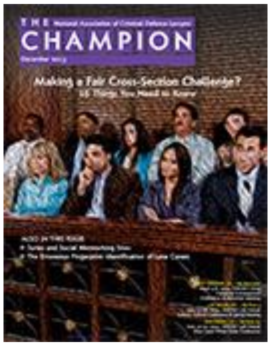

Juries and Social Networking Sites

By Hayes Hunt and Brian Kint

Social media is a mainstay in daily life. Over a billion people are registered users of Facebook. The Facebook logo and the logos of other social networking giants such as Twitter are quickly becoming as iconic as McDonald's Golden Arches or Apple's apple. As the popularity of social networking sites grew, industries scrambled to utilize such a powerful tool. The legal profession is no exception. Unfortunately, the combination of rapidly changing technology and slowly evolving law has created a potpourri of law in which little is settled or clear when it comes to social media and the courtroom. What is clear, however, is that attorneys who understand how social media can help or hurt their clients and have well-defined plans for tackling social media issues will be in the best position to successfully advocate for their clients.

Social media has made the world less private. Twenty years ago, the intimate details of people's lives were written down in diaries and journals, stashed safely away from the rest of the world under mattresses or in locked drawers. Today, however, these intimate details are shared widely, regularly, and instantly. In fact, social media has created a new psychology in which the constant revelation of opinion and personal information is *expected*. This is especially true with younger generations who view social media as a way to interact with the world, not merely as a way to stay in touch with friends. Consequently, social media has produced a rich source of unfiltered opinions and intimate details that were inaccessible in past times.

Researching Potential Jurors

Perhaps one of the most powerful ways defense counsel can use this wealth of information from social media is by investigating potential jurors prior to trial and monitoring jurors for potential misconduct during trial. Attorneys can undertake a pretrial search of prospective jurors' social networking pages — as long as they do not attempt to contact or communicate with the juror.[1] In other words, attorneys can investigate potential jurors' social networking content, but cannot "friend" them, send tweets or emails to them, subscribe to their twitter feed, etc. Nevertheless, the information publically available on a potential juror's site can give valuable insight into how sympathetic that person may be to the defendant's case.

Counsel can use this information to avoid having to use preemptory challenges during jury selection. For example, counsel can use social media to investigate a potential juror's political affiliations, personal relationships, hobbies, charitable activities, and many other details that give clues as to how that person may feel about a particular case. Counsel can then use that information to formulate *voir dire* questions that will help expose any juror bias. In this way, counsel can get unsympathetic jurors excused without using valuable preemptory challenges.

Expanded access to information about potential jurors outside of the courtroom creates new ethical and practical dilemmas. What if an attorney discovers a case of *clear* juror bias using social media, such as a potential juror posting that the FBI is a corrupt organization full of nothing but liars? What if a prospective juror's answers directly contradict the information on social media sites? Must the attorney tell the court? Must the attorney tell opposing counsel? Does the attorney have an ethical duty to do either as an officer of the court?

Arguably, Model Rule of Professional Conduct 3.3, requiring lawyers to display "candor toward the tribunal," would necessitate that they notify the court of potential juror bias. The applicability of the rule, however, is far from certain. Some jurisdictions have attempted to clarify this ambiguity. For example, New York Rule of Professional Conduct 3.5(d) provides an explicit requirement that a lawyer must reveal evidence of juror misconduct to the court. In 2011, the New York County Lawyers' Association on Professional Ethics issued an opinion stating that under Rule 3.5(d) lawyers who uncover juror misconduct through social media monitoring must promptly notify the court.

No matter what a lawyer's ethical duties may be, *United States v. Daugerdas*[2] highlights the practical effects of failing to disclose juror misconduct. The case stemmed from the tax evasion trial of David Parse and four co-defendants. Parse's attorneys conducted an Internet search of one of the perspective jurors, Catherine Conrad. Their research revealed a 2010 Suspension Order suspending a Catherine M. Conrad from the practice of law. The name on the jury roll matched exactly the name on the suspension order, including listing the same middle initial. At *voir dire* questioning, however, Conrad had stated that her highest level of education was "a B.A. in English literature." Therefore, Parse's attorneys simply concluded that the prospective juror and the suspended attorney were two separate people.

