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SOCIAL DISTRACTION: How social media has changed the legal playing field

■ David Baugher

ATTORNEY ERIK SYVERSON works hard at his job, but he is the first to admit that the research model for his Internet law and civil litigation practice doesn't fit the shopworn image one might have for lawyerly investigation.

In fact, he compares traditional discovery processes to "the horse and buggy"

"I bust cases wide open almost every day without leaving my home, without leaving my recliner," said the North Carolina resident whose prominent practice in California has earned him appearances everywhere from CNBC to The Huffington Post as he represents Academy Award-winning actors, large companies and CEOs in cases that frequently feature cyberliability and social media. "What I've found in my practice is that you've got to have an open heart when it comes to information, the Internet and technology"

But, with the rise of platforms like Facebook, Instagram and Twitter, that openness has become a necessity for more than just attorneys who focus on Internet law. In both the civil and criminal worlds, social media and instant communication has radically altered the playing field for everyone and changed nearly every aspect of the legal landscape from how evidence is presented to the way jury selection is done.

"The days of sitting in a warehouse looking through boxes of documents, which is what the practice was when I started, that's long gone," said Syverson.

DAMAGED CASES AND DROPPED CLIENTS

Michael Newman of Van Camp, Meacham & Newman in Pinehurst puts it simply.

"It is definitely something that has tak-

en on a life of its own because everybody is on it," said the Wake Forest law graduate who has been named one of the ten best attorneys in the state for client satisfaction by the American Institute of Personal Injury Attorneys.

Newman said that he works hard to make clients aware that social media is constantly scoured by insurance adjusters and a single careless message can spell the difference between a sizable judgement and a disappointing defense verdict.

"You'd be surprised at the number of injured folks that, for whatever reason, prior to getting a lawyer, and sometimes even after, they are posting something on their Facebook page like 'I'm so glad I wasn't hurt worse in this accident'" he said.

Isaac Thorp of Thorp Law in Raleigh has a similar view and even puts it in his contract with personal injury clients that he has informed them regarding the issue.

"I tell my potential clients social media can kill your case," he noted.

It can also kill the attorney-client relationship itself. He recalled heavy social media user whom he represented only on the strict condition that she not comment about the matter on any platforms. Within a month, he found she was posting anyway and dropped her as a client.

Thorp said that pictures or posts from an injured person showing them enjoying life or engaging in physical activity can severely damage a case, a problem made worse by a natural bias in which people tend to publicize happier moments for public consumption rather than pain, struggles or sadness.



Isaac Thorp

"You've got your real life and your Facebook life," he said. "Generally, people don't post pictures of how miserable they are on Facebook. There is this vast discrepancy between reality and what appears on the social media platform."

'A TREASURE TROVE'

That discrepancy can have a big impact on cases – even when they may be based on misimpressions created for entertainment purposes. Patrick Sharpe, a Columbia attorney recalled representing a rap artist accused in a murder.

"It made it very difficult for us to go in front of a bond judge – even though he didn't have a record – and tell the bond judge that he's not a dangerous person, doesn't have a record and doesn't have involvement with any guns when the prosecution can pull up pictures from Facebook where he's pointing guns at the camera carrying on with his rapper persona," he said.

Posts that admit actions or express intent can also be a problem for a case and geolocation data that may put someone at the scene of a crime could also be a big blow to a defendant's chances of acquittal. Sharpe recommends asking clients about things that may be out there – or even requesting to look at their Facebook page – to avoid unpleasant surprises during trial.

"I think the best thing to do is try to address it on the front end," he said. "It

is one of those things that is a lot easier to deal with if you know about it.”

Dayne Phillips, another Columbia-based attorney who does criminal and appellate work agrees that social media can influence cases. He feels that has mostly benefitted prosecutors who can use information to establish the location or key connections to others that the accused might have.

“It could be great for a criminal defendant but I think that’s a rare case for the most part,” he notes.

Defense arguments to exclude such material often focus on hearsay or problems with proving the authenticity of a message but he said courts have generally given significant latitude to the government’s efforts to introduce social media evidence.

