

# facebook *faux pas*: Is social media sabotaging your client's case?

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## Introduction

What started out as a seemingly harmless assortment of social networking tools is quickly becoming an arsenal of litigation weapons. It is no surprise that Facebook is now the most-visited website on the Internet<sup>1</sup> or that nearly 95 million Americans, roughly one-third of the nation's population, use Facebook, along with other social networking websites, to connect with others socially and professionally.<sup>2</sup> Given the ease of access social networking websites provide to an individual's personal information, photographs and videos, attorneys are using these websites to informally and inexpensively obtain background information on prospective clients, jurors, potential witnesses and adverse parties.<sup>3</sup>

For example, in the murder trial of Casey Anthony, in order to show Anthony's state of mind at the time of her daughter's disappearance, prosecutors offered and the court admitted photographs from Anthony's Photobucket account depicting her dancing at a nightclub while her daughter was missing.<sup>4</sup>

In civil cases, in an effort to defeat plaintiffs' "loss of enjoyment of life" claims, defense attorneys have presented as evidence Facebook photographs portraying the plaintiffs as happily engaging in social activities.<sup>5</sup> Moreover, appeals courts in several states have reversed jury verdicts due to the use of social media by jurors during trial.<sup>6</sup> Given the potential dangers posed by a client's social media content and the evidentiary concerns implicated by the deletion of such information, attorneys must take caution when advising clients regarding their use of social networking websites.

## Discoverability of social networking website content

Courts that have considered whether social networking websites are subject to discovery have determined that social media content is always discoverable on some level as long as the content is relevant and not privileged.<sup>7</sup> Social media content is considered within the scope of "electronically stored information" in accordance with Rule 34 of the Federal Rules of Civil Procedure.<sup>8</sup> Louisiana Code of Civil Procedure article 1461 also provides for the discovery of electronically stored information, such as social networking websites. However, while some courts have required a party to turn over all social media information, including logins and passwords,<sup>9</sup> others have

permitted discovery of social networking websites only if the discovery request is narrowly tailored.<sup>10</sup> Furthermore, some cases have resulted in the judge "friending" the litigant to access the litigant's social media profile for the purpose of conducting an in-camera review.<sup>11</sup> Nevertheless, although discovery of social media is subject to the same formal requirements as are other forms of potential evidence, content to be discovered on a social networking website is also more likely to be available without the need for formal discovery.<sup>12</sup>

## Private profiles may still be discoverable

While social networking websites usually allow a user to change the privacy settings so that only certain persons can view the user's information, it is questionable whether such safeguards provide the user with a reasonable expectation of privacy.<sup>13</sup> In fact, social networking websites, including Facebook, typically contain a disclaimer that the site cannot guarantee that the user's information posted on the site will not become publically available.<sup>14</sup> Thus, even if a user changes the privacy settings to deny public access to the user's social media content, a court may still order the production of the user's "private" content in the course of formal discovery.<sup>15</sup>

## Louisiana courts

Within the past two years, Louisiana courts have indicated that the use of social media by a party to the litigation has factored into the courts' decisions. In an unpublished opinion<sup>16</sup> dated Feb. 6, 2013, the Louisiana Court of Appeal for the Third Circuit was faced with whether to grant a motion for new trial after the defendant alleged that the plaintiffs had "impermissible contact and/or communication" with a member of the jury on Facebook during the trial. In another matter,<sup>17</sup> the Louisiana Court of Appeal for the First Circuit upheld the trial court's awarding of joint custody of a child and the mother's designation as the child's domiciliary parent (against the father's wishes) after the court considered the evidence presented regarding the father's mental health. Specifically, the court noted that "[the father's] 'MySpace' page contained numerous quotations from serial killers, and he utilized 'Twist3d.one' or 'twist3d1' (twisted one) for his usernames, email address, and logo."<sup>18</sup> Finally, in another unpublished opinion<sup>19</sup> dated Sept. 14, 2011, the

First Circuit upheld the trial court's denial of damages for physical disability and loss of enjoyment of life claimed by the plaintiffs. The court noted that one plaintiff's Facebook page reflected that she regularly engaged in challenging exercise programs, and the other plaintiff's Facebook page contained reports of his various athletic endeavors, including participating in a softball tournament the month before trial.<sup>20</sup>

