



Using social media to build — and protect — your case

You must thoroughly research social media on every case and thoroughly brief your clients on how their postings may be used against them

BY STEVEN A. KRONENBERG

Social-media research is among the least expensive, broadest, and most detailed methods to identify information to prove your case, impeach defendants' credibility, and tailor your arguments to the jury. This article provides some guidelines for how to collect and leverage information with under-utilized sources from pre-litigation through trial.

Search parameters

You are probably already searching major sites like Google and Facebook, but are your searches under-inclusive, resulting in missing information? Or are they over-inclusive, stuffed with irrelevant facts that require too much time to review for too little reward? And do your searches comply with the Rules of Professional Conduct?

Pre-litigation: First things first

Due diligence: We all want to believe our clients are sincere and honest. But at a minimum, you must learn what competent defense counsel will likely discover – complaints about pre-existing injuries (even if they did not undergo medical treatment or file a claim), irresponsible behavior that is irrelevant and unduly prejudicial, and inconsistent versions of the facts giving rise to the case. Defendants may also argue that your client's post-incident conduct demonstrates that he or she was not seriously hurt.

Ask your clients diplomatically about whether they have posted this kind of information, and to prepare a list of their social media apps and usernames. Disclose that defendants will search for negative information, and that it is important to identify and address this proactively. Investigate these skeletons so that you can be prepared to explain or rebut them at deposition or trial.

Focus your search: Ask clients if they know about any defendant's or witness's use of social media (based on publicly available information or direct communications, not by attempting to access those accounts). Many people use the same login for



several platforms, so you may be able to search among apps for the same username.

Advise clients to preserve social media (but not to create any more related to the case): An attorney cannot ethically advise a client to delete social media content related to the case because this violates Rules of Professional Conduct regarding suppression of evidence. (https://apps.calbar.ca.gov/mcleselfstudy/mcle_home.aspx?testid=61 [citing Rule of Professional Conduct, rule 5-220].)

However, nothing prevents an attorney from advising a client to *restrict* access to their social media accounts so that it is not available to the public. And to protect confidentiality, clients should not post about anything related to their claims.



Request preservation of defendants' content and devices: Send a preservation letter to target defendants as soon as practicable. A preservation letter reminds defense counsel about their obligations to preserve evidence and reduces the risk that the defendants will delete or revise online content. If you can prove that a defendant "intentionally concealed or destroyed evidence," then the jury may conclude that the evidence would have been unfavorable to the defendant. (CACI 204.)

If your clients have provided a list of a defendant's social media apps or usernames, then your letter should include them. Your letter should also remind defendants not to dispose of cell phones and other hardware they use to access their accounts and that may store photos, videos, and chats.

Preparing a discovery plan

Review jury instructions for your causes of action to identify the elements you will need to prove. Then consider how online information can provide supporting evidence. If you use workflow apps like Trello or Taskworld, then prepare a checklist to use with the same types of case.

For a food-allergen injury claim, you will need to prove that the defendant knew or should have known of the ingredient's danger and presence. (CACI 1206.) You may be able to find evidence that the defendant had been ordering that same ingredient for years (and had not bothered to review the ingredient statement for allergens). Do photos show that the menu or ownership have been the same for a long time? Did your target defendant write any product reviews that are posted on the manufacturer's website or with popular online vendors?

For a strict-product-liability-design-defect and failure to warn claim, you will need evidence that the defendant knew the potential risks presented a substantial danger when used in a reasonably foreseeable way. (CACI 1205.) Unhappy

customers are not shy about posting their own product reviews. Search for videos that demonstrate the defect at issue, especially ones that include comments from the manufacturer.

Depositions: Impeach credibility and lay foundation for admissibility

Deposing a defense witness whose counsel has not properly prepared him or her to testify about social media can completely undermine the defendant's credibility. Asking these questions may force the witness to admit to resume fraud (or lie under oath), show the witness that you are more prepared than his or her attorney (weakening confidence in their own counsel), help you exert more control over the deposition, and increase the probability that the witness will answer other questions truthfully for fear of being confronted with facts that contradict their testimony.

If the witness is testifying as the defendant's corporate representative regarding, inter alia, the company's social media and web content, your questions can lay a foundation for admissibility at trial. Does the witness recognize the content of this "writing?" (Under Evid. Code, § 250, a "writing" can be any form of communication, including ones that combine words, sounds, and pictures.) Is it authentic? (Evid. Code, § 1400 et seq.) Who created, approved, and posted the content? Is the content a party admission, or does another exception to the hearsay rule apply?

Social-media postings may identify witnesses like former employees who may cast doubt on the defendant's contentions and defenses. If you can only locate photos, you may still be able to identify them with an image search.

Prepare to use social media evidence at trial

Suppose that you identified important information that the defendant published on an earlier version of its website that you found in the Internet Archive.

There are at least four ways you may be able to admit this evidence. First, make a written request to defense counsel to stipulate to the admissibility of the archived page. (At a minimum, this will show the court that you tried to resolve the issue informally, and the defendant is wasting the court's time fighting a losing battle.)

Second, for a fee, the Internet Archive will provide an affidavit to authenticate stored webpages. (<https://archive.org/legal/>; Evid. Code, §§ 1400 et seq.) Vendors like Page Vault will also provide affidavits regarding their efforts to capture and preserve social media for modest extra cost.

