



## Facebook Meets Voir Dire: The Good, The Bad and The Ugly of Mining the Internet during Litigation©

An overview of the advantages, disadvantages, and ethical  
issues related to public information and social media at trial.

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A T T O R N E Y S

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The purpose of this article is to discuss the advantages (“the Good”), disadvantages (“the Bad”) and ethical issues (“the Ugly”) associated with using the internet and social media to gain advantages at trial.

## **I. The Good**

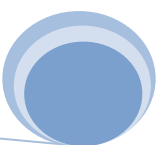
### **A. Pre-Trial Research and Preparation**

The explosion of social media over the Internet has created an era of unchecked and virtually limitless publicly available information. Most notably, the rise of social sites like Facebook, Twitter, LinkedIn and other “networking” pages has created the possibility for information to be posted related to individuals who are not even participants in the social media world.

For lawyers, it would come to be expected that the use of these sites has rapidly outpaced rules and procedures governing the same. Lawyers are creatively discovering new tactical uses and advantages while Courts and State Bar discipline boards are struggling to even understand the media itself. The advantages to be gained are tremendous and start in the pre-trial and preparation phase of litigation.

#### **1. Public Records Inquiries**

In the past decade, virtually every governmental agency at the state level and those at the county or municipal level in mid to large size areas have gone online. The resulting benefit to law firms seeking to stay competitive in litigation is access to public



records that in prior decades required thousands of dollars in man hours from a private investigator to uncover. In many cases, it was simply too expensive to check into the lives of the parties (including your own client), witnesses, jurors and even the lawyers and judges.

As these records have migrated online, various search engines can be utilized to discover hosts of information for use in case evaluation, discovery, mediation and trial. Without knowing any more than a last name, first name (even first initial) and state of residence, one can retrieve the following in two clicks of the mouse:

- 1) Business & Corporate records (County and Sec. of State);
- 2) Property Tax Records (Tax Commissioner & Assessor);
- 3) Property purchases and sales (Superior Court Clerk)
- 4) Liens, Judgments and Debts (Superior Court Clerk)
- 5) Prior cases & lawsuits (Clerks of Court)
- 6) Criminal History (Clerks of Court)
- 7) Credit Header;
- 8) Prior Addresses;
- 9) Vehicle ownership and registration;
- 10) Voting Registration; and
- 11) A "Google Earth" style view of the address & neighboring addresses.

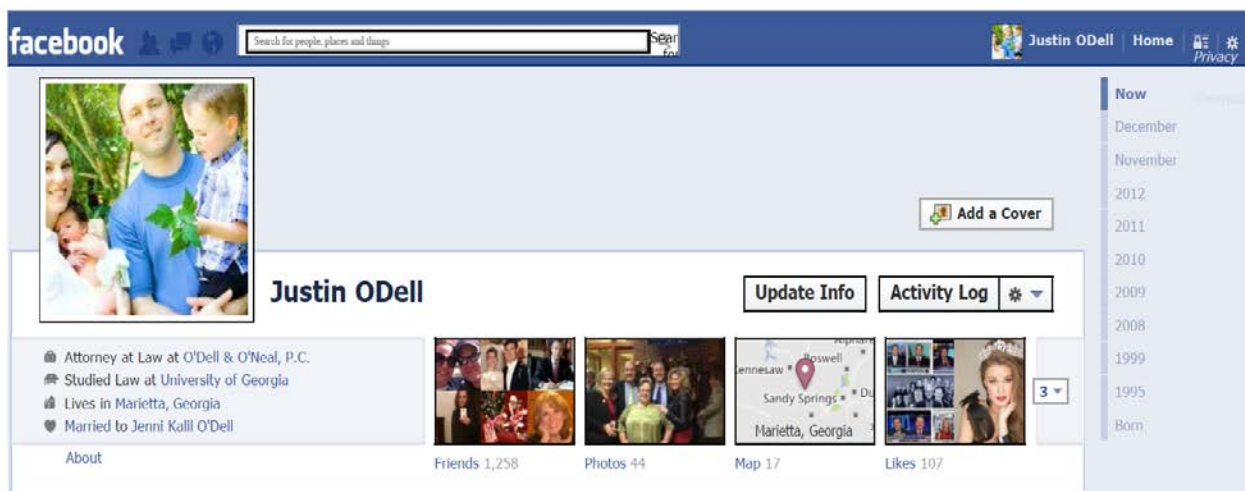
At a minimum, it should now be standard practice to run a public records inquiry on all parties (including your own client) and key witnesses to any case.



