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Three Uses of Social Media for Corporate Counsel

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By now, most litigators have bumped up against at least one or two social media issues in their practices. Social media has become a hot-button discovery issue and a potential source of valuable information in cases from personal injury to employment discrimination. Often, social media discovery requests are now included as a matter of course in individual plaintiff cases. Juries are using social media to broadcast, often improperly, about their cases while lawyers scour social media during voir dire looking for juror bias. Companies now frequently use social media to vet applicants, with some even going so far as to force applicants to permit company employees to access their various social media sites.

With Facebook expected to hit the 1 billion user mark in August and more than half of Americans using at least one social media platform, the importance of social media in business and everyday life will only increase. In-house counsel have no real choice but to become familiar with the various social media platforms, the issues these platforms create for their companies, and the pitfalls and advantages they present in management and litigation.

To that end, here are three ways that in-house counsel can use social media to their advantage.

Screening Employees

Use of social media as an employee screening tool has become much more prevalent over the past year. Much like a background check, social media can provide a wealth of information about potential hires that typical interviews won't reveal. For certain jobs, this information can prove highly important, and if performed properly, social media screening can prevent the company from facing a potentially embarrassing situation in the future. So how can employers use social media to effectively (and legally) screen employees?

To effectively screen employees, employers should use social media screening at the final stages of the interview process, and only after an in-person interview has been conducted. Social media can reveal characteristics about job candidates, such as age, sex, race, sexual preference, family status, etc., that would normally be off-limits in a typical interview. The employer must take care to avoid creating a perception that these characteristics are factoring into hiring decisions. In some cases, employers would be well advised to use a third party to perform social media searches and to report anything job-related to the employer while screening any nonrelevant information.

What should the employer be looking for that might bear on the worthiness of a job candidate? For one, the company should consider how the potential employee presents himself or herself to the public. What type of judgment does the candidate show? More importantly, has the candidate revealed information about prior jobs or posted potentially confidential information? Does he or she speak negatively about prior employees or employers? Does he interact with people in a way that makes him look like a sexual harassment suit waiting to happen? All of these factors, and many others, can legitimately be considered by the employer.

Should the employer demand that the interviewee or employee give up his social media passwords or be required to "friend" a supervisor? While such demands are not currently illegal in Pennsylvania, the trend is certainly moving in that direction. Many states are considering laws that would make it illegal to force an employee to allow his or her employer to view his or her private social media pages. Last Wednesday, legislation was introduced in both houses of Congress that would make it illegal for employers to force employees to give up passwords to a wide variety of social media sites.

The better practice is to implement strong, clear social media policies that spell out what employees can and cannot do on social media, and advise the employees that if their social media presence reflects poorly on the company or on their job, they can be subject to discipline.

Investigating and Defending Claims

Social media websites can provide extremely helpful evidence to employers in both investigating and defending claims of harassment brought by employees. For example, when the employer receives a claim of co-worker harassment, it should consider reviewing the social media of the alleged harasser as part of its investigation. If the social media provides evidence that the harassment did in fact occur (which it can and often does), the employer can use that information to discipline the employee as part of its remedial actions in an effort to ensure that the harassment ends. Whether or not evidence of harassment is found, the fact that the employer used this avenue of investigation can help, in the event that the employee brings suit, in establishing that the employer took prompt and effective remedial action.

An investigation of a claimant's social media can also provide very helpful evidence in defending against such a claim. For example, if the alleged harasser and victim are "friends" on Facebook, their communications can often reveal whether any allegedly harassing conduct was, in actuality, welcomed and reciprocated. Social media can also provide evidence useful in defending against damages resulting from claims of emotional distress, as users will often post about traumatic events that may have predated the alleged harassment.

Often, an employer will not be able to access all of a claimant's social media freely. Most users keep some or all of their social media postings private and require people to be invited or "friended" before they can view all of the postings. In certain cases, however, a plaintiff can be compelled to produce or provide access to information that has been kept private via discovery.

At this time, most judges are reluctant to permit wide-ranging discovery into a litigant's social media. Citing privacy concerns, many judges consider such information nondiscoverable without a showing of relevancy by the party seeking the information. So how can this information be obtained?

