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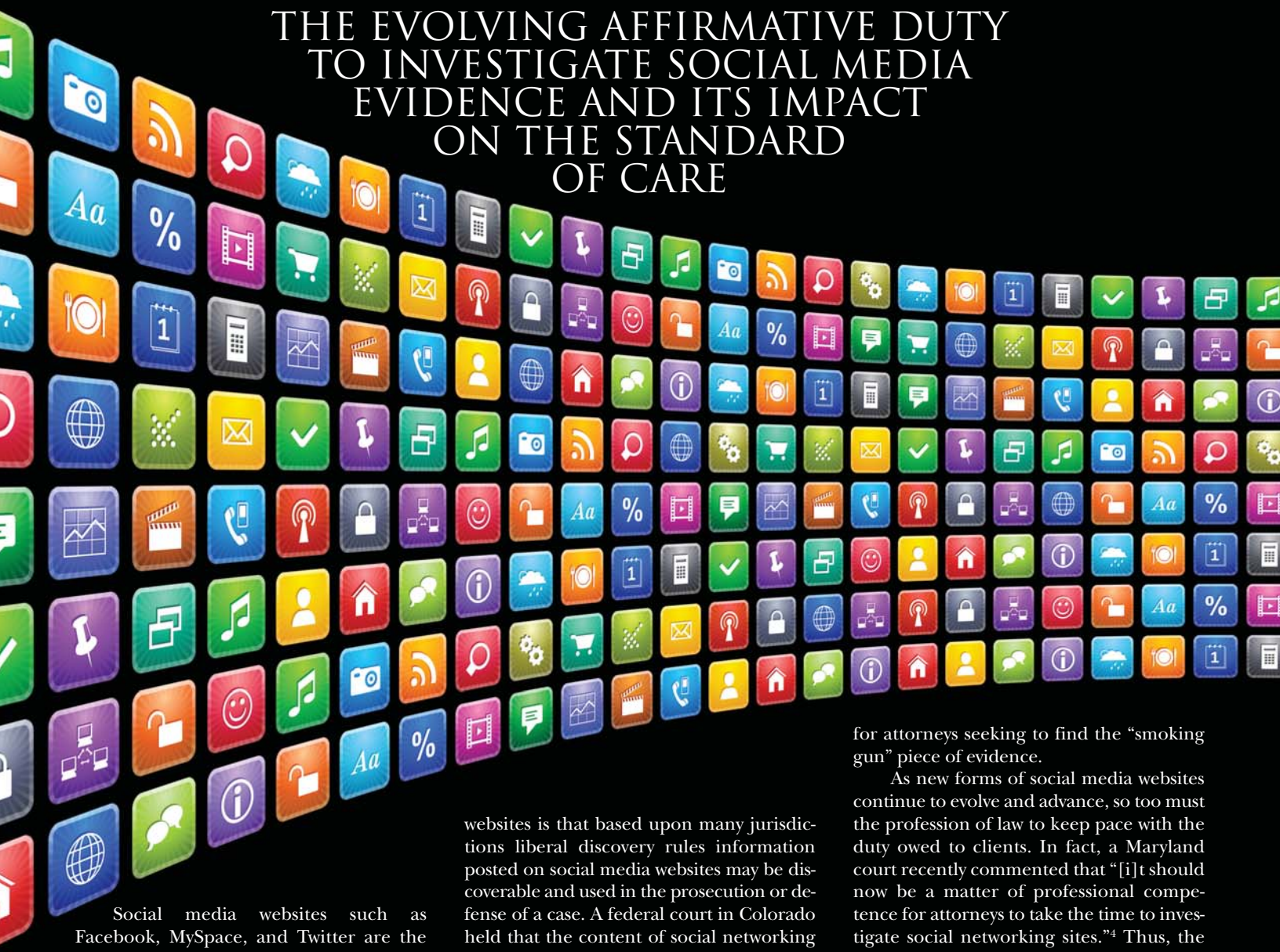
THE EVOLVING AFFIRMATIVE DUTY TO INVESTIGATE SOCIAL MEDIA EVIDENCE AND ITS IMPACT ON THE STANDARD OF CARE