## 2. Social Media Sites (Facebook, Twitter, LinkedIn, etc..)

In addition to the public records inquiry, standard practice would now involve running a “Google” search on all parties and key witnesses. This should be done as early as possible. It is critical during this phase to “capture” the site from the beginning as any damaging content will likely be removed during litigation. Numerous courts have also held that a party may be forced to give the other party access to sites like Facebook in discovery.

Adobe “Webcapture” is an essential feature in the world of social media and online commerce. The first option is attached to your “Right Click” feature once you have Adobe Professional. No matter what you are doing or what program is open, you can right click on anything (a web page, word document, etc...) and choose to “Convert to a PDF”. This is a great way to snag a single page (for example Facebook) ( Facebook page:

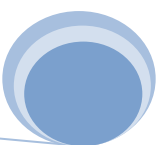


For more dramatic results, one can capture a whole website (subject to size restrictions). By inserting the URL into Webcapture, the software then goes to the internet and takes a digital picture of every page associated with that URL, including as many subfolders as the user directs. The web site is then converted into a PDF and preserved forever. This protects against someone later modifying the site to take down something offensive or, better yet, damaging to their case.

### **B. In the Courtroom At Trial**

As more and more courtrooms become “wired” to the Internet, these inquiries could literally be run during the voir dire phase of jury selection in order to find publicly available information regarding potential jurors. Public records inquiries would quickly reveal whether jurors were being honest and forthright about issues such as property ownership, criminal records, and involvement in civil actions. Movies have been written and legends told about jurors lying about elements of their own past in order to get on a jury to deliver payback. The public records inquiry can help rate the validity or invalidity of answers.

Social media sites, particularly Facebook, present an even more interesting opportunity for the trial process. The Wall Street Journal recently published an article “Searching for Details Online, Lawyers Facebook the Jury” *Anna Campoy*, February 22, 2011, in which numerous potential examples of useful information were discovered, even on the “public” portions of potential jurors pages.

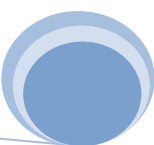


- District attorneys in one Oregon jurisdiction frequently strike jurors who are fans of TV shows like “CSI” fearing that they have an unrealistic expectation of criminal evidence;
- A Plaintiff’s lawyer in Beverly Hills, CA ran social media searches on jurors during a sex-abuse case in order to eliminate those devoutly identified with the Catholic religion; and
- A Defense lawyer in a personal injury case ran social media searches on potential jurors and discovered that one spent extensive amounts of time blogging and Facebooking regarding her attempts to contact extraterrestrials.

In New Jersey, a lower court prohibited an attorney from using the Internet during the trial. The trial court was reversed by an appellate court. The appellate court held that the fact “the Plaintiff’s lawyer had the foresight to bring his laptop computer to court and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of fairness or maintaining a level playing field.”

## II. The Bad

As lawyers are to recognize the inherent advantages of public information before and during trial, they are equally slow to appreciate the downside risks. Although most lawyers are able to recognize the potential dangers of having their clients and witnesses on Facebook and other public sites, they have neglected the potential damage of having



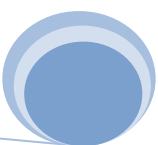
themselves on such sites. Lawyers and law firms are blinded by the marketing and networking advantages of these sites and fail to appreciate the trial risks associated.