Still, it is imperative for attorneys to remind clients that, no matter how bad something might look, they may not delete it from social media since that could be deemed destruction of evidence and leave them open to an additional criminal charge when they may not even realize they were doing anything wrong.

Phillips said that his main use for such evidence on the defense side has been to dampen the credibility of prosecution witnesses.

“If you have access to social media with certain witnesses, you could have potentially a treasure trove of impeachment evidence regarding their character or their whereabouts or their dealings related to the case,” he said.

‘PEOPLE DON’T STOP TO THINK’

That kind of impeachment can be devastating. Shelia Huggins, a solo business contracts and litigation practitioner in Durham said it can make a strong impression when a witness is forced to read a text message that may expose an unpleasant fact in court. Even what’s not said can reveal an individual’s state of mind in a given moment. A witness may testify in court that something was important at the time but if their messages don’t bring it up, it calls that assertion into question.

“Anything that can show how a person is thinking, what they are feeling and what

they see as important, that’s going to be the first thing that comes out in those text messages,” she said. “It is going to be hard to dispute that.”

Huggins said that the use of emojis or all caps in messages can accentuate emotions for the jury and sometimes undercut the calm demeanor a witness might adopt in court.

“It amazes me that people don’t stop to think this could actually be used against me and yet they send it anyway with all of the profanity that shows they are the guilty party,” she said.

Social media revelations aren’t just limited to witnesses and clients either. Back in Raleigh, Thorp said that a cursory search of platforms like Facebook can give valuable guidance for voir dire of jurors to look for potential sources of bias such as a recent experience or strong ideological leanings that they might be reticent to volunteer under general questioning.

“If they’ve got strong political views that they are expressing on social media, we make note of that,” he said. “It is not necessarily that a particular point of view would automatically make them good or bad for a particular case but it is just helpful to have a lot of background information.”

‘NEEDLE IN A HAYSTACK’

While the power of the Internet at one’s fingertips may have changed the game when it comes to research, Tami McKnew, a Fox Rothschild attorney in Greenville who focuses on franchising, dealerships, antitrust and intellectual property, said it hasn’t necessarily gotten easier. In fact, it has made process more difficult in some ways due to the sheer volume of documents which might now be produced in discovery leaving attorneys, judges and jurors awash in evidence.

She calls it a “terrible stress on the legal system” that can slow cases to a crawl.

“If you are the receiving attorney, you’ve got to figure out a way to do it that’s logical and allows you to find the needle in a haystack,” she said.

McKnew also said that the legal field still struggles with what is admissible and

how it can be validated though caselaw in this area is building rapidly.

“It is a very thorny issue because sometimes, you don’t know who posted it, you don’t know the situation, it’s hearsay, all kinds of objections,” she said, “so courts are still wrestling with how to deal with evidence or attempted evidence that comes over social media because it doesn’t have the controls.”

Moreover, the permanence of items posted on the Internet has made IP work a particular challenge. McKnew said she may reach agreement with a defendant in a trademark case but it doesn’t always mean that the other party has the ability to enforce the solution and expunge the problem. Attorneys are sometimes at the mercy of internal processes at social media platforms to eliminate offending material.

“That means that even if you get a remedy from the infringer, that misuse is likely to stay in social media forever because it is extremely difficult to have it removed,” she said.

Back in Los Angeles, Syverson said that the level of cooperation or resistance encountered dealing with different platforms varies. It is an important issue in dealing with defamation or data privacy matters since there is often a lot of cyber-detective work to track down parties in John Doe lawsuits launched against defendants hidden by a curtain of anonymity that can only be breached by a string of subpoenas following a trail of digital breadcrumbs.

“It’s not always a straight line. Sometimes you get lucky and boom, it’s obvious. But a lot of times, it is a crooked line and takes a couple of years,” he said. “You just stay at it and eventually you nail these people.”

But one thing is clear. In a legal world once dominated by cumbersome depositions, interrogatories and document requests, there has been a fundamental change for lawyers in both the volume of data, its uses and the means by which it is obtained.

“You just have to know how to hunt for it and find it,” Syverson said.