Social media websites such as Facebook, MySpace, and Twitter are the 21st century's preferred method of interacting and communicating with people around the world. As of February 2012, Facebook had over 500 million users, and of those 500 million, 50% of active Facebook users logon every day. Further, another study found that there are approximately 140 million "Tweets" per day, or 750 "Tweets" per second. This phenomenon has lead to courtrooms across the country facing novel issues on the use of social media websites in litigation. As a result, the scope of an attorney's duty to not only advise clients of the ramifications of maintaining social media websites, but also the duty to use it to obtain information about an adversary, has created a new challenge in competently representing clients.

A common theme found throughout recent decisions on the use of social media websites is that based upon many jurisdictions liberal discovery rules information posted on social media websites may be discoverable and used in the prosecution or defense of a case. A federal court in Colorado held that the content of social networking sites in the public areas, which contradicted the allegations as to the effect of the injuries on the plaintiffs' daily lives, was discoverable.[1] A New York trial court found that access to information contained on the plaintiff's current and historical Facebook and MySpace pages and accounts to be both material and necessary.[2] Further, a Florida federal court ordered a plaintiff to produce all photographs added to any social networking site since the date of the subject accident that depicted plaintiff, regardless of who posted the photographs.[3] A recent study revealed that between January 1, 2010, and November 1, 2011, there were 674 reported state and federal court cases that involved social media evidence in some capacity. Thus, social media websites have replaced the use of surveillance and has become a less expensive and more useful source of information for attorneys seeking to find the "smoking gun" piece of evidence.

As new forms of social media websites continue to evolve and advance, so too must the profession of law to keep pace with the duty owed to clients. In fact, a Maryland court recently commented that "[i]t should now be a matter of professional competence for attorneys to take the time to investigate social networking sites."[4] Thus, the question becomes what duty does a lawyer owe to his own client to warn about the messages or photographs he posts to his social media website? Conversely, what duty does a lawyer owe to a client to obtain all relevant and material information about an adversary's postings and photographs to a social media websites? While there is a dearth of case law on the subject, the sentiment appears to be that a lawyer who chooses to ignore social media does so at his own peril.

With regard to his own client, at the time of being retained, an attorney has a duty to explain to the client the effect his social media website can have on the case. Such a discussion is akin to warning a client that a former conviction may come to light during the course of discovery. However, this is not to say that an attorney should instruct clients to delete potentially damaging

content from their social media websites. This notion was clearly exemplified in *Lester v. Allied Concrete Company*, 2011 Va. Cir. LEXIS 132 (Va Cir. Ct. 2011) where a plaintiff's attorney instructed his client to remove damaging evidence from his Facebook page, which showed the plaintiff as anything but grieving, resulting in a severe court sanction of over $700,000. In addition, in *Qualcomm, Inc. v. Broadcom Corp.*, 2008 U.S. Dist. LEXIS 91 (S.D. Cal. Jan. 7, 2008), a Court ordered Qualcomm to pay $8,568,633 for failure to produce tens of thousands of documents requested in discovery. The Court also sanctioned six attorneys from an outside law firm for blindly accepting Qualcomm's claim that their e-discovery searches were adequate, as well as intentionally hiding or recklessly ignoring relevant documents. Nevertheless, an attorney has a duty to warn a client that as the litigation proceeds, even non-public postings, or postings to their social media website by a third party may be discoverable.