First, the party seeking the information should ask pertinent questions during the deposition process to determine if the information may be relevant. Ask whether the party has ever discussed the case, injuries, facts or parties online or posted about them on social media. Ask whether the party has discussed other jobs that might have a bearing on damages. Ask if the party has connected with any other people involved in the case. Probing a litigant's social media profile in depositions will often provide the answers necessary to access private postings.

If a party is unable to gain any useful admissions via deposition, but still believes that the opposition's social media would provide relevant information, the party should consider proposing a compromise by which the information is provided on an attorneys'-eyes-only basis or reviewed in camera for relevance before being produced. Such an arrangement can help alleviate a judge's concerns about the infringement on the

litigant's privacy.

Investigating Jurors to expose Bias and Misconduct

Use of social media to explore the histories and potential biases of a jury pool is relatively new, but it is rapidly gaining in popularity. While voir dire can be an effective tool for weeding out obviously biased jurors (and those who do not want to serve), it can be difficult to get complete, detailed and truthful answers from all prospective jurors.

Social media can help. In jurisdictions where a list of prospective jurors is provided to counsel in advance, social media screening can be performed in advance and in detail, can help expose juror bias, and can help craft voir dire questions to eliminate undesirable jurors without wasting peremptory challenges. Social media can reveal work history, political affiliation, charitable activity, personal and professional relationships and affiliations, purchasing habits, hobbies, socioeconomic status and many other traits that may impact a juror's way of thinking about a case.

If the names of prospective jurors are not made available in advance, using social media can be more difficult. Certainly, attorneys cannot examine jurors' Facebook pages during active voir dire of the panel. However, counsel should consider having another attorney perform social media research on jurors during questioning. Although time constraints will prevent the attorneys from probing as wide or as deep as they could if they were able to do so in advance, even a shallow investigation might weed out a problematic juror or two who might have otherwise made it through.

After voir dire is complete and a jury is impaneled, counsel should investigate the jury more thoroughly. As noted above, the jurors' social media pages may provide a wealth of information that will give insight into how they will think about a case and deliberate the evidence. Counsel can use this information to better craft their arguments and examinations to specifically address the tendencies of individual jurors.

Counsel should also monitor jurors' social media use during trial to see whether jurors are improperly discussing the case. Most judges now give an instruction to the jury at the time they are impaneled that they are not to discuss the case on their social media. Some judges require juries to pledge or take an oath that they will obey the instruction. It now seems that, nearly every week, a new story emerges about a juror who ignored the instruction, discussed the case and either caused a mistrial or was dismissed from the jury. Counsel should know if the jury is misbehaving.

Finally, what if you've lost the trial, and you need a new one? Social media might be able to help. Perhaps a juror, after finding your company liable, revealed on Facebook that she never would have agreed with the verdict if another juror hadn't told her that your company just fired 500 people in her hometown. Perhaps a juror had discussed the case and solicited input from his many friends on Facebook, who encouraged him to find for your opponent. Perhaps a juror lied during voir dire and concealed information that clearly reveals a significant bias against your company. Perhaps a juror concealed relationships with parties or witnesses involved in the case. While judges are loath to disturb a verdict on allegations of juror misconduct, most will entertain and consider post-trial motions involving scenarios like those presented above.

Use of social media during trial can provide information that has previously never been available to counsel. As data management and analytics increase in capacity and ability, its use will only increase. If your opponent isn't using it for the reasons listed above, it can provide you with a great advantage. If your opponent is using it, shouldn't you be using it, too? •

Top Social Media Sites

Of the countless social media platforms currently in existence, the following are some of today's most popular, and consequently, most useful sites.

- **Facebook:** The undisputed champion as the largest of the social networks, this site allows users to post thoughts, pictures and videos and to cross-network with other users via the "friend" function.

- **Twitter:** The second-largest social network with more than 500 million accounts, this service allows users to share thoughts in 140 character bursts, along with links, pictures and video clips.
- **Pinterest:** Billed as a virtual pinboard and currently recognized as the third-most popular platform, Pinterest allows its users to tag and organize various content from around the Web and display it on their own pages.
- **LinkedIn:** A sort of Facebook for professionals, this site allows users to post resumes and business affiliations while connecting with other users.
- **Tumblr:** A blog-hosting platform that allows users to create and personalize their own blogs.
- **Google Plus:** Google's answer to Facebook, this relatively new platform has had some difficulty attracting users, but with Google behind it, it is likely around for the long haul.

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