Conrad was ultimately seated as Juror #1. Several weeks into the trial, she submitted a note to the court asking if the jury would be instructed on the doctrine of *respondeat superior* and inquiring about vicarious liability. No party had used these terms during trial. Conrad's note led Parse's attorneys to conduct additional Internet research. Their research again revealed the Suspension Order, but this time it also matched Conrad's address and household information to information on the Suspension Order. Still, they failed to raise the issue with the court, finding it "inconceivable" that Conrad had lied during *voir dire*.

The jury reached a verdict at the conclusion of trial, convicting four of the five defendants, including Parse. Several days after the jury rendered the verdict, Conrad sent a letter to the government attorneys who had prosecuted the case; she commended them on the "outstanding job" they did on behalf of the government. The government eventually disclosed this letter to the court and defense counsel. This letter led Parse's attorneys to conduct even deeper research into Conrad's background. This research revealed that during *voir dire*, Conrad had lied extensively about her educational, personal, and professional background, including failing to disclose her legal education, her suspension from practicing law, and her extensive criminal background. As a result, several defendants moved for a new trial based on juror misconduct.

Ultimately, the court granted the motion as to all defendants *except* Parse. The court ruled that based on their preliminary investigations, Parse's attorneys knew or should have known that Conrad had lied during *voir dire*. Further, their failure to bring this potential misconduct to the court's attention *waived* Parse's right to challenge the partiality of the jury based on juror misconduct. A defendant who knows of juror misconduct but fails to disclose it, the court reasoned, essentially has a risk-free trial. Therefore, "a defendant waives his right to an impartial jury if defense counsel were aware of the evidence giving rise to the motion for a new trial or failed to exercise reasonable diligence in discovering that evidence."[3]

The *Daugerdas* decision should not dissuade defense counsel from conducting Internet and social media research into potential jurors. What it should do is convince defense counsel that if the research uncovers potential juror misconduct, it should be *disclosed to the court immediately*. If there is any doubt, such as the identity issue in *Daugerdas*, counsel should dig deeper until that doubt is resolved one way or another. If it is not resolved, the attorney should err on the side of disclosure. Counsel should not risk inadvertently waiving a client's fundamental rights by failing to raise the issue with the court.

Juror Misconduct

The *Daugerdas* case also shows the importance of continuing juror investigation beyond *voir dire*. Monitoring jurors' social networking sites during trial and deliberations can reveal instances of juror misconduct as well. As social networking has become more ubiquitous, it has inevitably penetrated the courtroom. In June 2012, the Judicial Conference on Court Administration and Case Management updated its "Proposed Model Jury Instructions — The Use of Electronic Technology to Conduct Research on or Communicate About a Case." These model instructions make it clear that jurors are not to use the Internet to conduct independent research on a case or use social media to discuss a case while it is still pending. The instructions specify by name the most widely used social media sites: Twitter, Facebook, Google+, MySpace, LinkedIn, and YouTube.

Still, some jurors have failed to get the point. Perhaps one of the more egregious instances of a juror using social media — and a great example of how that can have real-world implications — occurred in the *Dimas-Martinez v, Arkansas* capital murder case.[4] During Dimas-Martinez's trial, a juror repeatedly discussed the case via updates on Twitter even after being specifically instructed by the trial court to refrain from doing so.