The other main duty of an attorney arises out of the investigation of an adverse party through social media websites. For example, a defense attorney would not be acting competently and diligently in a personal injury case, if the attorney ignored pictures of a recent trip to Hawaii posted by a blissfully looking plaintiff who is claiming loss of enjoyment of life. However, an attorney does not have carte blanche to send "friend requests" to every opposing party he has an active file with. First, most jurisdictions have a rule prohibiting a lawyer from contacting a represented party without the party's counsel's consent. Second, Courts will not permit a "fishing expedition" into a person's private social media website without a reasonable basis. There still must be a "factual predicate with respect to the relevancy of the evidence", as described by one New York appellate court in *McCann v. Harleysville Insurance Co. of New York*, 78 A.D.3d 1524, 910 N.Y.S.2d 614 (N.Y. App. Div. 4th Dept. 2010). Third, most on-line social media is controlled by a non-party service provider. The Stored Communication Act, 18 U.S.C. § 2701 *et seq.*, prohibits electronic communication services from revealing a user's private messages even if they receive a subpoena. Further, the extent of the privacy protection afforded by the Stored Communication Act may depend upon the user's conduct, i.e., their privacy settings. Therefore, an attorney is required to obtain written authorization from an adverse party for a non-party to reclaim data from a private social media website. Despite these hurdles, an attorney has a duty to check all public social media websites for any relevant information. Moreover, attorneys should begin to craft and formulate new interrogatories, requests for documents, and deposition questions that can help form a basis for gaining access to potentially material information and photographs contained in an adversary's private social media website. Similar to obtaining written authorizations for receipt of a plaintiff's pertinent medical records, attorneys should also consider requesting written authorizations for a plaintiff's non-public social media websites when deemed appropriate.

Another area of the law where social media has played a large role is in an attorney's due diligence in serving legal papers upon an adverse party. Courts have recognized a duty of attorneys to perform basic internet searches to find the whereabouts of a party. One Indiana appellate court was amazed that the plaintiff's attorney had failed to Google an absent defendant as a matter of due diligence, noting that the Court itself had done so and immediately obtained search results that included a different address for defendant as well as an obituary for the defendant's mother listing numerous relatives who might have known his whereabouts.[5] A Florida appellate court questioned the effectiveness of an attorney who had only checked directory assistance in order to get an address to serve a defendant, calling such a method in the age of the Internet the equivalent of "the horse and buggy and the eight track stereo."[6] Moreover, in Louisiana the appellate court upheld a trial judge's rejection of a party's due diligence claims where that judge had conducted his own Internet search and concluded that the proper contact information for the defendant was "reasonably ascertainable."[7] Therefore, an attorney's duty to diligently obtain the location of a party for service purposes has been heightened by the availability of social media.

In a profession based upon tradition and legal precedent, it is apparent that attorneys cannot ignore the technological changes going on around them. Rule 1.1 of the ABA Model Rules requires lawyers to be competent in the representation of their clients. Further, Comment 6 the aforementioned Rule advises that lawyers "should keep abreast of changes in the law and its practice." Thus, early on in their representation attorneys should discuss the ramifications of a client's social media on the matter. In addition, an attorney should perform a search, using a search engine such as Google, for any relevant, public information available not only for his client, but any parties or witnesses to the action. Lastly, an attorney should create a discovery plan that includes interrogatories and document requests that take into consideration potentially relevant information contained in a social media website. While a body of case law continues to develop as to the duty with regard to social media, the biggest takeaway for attorneys is that they must be cognizant of these websites and their potential use for better or worse in litigation.

1 *Ledbetter v. Wal-Mart Stores, Inc.*, 2009 U.S. Dist. LEXIS 126859 (D. Colo. 2009)
2 *Romano v. Steelcase, Inc.*, 30 Misc. 3d. 426, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010)
3 *Davenport v. State Farm Mutual Automobile Insurance Company*, 2012 U.S. Dist. LEXIS 20944 (M.D. Fla. 2012)
4 *Griffin v. Maryland*, 995 A.2d 791 (Md. Ct. Spec. App. 2010)
5 *Munster v. Groce*, 829 N.E.2d 52 (Ind. Ct. App. 2005)
6 *Dubois v. Butler*, 901 So. 2d 1029, (Fla. Dist. Ct. App. 2005)
7 *Weatherly v. Optimum Asset Management*, 928 So. 2d 118 (La. Ct. App. 2005)

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