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Wielding the Weapon: A Guide to the Practical and Strategic Use of Social Media in Litigation

The social media revolution has changed the face of society and it is increasingly changing the face of litigation. Evidence that previously could be obtained only through surveillance or hard won discovery battles is now available at the click of mouse. Thousands of reported cases in the last five years show how social media evidence is relevant to both personal injury and commercial litigation. This panel will discuss those cases and offer strategic and practical advice on obtaining all available social media evidence from a party opponent via informal and formal discovery. It will also discuss the evidentiary rules that must be addressed to use this evidence at trial, including relevance, authenticity and exclusionary rules. Lastly, this panel will offer advice and tips on a social media topic not often discussed: strategic considerations for obtaining and using social media evidence in discovery and trial, including whether and when to pull out the “smoking gun” to surprise the party opponent and effectively “sink” their case.

First things First: What Exactly Is Social Media?

It's important to understand what social media is, so that you can know what exactly what you're looking for. Let's focus first on Facebook and Twitter, the two biggest social media networks, although there are dozens and dozens of other social media networking sites.¹ On both of these sites as well as other social media sites, individual users create content inside a framework provided by the site's owner.² A user logs into an account with a secure username and password that he/she selects when setting up the account. However, there is no verification from the social networking site to verify the identity of the user. On Facebook, the user creates a profile page, and has the option of inputting various data about themselves, including residence, birthday, interests and other identifying information. The user can also upload photos and videos about themselves. Facebook automatically puts the uploaded content into a "timeline" based on when it is uploaded, not when the event in the photo or video occurs.

Facebook users have the option of making posts on their "wall" for others to see, sort of like a public diary. Users can set privacy settings for who can see this content, but the default setting is open for the general public. Users "friend" other Facebook users, and typically allow

¹ See <http://www.ignitesocialmedia.com/social-media-stats/2012-social-network-analysis-report>.

² See generally Griffith, *Understanding and Authenticating Evidence from Social Networking Sites*, 7 Wash. J.L. Tech. & Arts 209 (2012) (excellent and thorough discussion of the relevant case law).

their "friends" to see the content on their Facebook pages. Essentially, that's the whole point of Facebook: to share thoughts, experiences, and observations with one's circle of friends.

Facebook users may also use the network as a private email service by sending private messages to others in their "friend network." Facebook retains each of the private messages that a user sends to and from another user. Users can also "chat" with each other using an instant message feature. Depending on a user's privacy settings, the site may retain a transcript of the chat session.

One of the fastest growing social networking sites is Twitter, which was publicly introduced in 2006 (Facebook started in 2004).³ Twitter is much simpler than Facebook, allowing users to share brief (140 characters max) messages ("tweets") to a list of approved "followers." But those messages can include links to longer articles, videos, and photos. A tweet can be posted publicly to anyone requesting the feed, or a tweet can be sent as a "direct message" to a specified group of recipients. Twitter has added a reply function that allows for others to reply and comment on the original tweet.

Depending on a user's privacy setting, Twitter allows even non-followers of a Twitter user to search the "full profile" of a Twitter user, which can provide a listing of every tweet a user has sent, as well as a listing who that user is "following." The tweets are listed chronologically.

The Revolution is Here.

Approximately one in every seven people on Earth are Facebook users (1 Billion out of 7 Billion).⁴ Fifty percent of users access their profiles every day. Twitter is the fastest growing social media network in 2012, followed closely behind by Tumblr, LinkedIn, Pinterest, and Reddit. Twitter has over 500 million registered users. 91% of online adults use social media regularly. Every minute of the day:

- 100,000 tweets are sent
- 684,478 pieces of content are shared on Facebook
- 2 million search queries are made on google
- 48 hours of video are uploaded to YouTube
- 3,600 photos are shared on Instagram
- 571 websites are created
- \$272,000 is spent by consumers online (source: [AllTwitter](#))

³ See generally Democko, *Social Media and the Rules on Authentication*, 43 University of Toledo Law Review 367 (2012) (discussion of the emergence and popularity of social media networking sites).