#### A. The Client

Upon retention, prudent advice to a client is to immediately privatize all publicly available media, remove any potentially damaging material (caution must be taken to avoid spoliation or obstruction of justice/destruction of evidence) and to restrict future usage to the greatest degree possible. Some real life examples of attorneys experiencing the disaster:

What's a Halloween costume cost? For college junior Joshua Lipton, it was two years of his life. In October 2006, the Bryant University student was charged with drunk driving after causing a three-car crash that left one Providence woman in critical condition. Two weeks later he showed up for a Halloween party dressed as "Jail Bird," photos of which made it onto Facebook. That didn't sit very well with the judge in the case, who called the picture "a defense attorney's worst nightmare" and sentenced Lipton to two years in prison. The good news: The department of corrections didn't have to issue Lipton a new jumpsuit--he already had his own.

What do you do with a drunken pirate? Throw her in the brig--or, if you're Millersville University, deny her a teaching degree. That's what happened to Stacey Snyder, a then-27-year-old student teacher who posted a self portrait to her MySpace page under the caption "drunk pirate," even though it was not clear from the photo exactly what liquid was in her plastic cup.





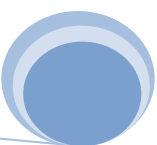
## B. The Lawyer and Members of the Lawyer's Office

If the average lawyer is now searching online for opposing counsel and the client, a lawyer should rest assured that he or she and the office staff are being searched. This becomes particularly true at trial. Although juries are instructed not to do any outside research about the case, the human condition teems with curiosity. It is also likely that a juror could reasonably feel that looking up information about the lawyer is not “research about the case.”

## III. The Ugly

As with any advance in technology, social media presents lawyers with a host of ethical issues. Social media touches upon the regulations concerning lawyer confidentiality, candor and communications, but also can constitute lawyer advertising and the ethical requirements associated with the same. Lawyers can learn the hard way:

- Sean Conway who posted on a blog site about the conduct of a judge during a trial and wound up being the subject of a Florida Bar Association ethics charge.
- Kristine Peshek blogged about a case and was fired from her job as an Illinois Public Defender, and charged with ethics violations for violating client confidentiality.



- Judge B. Carlton Terry was publicly reprimanded by the North Carolina Bar for exchanging comments with “Friends” on Facebook regarding a proceeding.

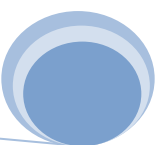
*Seduced: For Lawyers, the Appeal of Social Media is Obvious. It's Also Dangerous.* Steven Seidenberg, ABA Law Journal, February 2011.

### 1. Online Research of Parties and Witnesses

Most states and jurisdictions would conclude or have concluded that merely mining for publicly available information regarding adverse parties and witnesses is not an ethical violation. Ethical issues arise when the contact shifts from passive to interactive exchanges of information. Few bar associations have addressed the issue. Most bar associations have analogized the contact to a personal setting in a public forum. In other words, if the contact would be improper person to person, then it would be improper online.

The Oregon Bar Association (Oregon St. B. Ass'n Op. No. 2001-164 (Jan. 2001) analogized as follows:

A website which allows the visitor to browse the site may be freely accessed by the public, therefore it may be accessed by a lawyer. This is no different than driving by the a store and taking photos or entering the store and walking around. Similarly, a one-way communication (such as ordering products) is permissible.

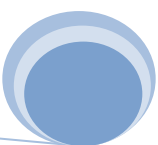


However, a lawyer who goes online and submits “chat” questions through the site or emails the store in the hopes of gaining information about the store violates the ethical prohibition on communications with client’s represented by counsel and communications which are deceptive. By analogy, a lawyer could not enter the store in person and without disclosing the real reason for the visit and begin questioning the store owner and staff about the operation.

*See also, Communication and the Internet: Facebook, E-Mail and Beyond, David Hricik, Professor of Law Mercer University School of Law.*

“Friending” witnesses or the opposition also presents ethical issues for lawyers. Most bar associations have rules against communication with an individual known to be represented by counsel. As a result, an ethical violation would result in trying to “friend” the opposition. The jurisdictions split when the target is a witness, not represented by counsel.