Ultimately, the Arkansas Supreme Court found that such postings constituted juror misconduct that denied the defendant a fair trial and vacated Dimas-Martinez’s murder conviction. The trial court had repeatedly instructed jurors to remain off social networking sites and the Internet during the course of the trial and deliberations, per the Model Jury Instructions. Therefore, the Supreme Court found the juror’s conduct especially troubling. “Even if such discussions were one-sided, it is in no way appropriate for a juror to state musings, thoughts, or other information about a case in such a public fashion,” the court stated. Therefore, it reversed the defendant’s conviction and remanded for a new trial.

A juror's disregard for the Model Jury Instructions, however, will not necessarily result in a new trial, as made clear by *United States v. Fumo.*[5] Former Pennsylvania Sen. Vincent Fumo was tried for fraud, tax evasion, and obstruction of justice. During jury deliberations, a local television station reported on a number of Twitter, Facebook, and blog postings by a juror discussing the case. During deliberations, the juror wrote on his Facebook wall, "Stay tuned for the big announcement on Monday everyone," hinting that a verdict was imminent. After discovering the post, Fumo moved to exclude the juror and for a new trial, arguing that this and similar posts raised questions about whether the juror received outside influence. However, after conducting an *in camera* review, questioning the juror, and allowing counsel for the government and the defense to question the juror, the trial court denied the motion.

On appeal, the Third Circuit upheld the trial court's decision. First, the court endorsed the use of the Proposed Model Jury Instructions warning jurors not to use social media to discuss an ongoing case. Nonetheless, the court stated that "it does not follow that every failure of a juror to abide by that prohibition will result in a new trial. Rather, as with other claims of juror partiality and exposure to extraneous information, courts must look to determine if the defendant was substantially prejudiced." It found no prejudice in the instant situation. Instead, it agreed with the trial court's characterization of the Internet posts as "nothing more than harmless ramblings" and "so vague as to be virtually meaningless." Consequently, it found no abuse of discretion in the trial court's decision to deny the motion for a new trial.

Prosecution's Use of Social Media Research

All of this goes to show that the use of social media in judicial proceedings is not a one way street. Law enforcement and prosecutors are increasingly utilizing social networking sites to build their cases. The U.S. Department of Justice, Computer Crime & Intellectual Property Section, has even produced training materials entitled "Obtaining and Using Evidence from Social Networking Sites." This guide provides an overview of key social networking sites and instructs investigators on how to obtain and use information from those sites in criminal investigations. Therefore, it is extremely important that criminal defense attorneys gather from their clients lists of all social networking sites the clients use and instruct them to shut down those accounts, or at the very least, cease all activity on those sites.

If a client does not close accounts and cease activity, the results can be severe, as evidenced by *United States v. Meregllldo*.[6] As part of an investigation, the government sought and obtained a warrant for the contents of a suspected gang member's Facebook page. Rather than subpoenaing Facebook to provide this information, however, the government accessed the information through a cooperating witness who was Facebook friends with the suspected gang member. When viewing the account, the government found messages detailing past acts of violence and threatening future acts of violence towards rival gangs and disloyal gang members. The government used the information from the Facebook page to build its case against the gang member.

Meregildo not only illustrates just how important it is to keep defendants off social networking sites, but also highlights the different ethical restraints that apply to law enforcement officials and attorneys. For example, ABA Model Rule of Professional Conduct 4.1 prohibits lawyers from knowingly making false statements of fact. Similarly, ABA Model Rule 8.4 prohibits lawyers from engaging in dishonesty, fraud, deceit, or misrepresentation. While these rules do not prohibit lawyers from accessing and monitoring the public portions of social networking sites, they certainly tie their hands when it comes to accessing information that is not public. For example, a lawyer who hires a private investigator to "friend" a witness whose profile is generally private may violate ethical rules unless the investigator clearly discloses an affiliation with the lawyer.