⁴ There are many, many websites that discuss social media statistics, and while none of the imprimatur of an official declaration from the Library of Congress, the sites tend to agree on the statistical trends. In particular, see <http://www.ignitesocialmedia.com/social-media-stats/2012-social-network-analysis-report/>; <http://thesocialskinny.com/216-social-media-and-internet-statistics-september-2012/>; http://www.mediabistro.com/alltwitter/social-networks-2012_b26341; <http://techcrunch.com/2012/06/14/comscore-us-internet-report-yoy-pinterest-up-4000-amazon-up-30-android-top-smartphone-more/>.

Internet users spend 22% of their time social networking. 93% of adult U.S. adult internet users have Facebook accounts. Facebook users spend an average of 6 hours and 35 minutes on Facebook, per month, double the amount of time users spent on Google. 58% of Facebook users return to the site daily.

Heard of Instagram? Recently bought by Facebook, it's a free photo-sharing program and social network that was launched in October 2010. It has gained over 50 million users over the past two years. 300 million pictures are uploaded to Facebook every day via Instagram.

The list of growing social media sites goes on and on. Social media has become the way that companies market their products, sell their artists' albums, appeal to investors, and connect in every possible way with their customers and vendors. Twitter provided a framework for the success of the Arab Spring. For all of social media's drawbacks in terms of interpersonal lack of connectivity and the fact that "Big Brother" is always watching, it is here and it is here to stay.

Convinced? Hope so. The point is that with these staggering statistics, it is inevitable that users and companies are adding content to their personal social media sites that are relevant to issues in any type of litigation to which they are a party or a witness. And, as discussed below, that information is *not* private. It's discoverable. It's searchable. And with the proper foundation laid, it's admissible.

Yeah, So How Can a Bunch of Pictures and "Wall Postings" Be Relevant to My Lawsuit?

It should not be surprising that with the fact that people and companies are turning to social media for their interaction with the world that social media is finding its way into admissible evidence in litigated cases across the country. In the past three years, there have been over 1,000 published cases discussing social media as evidence (which means that, in all likelihood, there are thousands more unpublished cases in which it has been at issue). One social media investigation firm, X1 Media, has a constantly updated listing of every published case discussing social media, with links to the cases.⁵ It is a valuable resource.

A review of the published cases reflects the myriad ways that social media evidence can be relevant to any type of lawsuit:

- (1) Fraud investigation (personal injury);
- (2) Finding witnesses;
- (3) Jurisdictional facts;
- (4) Service of process (establishing home address)
- (5) Proving business torts such as patent, copyright and trademark infringement;
- (6) Proving breach of contract and unfair and deceptive trade practices;
- (7) Defamation;
- (8) Violations of non-compete agreements;

⁵ http://www.x1discovery.com/social_media_cases_2011.html

- (9) Liability issues in employment litigation;
- (10) Personal injury damages;
- (11) Business damages;
- (12) Establishing venue;
- (13) Searching for assets;
- (14) False advertising;
- (15) Establishing extent of publication of false material;
- (16) Credibility and background of expert witnesses; and
- (17) Jury research.

The list of issues to which social media evidence is relevant will continue to grow as parties realize that the information is available and can be employed to help them win their cases. There is, essentially, no issue to which this type of evidence cannot be utilized.

Ok, I'm Convinced. How Do I Get My Hands On It?

How? The same way that we litigators have been collecting evidence for all of our cases: informally and formally. Informal methods involve searching the internet for relevant material. Formal methods involve sending discovery requests and issuing subpoenas.

Prior to suit being filed, informal methods are the only option. There are two means to accomplish informal social media investigation: you and your staff do it and/or you hire a third-party company to do it for you. You and your staff should take advantage of CLE's and other avenues to learn how to search for social media evidence. "Googling" someone is great, but it's just the first step. You can use other search engines like Yahoo! to see if social media results are uncovered. You also can search the actual social networking sites themselves, with generally more productive results than general search engine searches.

It is important to remember that the availability of a particular subject's profile, and what information can be publicly viewed, depends on the particular social media website and the subject's specific security/privacy settings. For example, a Facebook user may have his or her entire profile available for public viewing. On the other hand, someone more cautious may only allow "friends" to view their content. But often you can see who the "friends" are of your investigation target (even if the profile is "private"), and you can uncover more by searching for content related to the "friends" of those who are your primary target. Often, the "friends" of your investigation target may not have their privacy settings set to exclude you, and you may find information or postings related to your target.⁶