New York says an attorney may withhold information so long as the attorney does not make false statements of fact in attempting to contact another person. The New York City bar found that a lawyer may use her real name and profile to send a “friend request” to an unrepresented person to gain access to his/her social networking site to gather information. NYC Bar. Opinion 2010-2 (September 2010). The association found the situation analogous to a lawyer or investigator sidling up to a witness in a bar on Saturday night and striking up a conversation. *Seduced: For Lawyers, the Appeal of*



*Social Media is Obvious. It's Also Dangerous.* Steven Seidenberg, ABA Law Journal, February 2011.

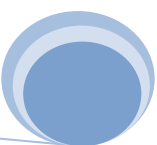
In Pennsylvania, the Bar Association found the opposite. The guidance committee found that absent full disclosure of the purpose for the contact, the request was “deceitful” and in violation of the ethical rules. Philadelphia Bar Association Opinion 2009-02 (March 2009).

Georgia has yet to have occasion to address the subject. By email, Paula Frederick, General Counsel states that the bar would consider it an ethics violation to “friend” someone using any kind of trickery or deception. In other words, until an opinion comes out to the contrary, this tactic is best avoided.

## **2. Lawyer and Staff Facebook “Friends” and Posts**

Bar Associations have struggled with the issue over “friending” a Judge. Florida Judicial Ethics Advisory Opinion 2009-20 held that a listing by a Judge and lawyer as “friends” could create the impression that the attorney is in a special position to influence the Judge. This would violate the Judicial Canons of Ethics of Florida. The Florida Bar Association prohibits a lawyer from assisting a judge in violating the canons of ethics, therefore the lawyer would be committing an ethics violation as well.

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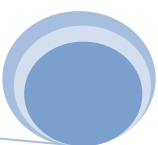


Three other states (Kentucky, New York and South Carolina) have concluding that “friending” someone is not an implication of special pull. These friendships are perceived as no more threatening to impartiality than friendships in the real world. These jurisdictions have cautioned that if the relationship or contact is specific to a case or appears to be a “close relationship” then it may warrant recusal or lead to ethics issues. *Seduced: For Lawyers, the Appeal of Social Media is Obvious. It's Also Dangerous.* Steven Seidenberg, ABA Law Journal, February 2011.

Since social media is also a form of advertising, all of the ethical rules and restrictions concerning trial publicity and lawyer advertising are involved. ABA Opinion 10-457 (co-authored by Paula Fredrick) contains a thorough review of the rules related to lawyer websites.

Social media presents additional problems related to client confidentiality, trial publicity and candor to the Court. Any lawyer who posts related to their cases risks violating client confidentiality. This is likely true even if the lawyer does not identify the client by name. In addition, posting about a case could invite comments by other individuals (who may or may not be lawyers) about the matter. The Georgia Bar has stated that since this content is contained on the lawyer’s “wall” and the lawyer regulates the same, the lawyer is responsible for it.

A lawyer who posts or blogs during a trial would likely violate both the trial instruction not to discuss the case with the jury (since a jury could read the posts) and general ethics rules concerning trial publicity. In addition, posting a successful result



(or even having someone else post about a successful result on your page) would likely run afoul of the rules related to lawyer advertising so as to create unjustified expectations. Given the space limitations of Facebook and Twitter, it is unlikely that the proper disclaimers would ever fit.

#### **IV. Conclusion**

Social media and the Internet create a wealth of opportunity for lawyers in litigation. The lawyer has access to unprecedented levels of information to aid in the process of case evaluation, preparation, discovery and a trial. However, a lawyer must recognize that an equal amount of information is accessible about the client and witnesses. Prudent representation demands discovery of the former and mitigation of the latter.

While this work is becoming second nature, lawyers are slow to limit their own exposure online. Law firms should work to develop social media policies related to content of individual employees and content related to clients. In addition, lawyers should consider carefully the content they place online. Finally, lawyers should act carefully when zealously researching in preparation of a case. An ethics violation can literally involve a single click of a mouse.

