



Social media trap for you, and for clients and witnesses.

Many litigation attorneys still do not know about social media tools (and why they need to know about them). If your client, your witness, or the adverse witness has used a social media tool, then there is personal information there about them. And the information may be disastrous to the credibility of witnesses.

Social media sites are on the Internet and mobile phones as tools for individuals to share information about themselves. They are cheap or free to the user. You have undoubtedly heard of some social media tools like MySpace, Facebook, Twitter, YouTube, and blogs. You may not know of Friendfeed or Avatars United or Second Life or Flickr, because the number of social media sites grows constantly. There are now more than 200 social networking sites on the Internet,¹ and when you read this there will be more.

Criminal prosecuting attorneys have been quicker than civil attorneys to use social media for investigations and evidence. E.g., during a California trial for vehicular DUI manslaughter, in the sentencing portion of the case, the district attorney presented pictures of defendant's Binkerd's partying and drinking, taken from Binkerd's MySpace page, to show the lack of remorse Binkerd felt. Binkerd's attorney said his client's sentence of five plus years of prison came partly as a result of the client's MySpace page.²

However, civil attorneys are starting to make use of comments parties or witnesses have posted on the internet, whether on personal or company social media sites. Indeed, it is likely that soon it will be considered lack of due diligence to have failed to run an internet search on every testifying witness.

The first thing you tell your client and principal witnesses is to shut down their Facebook page.

It's true that most of those posting in social media are less than 50 years of age. However, if you think the use of social media is limited to teenagers, think again. For example that Executive VP you are deposing tomorrow may have been looking for a job

¹ www.InfoJuice.com. Viewed January 19, 2008.

² Daily Nexus, Santa Barbara, CA, issue of February 28, 2007, available at <http://www.dailynexus.com/article.php?a=13440>, viewed 20Jan09.

via LinkedIn. LinkedIn is used particularly by job seekers and claims to have more than 20 million registered users from 150 different industries. Even the Texas State Bar Association has a social media network. They call it an “affinity circle” and it is named *InCircle*.³ The Texas Bar Association tells lawyers it is good to “Tell members about your career, hobbies, family.” All sorts of professional and business associations are now running social media networks. Your accountant witness may have posted pictures in an accountant’s social media site touting her tax-avoidance seminar held in the Turks and Caicos Islands.

Even companies now are routinely using social media sites like Twitter, Facebook, and company blogs to promote their business or communicate with customers or employees. The management of those company social media sites is often assigned to a junior employee who allows statements that can haunt the company during subsequent litigation. However, even corporate executives are using Twitter and personal blogs as part of the communications they want to make within the company. Jonathan Schwartz, the CEO of Sun Microsystems encourages his employees to blog. Some 3,000 of them--10% of the company's payroll--do. Schwartz has led by example, integrating blogging into his leadership life. In a 2005 opinion piece in the Harvard Business Review, titled "If You Want to Lead, Blog," Schwarz wrote: "For executives, having a [personal] blog [to communicate within the company] is not going to be a matter of choice, any more than using e-mail is today."

What the explosion of social media tools means to you as an attorney:

1. Ask:

your client,
your witnesses,
every prospective juror,
your adversary party, and
everyone you depose,

if they ever have posted something about themselves on a page on the internet. Specifically ask about MySpace, Facebook, Twitter, YouTube, and "blogging" (because they are the most popular).

#2. The first thing you tell your client and principal witnesses is to shut down their Facebook page, don't blog, don't Twitter, and don't post anything on YouTube. Or more exactly but abstractly, shut down all social media pages they have, don't post their opinions on the internet, and don't post anything about themselves on the internet.

#3. Run an internet search on the name of every witness and every personal

³ <https://texasbar.affinitycircles.com>.

party. That will show you social media comment that can be readily accessed by the public (hence by you and every other attorney in the case). You do not want you and your witnesses to be surprised at the trial — and you do want to surprise the other side! E.g., you may not want to use as a witness that charming young woman (who you find has chosen to present herself on the internet as interested in sexual experiments) or that expert witness (who you find has been lamenting his lack of ability to find a paying job for the last three years). At the least, you can be warned to seek protection by a motion *in limine* to prohibit reference to your witness's social media comments.

4. Ask for permission to view items not available for anyone on the internet. Attorneys and their investigators cannot lie to secure information. Hence, you cannot pretend to be someone else other than yourself when the witness's (or prospective juror's) social media site requires you to log in or identify yourself to secure access to the social media site. The best place to ask for permission is at a deposition, where the witness must respond quickly and feels that saying "no" would make his/her testimony at the deposition seem suspicious.

5. Check what jurors post during the trial. If you leave on the jury someone who has a social network page, check what they post during the trial! They may not only be writing about what happens, but also prejudging the case and telling the world how they intend to vote!

6. Use a standard "building block" of questioning about social media in discovery depositions. A suggestion follows on the next page of this text.

Form: Social Media Building Block in Depositions.

In most deposition question outlines you have a section in which you inquire about the personal identity or characteristics of the deponent. Consider adding into that section a standard block of questions about the deponent's use of social media. That small block of questions can be like the following form set. The initial group of questions (about a company internet site to exchange information) is at the top of the form block of questions to signal to the witness that having a social media site is socially acceptable. It may easily be omitted if not applicable, as in a domestic relations dispute.

Does your company have an internet site which you can use to exchange information with others for company purposes?

What is the name of the site, and how do you use it?

What is the nature of the items you put on the company internet site?

When did you put the items on the internet?

What name do you use for yourself when you post something on the company site?

If we wanted to see the information you put on the company site, what would be the best way to see it?

Do I have your permission, without a court order, to see what you have posted there?

Do you have an internet page on Facebook or MySpace, or some other internet site, where you post personal information about yourself?

What is the name of the site?

Have you had other internet sites or pages in the past?

When did you have the page?

What name do you use for yourself when you post something on the site?

If we wanted to see the information you put on the internet, what would be the best way to find it?

Do I have your permission, without a court order, to see what you have posted there?

Have you ever posted something on YouTube, or some other internet site, where you post items for amusement or education of others?

What was the name of the site?

When was the subject of the items you put on the internet?

When did you put the items on the internet?

What name was used for a title or to identify the items you posted?

If we wanted to see the information you put on the internet, what would be the best way to find it?

Do I have your permission, without a court order, to see what you have posted there?

Have you ever posted comments in any internet blog?

Was it a personal blog of yourself, or your company's blog, or some other blog?

What was the name of the blog?

When was the subject of the items you put on the internet?

When did you do blogging?

What name did you use in posting your comments on blogs?

If we wanted to see the information you put on the internet for anyone to see, what would be the best way to find it?

Do I have your permission, without a court order, to see what you have posted there?

Have you ever used internet message sites or internet document exchange sites like WindowsLive or GoogleGroups or something like that?

What was the name of the site?

When was the subject of the items you put on the internet?

When did you put the items on the internet?

What name did you use for yourself when you use the site?

If we wanted to see the information you put on the internet, what would be the best way to find it?

Do I have your permission, without a court order, to see what you have posted there?