Law enforcement officials, however, are not subject to the same restraints. Indeed, the Justice Department's materials encourage law enforcement officials to use undercover operations. Law enforcement departments around the country are increasingly using social media to build cases, perhaps even going so far as to create fake profiles to "friend" suspects to gain access to nonpublic areas of their profiles.[7]

Trial Evidence

Despite the relative freedom law enforcement officials have to gather evidence, prosecutors and defense counsel alike are limited as to what information they can introduce into evidence at trial. Perhaps the biggest hurdle attorneys face when attempting to admit this information into evidence is authentication.

The openness of social networking sites and the anonymity of the Internet make the introduction of information from social networking sites ripe for authentication challenges. One court in refusing to admit into evidence paper printouts of a MySpace page noted, "[A]nyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's username and password."[8]

Consequently, anyone wishing to introduce social networking data into evidence must first establish a foundation through circumstantial evidence. A wealth of authenticating information can be found in metadata fields. Metadata, commonly described as "data about data," is descriptive information that is associated with substantive content. There are over 20 unique metadata fields associated with individual Facebook posts and messages — unique ID of a user's account, the author's display name, when a post was created, message recipients, etc. Similarly, the two dozen metadata fields associated with each tweet include the poster's ID, the user's screen name, and the username of anyone who retweeted. This metadata is an important source of authenticating information.

For example, in *State v. Tienda*[9] the court overruled the defendant's authentication objection and allowed into evidence computer printouts of certain MySpace pages. The prosecution was able to overcome the defendant's authentication objection by introducing subscriber reports with metadata showing that the accounts were registered to the defendant's email address, the zip code listed on the accounts was the same as the zip code in which the defendant resided, and one of the pages was titled with the defendant's nickname. The court found that this information "sufficiently linked [the content] to the purported author so as to justify submission to the jury for its ultimate determination of authenticity."[10]

Unfortunately, most social networking sites do not have means by which users can download their own metadata. While sites may allow users to download content, it usually does not capture metadata, and as mentioned earlier, simple printouts of screen captures are unlikely to be admissible without additional authenticating information. Therefore, it is best to hire an outside consultant or subpoena the information directly from the social networking site.

Obtaining information through a subpoena may be easier said than done. Third-party subpoenas to social networking sites are likely to result in an objection on the grounds that the production of private information would violate the Stored Wire and Electronic Communications Privacy Act (SCA).[11] The SCA prohibits Internet companies from disclosing a user's private information absent the user's consent. Therefore, courts have generally held that parties cannot obtain opposing parties' social networking data through a subpoena to the social networking site.[12]

The SCA gives prosecutors a distinct advantage when it comes to obtaining information from social networking sites. For example, 18 U.S.C. § 2703 allows governmental entities to compel social networking sites to provide the content of electronic communications through a warrant (if the content is no more than 180 days old) or through either a warrant or a court order (if the content is more than 180 days old). The law requires that the government notify the social media user if the information is to be obtained through a court order. The law provides an exception to the notification requirement, however, if the government can show that notification could result in a risk to someone's safety, flight from prosecution, destruction of evidence, intimidation of potential witnesses, or an investigation being jeopardized.[13] As a result, defense counsel may have difficulty obtaining *any* information from social media sites, while law enforcement officials, under certain circumstances, may be able to obtain the information without the user even knowing.

Facebook's position regarding nongovernmental access to user content highlights this disparity. Facebook receives so many subpoena requests for user data that it currently dedicates a section of its Help Center to answering questions about civil subpoenas. Nevertheless, Facebook takes the position that it is prohibited by law from disclosing users' private information and generally moves to quash subpoenas on that basis. Specifically, Facebook argues that the SCA prohibits it from disclosing the contents of a user's account to any nongovernmental entity through a subpoena. For the most part, this strategy of refusing to disclose user information has been successful.

A recent case, albeit one dealing with a governmental subpoena, shows that the SCA may not be the panacea that social networking sites think it is. In *People v. Harris*,[14] Twitter sought to quash a subpoena it had received to produce all user information and tweets from a criminal defendant's Twitter account. The court disagreed with Twitter that the subpoena violated the SCA. The court noted that the SCA protects only private communications and that the government can still compel a provider to disclose certain types of information if it obtains a search warrant or court order as prescribed by the statute. As a result, it ordered that certain information be disclosed over Twitter's objections.