### Advising your clients

In light of the increasing use of social networking website content as evidence, an attorney may be inclined to advise his client to delete the client's social media profile for fear that it may be used against the client in the course of litigation. However, Rule 3.4(a) of the Louisiana Rules of Professional Conduct prohibits a lawyer from unlawfully altering or destroying evidence and assisting others in doing the same. Therefore, attorneys are required to preserve electronically stored information, including social networking website profiles, if the profile contains content relevant to the lawsuit.<sup>21</sup> By instructing his client to delete the client's profile in part or in its entirety, a lawyer subjects himself to a charge of spoliation of evidence, which could result in sanctions.<sup>22</sup> In addition, the judge or jury may presume that the spoiled evidence would have been unfavorable to the client because the client was the one who destroyed it.<sup>23</sup> Alternatively, an attorney could instruct the client to set the client's profile as "private" using the website's privacy settings, which would preserve the evidence without the content being easily accessible by the public.<sup>24</sup> Of course, as explained above, the opposing counsel could still request access to the private content through formal discovery.<sup>25</sup>

On the flip side, an attorney wishing to use an opposing party's social media profile as evidence would be wise to send opposing counsel a "preservation letter," which lawyers use for other forms of electronic discovery preservation.<sup>26</sup> Although the letter will not impose a legal obligation on opposing counsel, it may be sufficient to place the opposing party on notice and suggest that any deletion or destruction of the social media content after receipt of the letter will be considered intentional spoliation of the evidence.<sup>27</sup>

### Conclusion

The ever-increasing utilization of social networking websites requires attorneys to monitor their clients' social media profile content and exercise caution in advising their clients to take measures to safeguard their social media content from disclosure. An attorney can spend years exerting significant time, effort and expenses preparing a case only to have the matter sabotaged by incriminating status updates, photographs and videos uploaded by his

client onto the client's social media profile. However, an attorney may be accused of spoliation of evidence if he advises his client to remove content from the client's social media profile. Therefore, attorneys must continue to tread lightly and very carefully into the electronically-evolving 21st century. ■

<sup>1</sup>Cassandra Burke Robertson, *The Facebook Disruption: How Social Media May Transform Civil Litigation and Facilitate Access to Justice*, 65 Ark. L. Rev. 75, 80 (2012) (footnote omitted).

<sup>2</sup>*Id.*

<sup>3</sup>Michelle D. Craig, *Did You Twitter My Facebook Wall? Social Networking, Privacy and Employment Law Issues*, 58 La. B.J. 26, 28 (2010).

<sup>4</sup>Kathryn R. Brown, *The Risks of Taking Facebook at Face Value: Why the Psychology of Social Networking Should Influence the Evidentiary Relevance of Facebook Photographs*, 14 Vand. J. Ent. & Tech. L. 357, 360 (2012) (footnote omitted).

<sup>5</sup>*Id.*

<sup>6</sup>Randy L. Dryer, *Advising Your Clients (and You!) in the New World of Social Media: What Every Lawyer Should Know About Twitter, Facebook, Youtube, & Wikis*, Utah B.J., May/June 2010, at 16, 20 (citation omitted).

<sup>7</sup>See *supra* note 4 at 368.

<sup>8</sup>See *supra* note 6 at 16, 19-20.

<sup>9</sup>Kelly Ann Bub, *Privacy's Role in the Discovery of Social Networking Site Information*, 64 SMU L. Rev. 1433, 1442 (2011) (footnotes omitted).

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>See *supra* note 1 at 81.

<sup>13</sup>See *supra* note 9 at 1436.

<sup>14</sup>*Id.*

<sup>15</sup>Kathleen Elliott Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just "Face" It*, 41 U. Mem. L. Rev. 355, 374-75 (2010) (footnote omitted).

<sup>16</sup>*Breaux v. La. Patient's Comp. Fund*, 12-0878, p.2, 3 (La. App. 3 Cir. 2/6/13), 2013 WL 456532 (unpublished).

<sup>17</sup>*Olivier v. Olivier*, 11-0579, p. 15 (La. App. 1 Cir. 11/9/11), 81 So.3d 22, 31-32.

<sup>18</sup>*Id.*

<sup>19</sup>*Boudwin v. Gen. Ins. Co. of Am.*, 11-0270, p.3 (La. App. 1 Cir. 9/14/11), 2011 WL 4433578 (unpublished).

<sup>20</sup>*Id.*

<sup>21</sup>Margaret M. DiBianca, *Ethical Risks Arising from Lawyers' Use of (and Refusal to Use) Social Media*, 12 Del. L. Rev. 179, 184 (2011) (footnote omitted).

<sup>22</sup>*Id.* at 185.

<sup>23</sup>Kathrine Minotti, *The Advent of Digital Diaries: Implications of Social Networking Web Sites for the Legal Profession*, 60 S.C. L. Rev. 1057, 1064 (2009).

<sup>24</sup>See *supra* note 21 at 185.

<sup>25</sup>See *supra* note 23.

<sup>26</sup>*Id.* at 1064-65.

<sup>27</sup>*Id.* at 1065.

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