⁶ Certainly, ethical concerns are present here. There is nothing unethical about an attorney or an agent of an attorney accessing an opposing party's or witness' social media evidence that is not protected with privacy settings. Scouring the internet for publicly available information is no different than video surveillance in a public place. But anonymously "friending" an opposing party or a critical witness in order to get past their privacy settings may be a breach of your ethical obligations. See Philadelphia Bar Association Opinion 2009-02; *but see* Zazzali-Hogan and Thibodaux, "Friend or Foe: Ethical Issues for Lawyers to Consider When 'Friending' Adverse Witnesses Online," 197 N.J. L.J. 726 (2009) (noting that there is no New Jersey authority on point). See generally Duhl, G. and Milner, J.S., *Social Networking and Workers' Compensation Law at the Crossroads*, 31 Pace Law Review 25-39 (2011) (discussing the approaches of various jurisdictions to the ethical issues of obtaining social media evidence).

It is also important to recognize that what was once deleted is not necessarily gone forever. The website "Internet Archive" has a feature called the "wayback machine" (http://wayback.archive.org/web/*/http://archive.org/web/web.php) that allows you to access archived material even from social media websites.

If your client is willing to cover the expense, third-party investigators like X1 Discovery and local investigators are an excellent option. It is likely that they will have greater experience than you and your staff in searching for social media evidence, and they may be able to find information that you could not, particularly from the dozens of social media sites not named Facebook or Twitter.

Once suit is filed, the litigator has more weapons in his/her arsenal.⁷ Formal discovery tools are much more powerful than informal searches because you not only can request full print-out of a party's social media sites,⁸ including even requesting the password of the party,⁹ you can request that your computer expert examine their computer's hard drive. Information that your opposing party thought was deleted can be retrieved relatively easily by a computer expert. Nevertheless, it is critical that you send a non-spoilation letter to the opposing party's attorney (or to the party if unrepresented) as soon as a summons is received.

Spoilation is critical issue not to be underestimated. In *Torres v. Lexington Ins. Co.*, 237 F.R.D. 533 (D.P.R. 2006), a federal judge denied the Plaintiff's emotional distress claims after she deleted online postings that defense counsel was aware of and had brought to her attention. In 2011, a Virginia plaintiff's attorney was ordered to pay \$522,000 as sanctions after instructing his client to remove damaging photographs from his Facebook profile.¹⁰

Courts across the country that have looked at a "privacy defense" for social media discovery have thus far found no basis for such a defense.¹¹ However, due to the sensitive nature

⁷ See 121 Am. Jur. Proof of Facts 3d 1, *Pretrial Involving Facebook, Myspace, LinkedIn, Twitter, and Other Social Networking Tools* (2012).

⁸ Federal Rule of Civil Procedure 34(a)(1)(A) allows a party to request "any designated documents or electronically stored information – including ... data or data compilations – stored in any medium" in "the responding party's possession, custody, or control." Therefore, attorneys may use subpoenas or other discovery requests for any information posted and stored on social networking websites, including messages, pictures, videos, e-mails, etc. related to the claim. Note as well that Facebook recently added a "download profile" feature which allows counsel to request that the opposing party download his entire profile, including information, interests, photographs, and wall postings.

⁹ See Orin Kerr, *Judge Orders Plaintiff to Give Defendant Her Facebook Password So Defendant Can Access Plaintiff's Account as Part of Discovery*, <http://volokh.com/2011/12/01/judge-orders-plaintiff-to-give-defendant-her-facebook-password-so-defendant-can-access-plaintiffs-account-as-part-of-discovery> (last accessed August 27, 2012).

¹⁰ See <http://blog.x1discovery.com/2011/11/15/facebook-spoilation-costs-lawyer-522000-ends-his-legal-career/>.

¹¹ See generally discussion and cases cited in Duhl, G. and Milner, J.S., *Social Networking and Workers' Compensation Law at the Crossroads*, 31 Pace Law Review 24-25 (2011); *Romano v. Steelcase, Inc.*, 90 N.Y.S.2d 650, 2010 WL 3703242 (N.Y. Sup. 2010) (broadly holding that there was no right to privacy in social media content); see also *Moreno v. Hartford Sentinel, Inc.*, 172 Cal. App. 4th 1125, 1130 (Cal. Ct. App. 2009) ("Cynthia's affirmative act made her article available to any person with a computer and thus opened it to the public eye. Under these circumstances, no reasonable person would have had an expectation of privacy regarding the published material."); 121 Am. Jur. Proof of Facts 3d 1, *Pretrial Involving Facebook, Myspace, LinkedIn, Twitter, and Other Social Networking Tools* Section 6 (2012) (discussing case law).