The *Harris* court also dealt with privacy issues and analyzed whether the information requested was protected by the Fourth Amendment. The court noted that the Fourth Amendment protects only information in which a person has a reasonable expectation of privacy. Accordingly, the Supreme Court has repeatedly held that the Fourth Amendment does not protect information revealed to third parties. Because tweets are essentially broadcast to the world, the court concluded, Twitter users have no reasonable expectation of privacy, and therefore, tweets are not protected by the Fourth Amendment.

The court distinguished the principal case relied upon by Twitter, *United States v, Warshak,*[15] because that case involved emails rather than social website postings. Unlike emails that are directed at specific addressees, the court compared tweets to yelling out an open window. It said:

Consider the following: a man walks to his window, opens the window, and screams down to a young lady, "I'm sorry I hit you, please come back upstairs." At trial, the People call a person who was walking across the street at the time this occurred. The prosecutor asks, "What did the defendant yell?" Clearly the answer is relevant and the witness could be compelled to testify. *Well today, the street is an online, information superhighway, and the witnesses can be the third-patty providers like Twitter, Facebook, Instagram, Pinterest, or the next hot social media application.*[16]

Of course, the court's analogy raises a question regarding the ways in which private social media users must disseminate their information in order to maintain a reasonable expectation of privacy. While tweets are inherently public, information on other social networking sites is not. For example, Facebook users can direct certain posts to individuals or small groups of friends. Are such posts more akin to private email communications or a public Internet communication? The answer will help to determine what information is accessible to prosecutors and defense attorneys alike.

Courts will continue to face this and many other questions regarding social networking sites as technologies continue to evolve. As the *Harris* court noted, "In dealing with social media issues, judges are asked to make decisions based on statutes that can never keep up with technology." [17] The SCA itself was enacted in 1986, when email was cutting-edge technology and before the widespread use of the Internet, blogging, and social networking. As a result, judges are often forced to apply outdated laws to constantly changing technologies that they may not even fully understand. While this dynamic can create uncertainty (and frustration), it can also create opportunities for defense counsel to find creative ways to vindicate the rights of their clients.

Notes

1. *See* Model Rules of Prof! Conduct R. 3.5.
2. *United States v. Daugerdas*, 867 F. Supp. 2d 44S (S.D.N.Y. 2012).
3. *Daugerdas*, 867 F. Supp. 2d. at 479.
4. *Dimas-Martinez v. Arkansas*, 2011 Ark. 515 (Ark. 2011).
5. *United States v. Fumo*, 655 F.3d 288 (3d Cir. 2011).
6. *United States v. Meregildo*, No. 11 Cr. 576, 2012 U.S. Dist. LEXIS 11S085 (S.D.N.Y. Aug. 10, 2012).
7. Heather Kelly, *Police Embrace Social Media as Crime-Fighting Tool,* CNN.com, (Aug. 30, 2012), *available at* http://www.cnn.com/2012/08/30/tech/social-media/fighting-crime-social-media/index.html
8. Griffin v. State, 19 A.3d 415, 421 (Md. 2011).
9. State v. Tienda, 358 S.W.3d 633 (Tex. Crim. App. 2012).
10. *Id.* at 639.

11. 18 U.S.C. § 2701, *et seq.*
12. *See, e.g., Viacom Intl, Inc. v. YouTube, Inc.,* 253 F.R.D. 256, 264-65 (S.D.N.Y. 2008).
13. *See* 18 U.S.C. § 2705(b).
14. *People v. Harris*, 949 N.Y.S.2d 590 (N.Y. Crim. Ct. 2012).
15. *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010).
16. *Harris*, 949 N.Y.S.2d at 594 (emphasis supplied).
17. *Id.* at 597.

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