Third, consider a trial subpoena for the Internet Archive's custodian of records to testify regarding the steps that that organization takes to preserve webpages. (See *Plaintiff* article by Miles Cooper, personal communication, May 16, 2018.) Then, confront the defendant's corporate representative with the page so that the jury can see this witness try to deny that the company published the content on the page. (*Ibid.*) The company's denial supports an inference that it has something to hide. (*Ibid.*) Alternatively, trial testimony from the defendant's person most knowledgeable about the company's website may provide the proper foundation. (*Ibid.*)

Finally, consider preparing a motion in limine that requests an evidentiary hearing under Evidence Code section 402. (*Ibid.*) The court will likely consider more arguments at this hearing, outside the presence of the jury. (*Ibid.*)

Note: For audio or video recordings downloaded from a site, prepare a written transcript so that you can proactively and efficiently address any disputes about their content.

Jury selection and observation for misconduct

You may be provided with the names of potential jurors with only a short time before beginning voir dire. Social media can help you quickly identify favorable jurors based on, e.g., statements



supporting political campaigns, educational background, preferred news sources, and strongly expressed opinions on key issues. This information will also help guide your challenges, and to communicate and connect with jurors who may seem to be less inclined to reach a favorable verdict.

Even if this overt information is difficult to find quickly, you may be able to identify jurors who enjoy the activities in which your injured client can no longer participate. Those jurors may empathize more with your client, and they will likely understand plaintiff's loss of enjoyment of that activity and award higher general damages.

Courts instruct jurors not to conduct independent research, including "use of the Internet in any way," because it is "important that all jurors see and hear the same evidence at the same time." (CACI 100.) However, despite the admonition not to communicate about the case using "electronic device[s] or media, such as . . . any Internet service. . . blog, or website, including social networking websites or online diaries" (CACI 100 [emphasis added]), some jurors cannot resist the temptation. (See generally *Juror Number One v. Sup. Ct.* (2012) 206 Cal.App.4th 854, 858-859.) This can negatively affect your client's right to a (fair) jury trial under the Sixth Amendment. (ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 466, April 24, 2014 [available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.pdf].)

Examples of how (not) to use social media

If defendants restrict access to social media postings to their "friends," i.e., not the general public, then you should not send a "friend" request to attempt to access the non-public information. (San Diego County Bar Association Legal Ethics Opinion 2011-2 [citing Cal. Rules of Professional Conduct, Rule 2-100],

available at <https://www.sdcba.org/index.cfm?pg=LEC2011-2>.) A "real world" example demonstrates the peril of doing so:

Could anyone credibly contend that making an in-person request to a defendant to access his or her Facebook page, without their counsel present, does not risk violating the rule against communication with a represented party? (*Ibid.*) "Obtain[ing] access to restricted information" ex parte "makes all the difference" in whether or not counsel violates Rule 2-100. (*Ibid.*) Notably, accessing a defendant's public social media page does not require that party's communication or consent. (*Ibid.*)

In addition to the Rule 2-100 prescription against communicating with a represented party, there is at least a colorable argument that counsel have a common law duty not to deceive or commit fraud. (*Ibid.*) Accordingly, "the attorney's duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request." (*Ibid.*)

Examples of sources and searches

Food poisoning cases: Research Yelp and other restaurant review sites like TripAdvisor for photos and videos, especially content that a business creates itself, like responses to negative reviews. The business may (inadvertently) make a statement against interest. The restaurant also may have posted a video of its fast-working cooks handling raw meat right before touching cooked food. Deposition questions can authenticate the video, identify the cook and videographer, and ask about proper food safety training.

Photos are usually posted chronologically, which allows for reviewing menu revisions over time. Restaurants are required to post a "consumer advisory" on their menus to warn customers about the dangers of foodborne illness from eating raw or undercooked food. (Retail Food Code, § 114093.) You may be able to demonstrate that at the time of your incident, the restaurant had failed to do so.

Yelp "check ins," where users identify when they visited a business, can help confirm that your client ate at a restaurant on a particular day. (https://www.yelp-support.com/article/What-are-Check-Ins?l=en_US.) You may be able to locate potential witnesses who also checked in and perhaps "[made] a comment for [their] friends to see." (*Ibid.*)

Strict product liability: Some reviews on retail sites like Amazon include manufacturer's responses that confirm actual notice of a design defect. In a personal-injury case against the manufacturer of a GPS device that allegedly directed a big rig to drive unlawfully on a non-truck route, years before the collision at issue occurred, customers posted negative reviews alleging the same defect. The manufacturer's response stated that it was updating the device's maps. These facts supported plaintiffs' contentions that the manufacturer was aware of the defect, it was feasible to fix the problem, and the manufacturer failed to adequately warn users about the risk of allegedly misdirecting their trucks. (CACI 1203-1205.)

Subject-matter forums sometimes include a "support thread" for consumers having trouble with a product. Manufacturers' employees sometimes participate in these discussions. As with the responses to GPS product reviews, a target defendant's company may disclose (1) actual notice of an alleged defect, (2) failure to disclose the alleged defect to customers outside of the small audience of forum members; and (3) that it was attempting to fix the alleged problem.

When a corporate representative is confronted with this evidence that starkly contrasts with its press releases, owner's manual, and promotional material, one can hoist a manufacturer with its own petard.

Employment claims: Disgruntled (former) employees may publish blog posts about their long hours without proper pay for overtime or breaks.

Specialty sites and searches: For image searches, Google's image search engine is a good start, but Yandex may



provide better (or at least different) results. (yandex.com/support/images/loaded-image.html.)

For archive searches, consider searching Timetravel (<http://timetravel.mementoweb.org/>) in addition to the Wayback Machine (<https://web.archive.org/>.)

To complement standard Google searches, consider using other search engines like DuckDuckGo and Yippy. They may provide fewer but more focused searches.

Conclusion

The more you productively search, the more you will find, and the more value you will add to your cases.

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