of some social media content, several states have legislatively enacted enhanced protections, but not in the litigation context. There is a growing trend toward laws protecting social media privacy, with recent legislation in Delaware¹² protecting students' social media lives, and laws in Illinois¹³ and Maryland¹⁴ protecting employees and job applicants. Most recently, the California Senate unanimously passed legislation that prohibits colleges and universities from requesting access to students' social media accounts.¹⁵ This growing trend will be important to watch to see if the courts ever extrapolate these privacy concerns into civil discovery.¹⁶

Attorneys concerned that the opposing party has deleted his/her social media account (and the attorney cannot obtain it through a search of a hard drive) may want to subpoena records directly from the social media network themselves. In this instance, a federal law comes into play. Attorneys requesting social media information directly from the social networks have run into a frequent roadblock, the Stored Communications Act ("SCA").¹⁷ Since the adoption of the SCA in 1986, courts have used the Act to protect the privacy of Internet users. This is consistent with Congress's intention to "protect privacy interests in personal and proprietary information, while protecting the Government's legitimate law enforcement needs."

Generally, the SCA "regulates two types of providers: providers of electronic communications service ('ECS') and providers of remote computing service ('RCS')."¹⁸ In very general terms, an entity is an ECS if it conveys electronic communications and is an RCS if it stores electronic communications.¹⁹ The SCA is a complex piece of legislation and its application requires careful analysis. Its general privacy provisions were summarized in Crispin v. Christian Audigier, Inc.²⁰ There, the court explained that "[a]n ECS is prohibited from divulging only 'the contents of a communication while in electronic storage by that service.' ... By contrast, an RCS provider may not divulge the content of any communication received by electronic transmission that is carried or maintained on its service for a customer or subscriber 'solely for the purpose of providing storage or computer processing services to [the] subscriber

¹² See Del. Code Ann. Tit. 14, § 94 (2012) (Synopsis: "Under current law there is no recognized right to privacy in a student's or applicant's social networking site passwords and account information. This Bill makes it unlawful for a public or nonpublic academic institution to mandate that a student or applicant disclose password or account information granting the academic institution access to the student's or applicant's social networking profile or account.")

¹³ H.B. 3782, 97th Gen. Assemb. (Ill. 2012) (to be codified at 820 Ill. Comp. Stat 55/10(b)(1)) (prohibiting employers from requiring employees to provide social networking passwords).

¹⁴ Maryland S.B. 433, available at: http://mlis.state.md.us/2012rs/chapters_noln/Ch_233_sb0433T.pdf

¹⁵ California (A.B. 1844 and S.B. 1349).

¹⁶ See, Favate, *Illinois Becomes Third State to Pass Social Media Privacy Law*, WSJ Law Blog, <http://blogs.wsj.com/law/2012/08/02/Illinois-becomes-third-state-to-pass-social-media-privacy-law/> (last accessed August 27, 2012) ("In all, at least 15 states have introduced some kind of social media privacy legislation.")

¹⁷ See, e.g., *Law Enforcement and Third-Party Matters: May I Obtain Contents of a User's Account from Facebook Using a Civil Subpoena?*, Facebook, <http://www.facebook.com/help/?faq=133221086752707> ("[T]he Stored Communications Act, 18 U.S.C. § 2701 et seq., prohibits Facebook from disclosing the contents of an account to any non-governmental entity pursuant to a subpoena or court order.")

¹⁸ See, generally, Orin Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1214 (2004).

¹⁹ *Id.* (discussing the SCA's definitions of ECS and RCS providers).

