence. Keeping an open mind can create significant opportunities to develop leverage in surprising ways.

*Major soft drink manufacturer Megasoda recently released its latest and greatest product, "Salty Watermelon Splash," into the North American market. Small-time competitor Littlefizz decided to get on the bandwagon and release its own version, called Saltymelon Spritz, selling for about half the price of Megasoda's product. Megasoda's infuriated president demanded that his lawyers force Littlefizz to change the name of their product, arguing it infringes on Megasoda's intellectual property rights. In the course of litigation, Megasoda's lawyers discovered that Littlefizz has a social media page dedicated to its new product, where consumers can post their comments on the litigation and the products. In a careful review of publicly accessible information, it was discovered that Littlefizz's vice president of marketing is married to a woman named Sandra Sugar. Further, it appeared that Sugar had been making false and derogatory comments on Littlefizz's social media page about Salty Watermelon Splash. During a cross-examination of the Littlefizz vice president, Megasoda's lawyer obtained the admission that it was the vice president himself, not his wife, who had made the posts. Megasoda immediately amended its claim to include a new claim for trade libel and significant additional damages. Although the infringement allegation was of questionable merit, Littlefizz quickly agreed to change the name of its product in exchange for a release of the trade libel claims.*

Having navigated the shoals of social media in litigation, you may be tempted to leverage your newfound expertise to build your own profile and practice. Several potential traps await the unwary lawyer.

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## Confidentiality Rules

Some social media platforms invite new users to grant the program access to their contacts lists to "friend" or otherwise connect with others. In jurisdictions where the identity of your clients is itself confidential information, you may unwittingly violate confidentiality rules if you permit a social networking application to mine and potentially publish your list of contacts,

which could include clients, opponents, witnesses, and suppliers. Running afoul of confidentiality rules can also happen in more subtle ways.

*Litigator Leonard is just starting his career and is very excited about landing Cracker Corporation as a client and learning that Cracker wants to retain him to sue a competitor, Biscuits Inc., for patent infringement and to obtain an urgent injunction. Leonard is an avid user of social media. He tweets about how excited he is that a new client wants to meet him to talk about an injunction. He is careful not to include any information that could identify the client. Leonard then takes his client for lunch and checks in on Foursquare at the restaurant. One of Leonard's social media followers is his former law school classmate, Janine. Leonard is not aware that Janine represents Biscuits Inc. She knows that the restaurant where Leonard has just checked in is a regular lunch-time hangout for Cracker Corporation's executives. She gives her client the heads-up that Cracker may be about to pounce, and they immediately begin preparing to respond to the injunction. When Leonard's motion materials are served on short notice, Biscuits Inc. has already done much of the work needed to respond and has retained the foremost expert in the industry to defend against the brief from Cracker Co. Leonard loses the motion and the client, and has no idea how Biscuits Inc. was able to mount such an effective response to his surprise injunction.*

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## The borderless nature of social media leads to additional risks.

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Facebook allows users to “like” groups, companies, and other entities. LinkedIn allows users to recommend each other and to add areas of expertise to their profiles. Be careful: If your jurisdiction forbids client testimonials, describing yourself as a specialist or an expert, or making assertions that cannot be backed up by objective data, you could get into trouble unless your recommendations are written by people who keep an eye on your local ethics rules.

The borderless nature of social media also leads to the risk that you could be accused of holding yourself out as qualified to practice in jurisdictions where you are not. (A disclaimer could help but would be difficult to include in a tweet of 140 characters or less.) Even if you are licensed in every jurisdiction to which a particular communication is connected, it may be unclear which jurisdiction's rules apply.

Because the point of social networking is networking, lawyers can be tempted to answer legal questions posed by other members of the network. There is a tension here between our ethical rules and the fact that your standing in the world of social media depends on frequent, open, and boundary-free communication. A real danger and irony is present here, and not just for lawyers. Many social networkers feel freed from the ordinary rules that would govern what they might write in a letter or an email, perhaps because of the intense pressure to give instantaneous responses and the fact that typing something into a device and pressing Send seems somehow less real. If anything, users should exercise greater restraint because tweets and blog posts cannot be taken back once posted to cyberspace. (For example, an archive of public Twitter tweets is now housed at the Library of Congress.)

The danger of creating a lawyer-client relationship with someone whom you never intended to make your client is obvious. So is the danger that the interests of this new “client” could conflict with those of a current client, especially when there is no quick and simple way to determine the true identity of a social media user. Although the canons of ethics usually allow or even encourage us to provide general legal information relating to hypothetical situations, this is not much comfort—the line between general legal information and specific legal advice is notoriously blurry. Furthermore, the tendency of many social media users to overshare by recirculating messages increases the risk that you could be exposed to contaminating information that could prevent you and your firm from acting against the party to whom the information relates.

*Derek posts a status update in which he voices an opinion about which way the Supreme Court decision coming down tomorrow should go. Derek knows that his client Miguel, in-house counsel at an insurance company, won't like his opinion, because it runs squarely against the interests of insurers, but Derek avoided friending Miguel for just that reason, and Derek's profile is not public. However, Derek has forgotten that while his photo albums and contact information are restricted to friends only, his status updates are available to friends of friends. Derek is unaware that Miguel is a friend of a friend and will be able to see his status update.*

Every development in communication, from telephones to fax machines to email, has presented litigators with new challenges and new opportunities as we follow and guide the evolution of the law. In time, just as we did with phones, faxes, and email, we will no doubt integrate social networking into our practices as we adapt to the world of Litigation 2.0 and as we prepare for the challenges posed by the next version. We ain't seen nothin' yet. ■