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COMMENTARY

Social media: A hidden force at jury trials

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Legal consultant Christine Martin of DecisionQuest discusses why attorneys must be cognizant of the important role that social media has on juries, from voir dire to deliberations to verdicts.

By the end of 2010 there will be more than 2 billion people online.[1] More than 77 percent of Americans are online.[2] Almost nine in 10 Americans (87 percent) who are online use social media.[3] This means that most jury-eligible Americans are Internet and social media users.

It can been argued that the entire contemporary Internet experience is "social" because of the new hyper-connectivity and increased practices of sharing our lives, opinions and interests through a plethora of online media and social networks.

For the purposes of this discussion social media include social networking with friends or professional contacts via Facebook, Twitter, MySpace or LinkedIn.

It also encompasses any other citizen-generated content in the form of commentary or posts on news websites, readers' opinions on news stories, consumer reviews and ratings, community discussions on forums such as Topix.com; feedback and conversations on blogs and message boards; and sharing on sites such as YouTube, Wikipedia, Flickr or Friendfeed.

KEEPING UP TO SPEED

The law is struggling to keep pace with the changes in digital technology and social media practices over the last few years. Last year alone, there were dozens of mistrials and appeals granted because of juror misconduct via Internet research or improper use of social media.

It is important to recognize that the right to a new trial exists if a juror uses the Internet in a way that has a prejudicial effect on the outcome of the trial. In one example, a defendant in a recent Florida murder case won an appeal because a juror had used a smartphone to look up a definition of "prudent" and shared that definition during deliberations.[4]

Jurors are not the only participants in our legal system who are using social media during trials—and using it inappropriately. In a recent case in North Carolina, a judge was issued a public reprimand when he "friended" and communicated with the defense attorney on Facebook about a case over which he was presiding.[5] According to the rules of professional conduct, attorneys and judges cannot communicate *ex parte* during a legal trial.

The rules of evidence and discovery will need to expand to accommodate the complexity of cyber-law, the demands of e-discovery and the new burdens of online privacy.

Recent court decisions have allowed attorney access to "private" social profile data online.[6]

In a recent New York case, the plaintiff had sued over personal injuries allegedly sustained from falling off an office chair at work. The complaint included claims for extensive damages due to extreme pain and loss of enjoyment of life.

The defendant employer was able to obtain access to private online profile information on Facebook and MySpace on the basis that there was evidence of information inconsistent with the plaintiff's claims. This case provides important precedent and highlights the fact that there really is no expectation of privacy in online privacy settings such as those offered by Facebook.

The New York court was not alone when it held that "private" online information is discoverable if it sufficiently relates to the issues in litigation and if efforts to obtain the information are reasonable.[7]

There are, however, limits to how far an attorney or his representatives can go when seeking private information about a witness or party to a case. A recent opinion by the New York City Bar Association concluded that lawyers may not use deceptive means to access information from social networking sites.[8]

The opinion states that it is improper and unethical for attorneys or their agents to "friend" anyone using trickery or pretense to get access to any online personal profile information. Clearly, the ethical concerns that will govern the use of social media for investigation are just beginning to be articulated.

USES OF SOCIAL MEDIA AT TRIAL

Interestingly, divorce lawyers, as well as those practicing in labor and employment and personal injury litigation, were some of the first attorneys to recognize the value of accessing a plaintiff's or witness' social profile for information related to a case. No surprise, what anyone publishes about herself on a social media site such as Facebook or Match.com can be discoverable with regard to evidence in a contentious family law, personal injury or divorce case.

A defendant in a recent Florida murder case won an appeal because a juror had used a smartphone to look up a definition of "prudent" and shared that definition during deliberations.

In the New York case noted above, the judge ordered the plaintiff to give the defendant access to private postings from two social networking sites that could contradict claims she made in the personal injury action.[9]

Clearly, attorneys involved in cases that focus on jurors' personal or work lives must be cognizant of recent rulings regarding the use of social media to paint a picture of their clients.

SOCIAL MEDIA MONITORING AND 'SENTIMENT MINING'

Social media research for trial support includes much more than just occasional opposition research (research of the opposition's case and issues) and witness research. It is no longer enough to just "Google" your client or case issue.

Social media research is perhaps the latest burden for trial attorneys but also presents an important research opportunity. Many trials now demand sophisticated monitoring of the Internet and the deliberate data mining of influential sentiment and opinions about a case or client. Social media monitoring and sentiment mining are critical to understanding what the jury pool thinks/knows about your client and case issues before and during trial. Insight gained from professional social media monitoring and sentiment mining can inform jury research studies and ultimately the story told at trial.

Sentiment and opinion mining is a broad area of communications research consisting of data and text analysis aimed at understanding a group/set of attitudes and opinions. When applied to jury research, sentiment mining can be an effective tool to analyze the large quantity of information and opinions found online.