²⁰ 717 F. Supp. 2d 965, 991 (C.D. Cal. 2010).

or customer, if the provider is not authorized to access the contents of [the] communications for purposes of providing ... services other than storage or computer processing.”²¹

Crispin highlights the difficulty of placing contemporary social media outlets into the ECS/RCS dichotomy created almost three decades ago. The court determined, with some effort, that Facebook and MySpace were ECS providers with respect to unopened messages but were RCS providers with respect to opened messages and wall postings.²² Thus, the Crispin court granted a motion to quash subpoenas with respect to private messages but, with respect to wall postings, remanded to the magistrate so that the parties could “develop a fuller evidentiary record regarding plaintiff’s privacy settings and the extent of access allowed to his Facebook wall and MySpace comments.”²³

You’ve won the Battle. Now how do you win the War?
Strategic use of Social Media Evidence During Pre-Trial and Trial

Once you’ve obtained social media evidence, there are key considerations on when and how to best use it to your client’s advantage. Considerations include:

- Telling the Story behind the Story- Plaintiffs paint a picture of changed lives that will never return to normal. Do you want to use the Social Media evidence in a comprehensive scheme, to take them through their *actual* daily lives in deposition? Or,
- Exposing the Reality v. the Fiction- As to specific elements of damage, is it more productive and powerful to ask a question in deposition addressing one or more particular posts that tend to discredit a particular damage element?
- Subtlety is Key- Is it more effective in trial to enter a Social Media Notebook as an exhibit and ask the jury to peruse its contents in the deliberation room? Or,
- Hammering the Point Home- Is it more effective to ask the court only to admit certain posts and ask the plaintiff specific questions in front of the jury?
- Timing is everything- Is there a time when social media posts should not be addressed in deposition at all, and should just be used at trial? Or,
- Show your cards- Is it more economically feasible to get a case settled by always putting the social media you plan to use on the table for use in negotiating a more favorable settlement?

²¹ *Id.*, quoting 18 U.S.C. § 2702(a)(1)-(2).

²² *Id.* at 987, 990.

²³ See also discussion and cases cited in Duhl, G. and Milner, J.S., *Social Networking and Workers’ Compensation Law at the Crossroads*, 31 Pace Law Review 18-24 (2011) and discussion and cases cited in the excellent and thorough following article: Ward, "Discovering Facebook: Social Network Subpoenas and the Stored Communications Act," 24 Harvard Journal of Law & Technology, Vol. 2, 563, *et seq.* (Spring 2011).

There is no right or wrong answer to these questions. Each case will bear out differently, depending on what constitutes a “win” for your client. In any case, the social media revolution can and will help attorneys that use it effectively in deposition and trial to win, either at the time of writing the settlement check, or at the court house.

Once at trial, however, you have to follow the basic procedural rules to get it admitted into evidence. There are three principal hurdles to getting any document or object (including social media information) into evidence: (1) the evidence must be **relevant**, which means that it must have a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence; (2) the evidence must be **authentic** – that is, it must be what the proponent claims it to be; and (3) the evidence must not be subject to an **exclusionary rule**, including, for example, the character evidence rule in Rule 404(a) or the hearsay rule stated in Rule 802. The unique issues arise out of the novelty of the media itself. These issues can be resolved by applying the traditional legal principles to the new media and evidence.

1. *Relevance*

Rule 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence.” The Federal Rules of Civil Procedure and its state counterparts permit discovery into “any nonprivileged matter that is relevant to any party’s claim or defense.” The evidence sought need not be admissible as long as it “appears reasonably calculated to lead to the discovery of admissible evidence.” Applying these principles, courts have permitted discovery of social media information where parties have established a basis for requesting the information and have demonstrated that their request is not a “fishing expedition.”

As noted above, social media evidence may be relevant to nearly every type of legal dispute primarily because of the explosive growth in nature and use of social media platforms. Therefore, it is quite likely that your opposing party has uploaded content that “has a tendency to make the existence of” material facts in your case “more or less probable.” How you articulate to a Court why you need the opposing party's entire social media profile is critical. Listing the issues in your case (*e.g.*, residency, pain and suffering, unfair trade practices, product disparagement, damages, etc.) and demonstrating to the Court how evidence from your opponent's social media profile may pertain to those issues is the task, and it will vary with every case. Increasingly, however, as courts become more familiar with social media evidence, it's not unlikely that the burden of proving that you've not "gone fishing" will lessen.