Sentiment mining uses both qualitative and quantitative techniques to measure the volume and intensity of opinion and attitudes toward a client or case issue. Ignoring this valuable online resource and experienced technique could be a costly mistake.

From the perspective of defense counsel, widespread Internet news and social media coverage can mean dangerous exposure to inadmissible evidence. This exposure may affect not only change-of-venue motions but also motions *in limine* that can become moot because the Internet has permanently preserved and/or publicized sensitive case information or delicate facts about parties. Information such as past criminal histories or other unknown facts that are not legally admissible in a current case can affect the trial outcome.

Awareness of this online exposure is essential to effective modern trial practice.

From plaintiff counsel's perspective, the media have always been an opportunity for valuable and influential pretrial publicity. Today plaintiffs' counsel may also need to consider the strategic use of blogs and other social media for publicity of their case issues within their venue.

As social media increasingly become a more dominant means of communication, lawyers in every area of litigation are learning better Web 2.0 knowledge, and social media literacy is a fundamental requirement. No more is it only high-profile "front page" trials (such as white-collar crime cases, environmental law, toxic torts and pharmaceutical litigation) that require monitoring of the online media.

In addition, attorneys working on less high-profile cases in consumer law, contracts, corporations, defamation and media law are quickly learning that their cases, too, are being exposed and discussed in social media.

> A New York case teaches that there really is no expectation of privacy in online privacy settings such as those offered by Facebook.

IMPACT ON THE JURY SELECTION PROCESS

Even the most skilled *voir dire* cannot account for juror concealment of information. However, online public records may reveal more information about jurors, including property tax records, criminal records, political contributions, community involvement, litigation history and more. Diligent research of social media and public records can provide even more insight into the hearts, minds and background of the jurors.

What is now seen as mere due diligence for attorneys may one day be promoted to a duty to search. A Missouri Supreme Court justice pressed for increased responsibility for attorneys to know about publicly available data about jurors. In this case, a mistrial was declared when it was discovered, after a six-day trial, that a juror had failed to disclose prior personal litigation history.[10]

Juror concealment of personal information is not new. It is understandable at times, since the *voir dire* process is sometimes complicated and confusing for jurors. What is new here is the judge's ruling about the increased responsibility of attorneys to use reasonable efforts to discover prior litigation history of jurors in a timely manner:

> In light of advances in technology allowing greater access to information . . . it is appropriate to place a greater burden on the parties to bring such matters to the court's attention at an earlier stage. Litigants should not be allowed to wait until a verdict has been rendered to perform a Case.net search for jurors' prior litigation history when, in many instances, the search also could have been done in the final stages of jury selection or after the jury was selected but prior to the jury being empanelled. . . . Until a Supreme Court rule can be promulgated to provide specific direction, to preserve the issue of a juror's non-disclosure, a party must use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial.[11]

Going forward trial attorneys would be well-advised to take extra efforts in online panel review.

Juror concealment regarding connection to a case or defendant may not be deliberate. Many Internet users do not know—and many do not consider—online "friends" to be "real friends."

In a West Virginia case all the jurors were asked if they had any business or social relationship with the defendant prior to the trial. All the jurors said no. However, following the verdict, one juror testified that although she was "friends" with the defendant on MySpace, she had never had a face-to-face conversation with him.

When asked why she did not bring this up during *voir dire*, the juror said: "Bad judgment, I guess. I just didn't feel like I really knew him. I didn't know him personally. I've never talked to him. And I just felt like, you know, when he asked if you knew him personally or if he ever came to your house or have been to his house, we never did. So I just didn't feel like I really did know him. . . . That's why I didn't say anything."[12]

In another New York case a juror "friended" a witness firefighter on Facebook during the trial. The witness was smart enough to ignore the request until after deliberations. The trial judge said this communication was a clear violation of the court's instruction.[13]

These juror concealments and the ubiquity of social media communication demand increased vigilance with juror

questionnaires and *voir dire*. This might include specific questions about jurors' use of the Internet and social media, their online news media consumption, and their online profiles, social networking habits and personal blogging practices.

PREVENTING SOCIAL MEDIA LEAKS

Earlier this year the Judicial Conference issued model jury instructions to all federal courts. The instruction tells jurors not to "search the Internet, websites, blogs or use any other electronic tools to obtain information about this case or to help you decide the case."[14]

The instruction goes on to tell jurors that they may not "communicate with anyone about the case on your cell phone, through e-mail, BlackBerry, iPhone, text messaging, or on Twitter, through any blog, or website, through any Internet chat room, or by way of any other social networking websites, including Facebook, MySpace, LinkedIn and YouTube."[15]

These model jury instructions have been widely adopted in state and federal courts, and they demonstrate the need for specific and frequent admonitions to jurors at the beginning of trial, throughout the trial and again before deliberations. However, attorneys could also remind jurors why only the evidence admitted in trial can be subject to the fact finder's examination lest the jurors feel deprived of the vast resources of the Internet at their fingertips.