2. *Authenticity*

An attorney seeking to introduce evidence from social networking sites must overcome the hurdle of authentication.²⁴ Under Rule 901(a), "the requirement of authentication . . . is

²⁴ For an in depth discussion of authenticating social media evidence, see Joseph, *Internet and Email Evidence (Part I)*, *The Practical Lawyer* (February 2012); Griffith, *Understanding and Authenticating Evidence from Social Networking Sites*, 7 Wash. J.L. Tech. & Arts 209 (2012); Democko, *Social Media and the Rules on Authentication*,

satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."²⁵ Three questions must be answered: (1) what was actually on the website; (2) does the exhibit or testimony accurately reflect it? and (3) If so, is it attributable to the owner of the site?²⁶

As to website data, authenticity can be established by the testimony, or under Federal Rule of Evidence 902(11) or (12), a certification, of any witness that he or she typed in the URL associated with the website, that he or she logged on to the site and reviewed what was there; and that a printout or other exhibit fairly and accurately reflects what the witness saw.²⁷ It's no different than the proof required to authenticate a photograph. The witness may be lying or mistaken, but that is true of all testimony and the witness is subject to cross-examination.

Authenticating social media profile pages is similar. A profile page can be authenticated through the admission of the party posting it, a forensic review of the computer or other device of the person allegedly creating it, evidence from the social networking site, or circumstantial evidence sufficient to link it to the purported creator of the site.²⁸ Rule 901(b) lists several ways to authenticate evidence, including "testimony of witness with knowledge," "distinctive characteristics and the like," and "process or system." The litigator can combine these approaches.

Notably, a number of courts have required more evidence than just a distinctive profile page to authenticate a specific posting on the site. They have held, quite understandably, that the proponent of the evidence must show that a specific person authored the writing, and not just that the writing came from that person's account." Concerns for hacking, unauthorized users, fictitious accounts, raise the likelihood of third parties creating unauthorized posts. The proponent of the evidence can address these concerns when laying the foundation through authentication by distinctive characteristics of the posting itself, testimony from a witness with knowledge of the posting, and process testimony, such as forensic computer evidence. The proponent can also authenticate the evidence using corroborating non-distinctive characteristics on profile pages or posts with additional evidence.²⁹

3. *Exclusionary Rules*

Social media evidence must satisfy the remaining exclusionary rules of evidence, chiefly character evidence and inadmissible hearsay.

Under Rule 404(a), evidence of a person's character or character trait is "not admissible for the purpose of proving action in conformity therewith on a particular occasion...." Courts

43 University of Toledo Law Review 367 (2012); Grimm, Ziccardi and Major, *Back to the Future: Lorraine v. Markel American Insurance Co. and New Findings on the Admissibility of Electronically Stored Information*, 42 Akron Law Review 357 (2009).

²⁵ *United States v. Simpson*, 152 F.3d 1241, 1250 (10th Cir. 1998).

²⁶ Joseph, *Internet and Email Evidence*, at 20.

²⁷ *Id.*

²⁸ *Id.* at 26 (citing cases).

²⁹ For a detailed discussion of these methods of authentication, see Griffith, *Understanding and Authenticating Evidence from Social Networking Sites*, at 217-20.

have recently been forced to apply Rule 404 in the context of social media evidence.³⁰ Ultimately, these issues are decided on a case by case basis.

Under Rule 801(c), hearsay “is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Most of the information attorneys will seek to admit from social media websites will qualify as “out-of-court” statements potentially subject to the hearsay exclusion. However, under Rule 801(d)(2), any postings on a profile by a party opponent would qualify as “admissions” and therefore would be admissible.³¹

The "Big Picture"

What to take from all of this? Social media is a big deal. We are just at the outset of the revolution. It's a little bit scary, in all frankness. It will change the way we do nearly everything, from how we contact our family and friends, to how we buy things, to how we consume news, information and entertainment, even to how we to how we select our leaders.

We are now officially plugged into the "Matrix."

As a person, you can fight it. Choose to unplug from the Matrix, if you can. As a litigator, you need to see it as an incredible new tool in your tool belt. Every party and every witness in your cases most likely has a social media presence, and you can often find some incredibly useful things that may help you win your case. You may not "like" Facebook, but you'd be wise to "friend" it.

³⁰ *United States v. Phaknikone*, 605 F.3d 1099, 1103 (11th Cir. 2010) (finding that MySpace photographs of the criminal defendant flashing a gun in his car with a child in the backseat was “classic evidence of bad character”).

³¹ See Joseph, *Internet and Email Evidence (Part I)*, at 26-30 (citing cases); Grimm, Ziccardi and Major, *Back to the Future: Lorraine v. Markel American Insurance Co. and New Findings on the Admissibility of Electronically Stored Information*, at 20-30 (electronic evidence and the hearsay rule).