Jurors often do not understand the reasons for limiting trial evidence. They may regret not "getting the whole story" and ask suspiciously, "What are they trying to hide?" Addressing these misconceptions and frustrations directly may be helpful in increasing compliance with court orders.

Jury instructions, however, may still not be enough. Unless the jurors are sequestered and completely cut off from their mobile devices and Internet access, trial lawyers must be prepared for the fact that jurors might perform independent research online via Google, Twitter and Facebook.

In preparation, trial lawyers must know everything jurors could be exposed to and influenced by online. For example, attorneys need to know:

- What is online in the news and blogs about the client and case issues?
- What is the local commentary by readers and viewers of online local newspaper and TV websites?
- What is available about witnesses and their reputations?
- What is the content of key definitions available on Wikipedia?
- What do key locations reveal on Google Earth?
- What is available on LinkedIn about parties to the case?
- What is publically available about the lawyers themselves?

All of this is subject to independent juror investigation.

DON'T LEAVE IT TO AMATEURS

Digital sentiment mining and social media analysis is a new field of communications research that trial attorneys must learn to embrace to stay on top of the Internet's influence over the jury pool. Advanced search and analysis is necessary to effectively accommodate the massive amount of online information that often relates to a case. It is no longer enough to just Google your client or ask a paralegal to keep a binder of news clippings.

In a Michigan case a juror publically disclosed her verdict opinion on her Facebook page: "Gonna be fun to tell the defendant they're GUILTY."[16]

The juror was charged with contempt, fined and removed from the jury. The violation was discovered by the defense attorney's son, who just happened to be searching for the jurors on Facebook. Even though this case did not result in a mistrial, it is alarming to learn that attorneys are relying on amateurs to monitor the Internet, often randomly, for juror profiles and other case-related information. You may not want to leave this important task up to luck.

One of the biggest hurdles of online research is the time consumption and the overwhelming quantity of data. A skilled social media professional understands the new search technologies and data mining techniques that can quickly and efficiently focus on the most important information to the trial team. The best case analysis also utilizes the social psychology of jury research.

Knowing how people/communities form opinions and make decisions is essential when trying to predict deliberative tendencies on a jury. Rigorous social media analysis is a sophisticated social science. When done properly, social media analysis can support your venue analysis, jury research and trial strategy. When not performed properly, the results can be disastrous. WJ

NOTES

[1] Int'l Telecomms. Union, Press Release, ITU estimates two billion people online by end 2010 (Oct. 19, 2010), *available at* http://www.itu.int/net/pressoffice/press_releases/2010/39.aspx.

[2] Internetworldstats.com, Usage and Population Statistics, *available at* http://www.internetworldstats.com/am/us.htm.

[3] Harris Interactive, Press Release, Thanks To Social Networks, Americans Feel More Connected to People (Oct. 21, 2010), *available at* http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/mid/1508/articleId/590/ctl/ReadCustom%20Default/Default.aspx.

[4] *Tapanes v. State,* No. 4D08-3176, 43 So. 3d 159 (Fla. 4th Dist. Ct. App. Sept. 8, 2010).

[5] N.C. Jud. Standards Comm'n, Inquiry No. 08-234, Public Reprimand of B. Carlton Terry Jr., District Court Judge, Judicial District 22 (Apr. 1, 2009), *available at* http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08- 234.pdf.

[6] *Romano v. Steelcase Inc.,* 907 N.Y.S.2d 650 (N.Y. Sup. Ct., Suffolk County Sept. 21, 2010).

[7] *Id.*

[8] New York City Bar, Formal Opinion 2010-2, Obtaining Evidence from Social Networking Sites.

[9] *Romano*, 907 N.Y.S.2d 650.

[10] *Johnson v. McCullough,* No. SC90401, 306 S.W.3d 551 (Mo. Mar. 9, 2010).

[11] *Id.*

[12] *State v. Dellinger,* No. 35273 (Va. Ct. App. June 3, 2010).

[13] *People v. Rios,* 907 N.Y.S.2d 440 (N.Y. Sup. Ct., Bronx County Feb. 23, 2010).

[14] U.S. Judicial Conference, Committee on Court Administration and Case Management, Memorandum Re: Juror Use of Electronic Communication Technologies (Jan. 28, 2010).

[15] *Id.*

[16] Judge punishes Michigan juror for Facebook post, Associated Press, Sept. 2, 2010.

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