

Social Media in Divorce Proceedings

The only thing that does not change is change. Lawyers must modify and change the way they prepare for highly conflictual cases in these changing times. To do so, they need to understand and know the right questions to ask about social media.

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According to the American Academy of Matrimonial Lawyers, more than 80 percent of divorce attorneys surveyed reported an exponential increase in the amount of evidence collected from social networking opportunities in the past five years.

The purposes and consequences of searches of social media produce rich information which can be used by and against litigants on trial or in settlement negotiations. This article will review what can be procured and where, and how we as advocates can mine for treasure on social media websites and in digital communications, as well as protect our clients from the pitfalls to which they may expose themselves by being connected in this new world.

First, what should be explored? Texts, emails, phone numbers, call histories, GPS and internet search histories, and social media sites such as Facebook, Myspace and dating services. Second: early in your case, ask that the opponent keep all social media sites intact during the case, and preserve all texts and emails so that there is no loss of evidence.

Cell Phones

Text messaging is the most common form of divorce evidence. More than 90 percent of divorce attorneys say they have seen a spike in the number of cases using evidence from text communications in the past three years, according to the American Academy of Matrimonial Lawyers.

Texts are a source of great embarrassment if one spouse keeps texts sent during times of anger or frustration, or sent when they were socially involved and not being mindful of their words. Likewise, texts sent to children or to friends and family members can show a mental state or disposition that contradicts the carefully constructed disposition of calmness and neutrality. Texts tend to be reflexive-- people do not think about them, so they exist in a context of immediacy and spontaneity. They provide a window into someone's real thoughts and intentions at times when they are not thinking like a litigant.

Texts can be printed. Clients can send you the entire chain of texts between spouses so attorneys can review them *in toto* to see if there is any gold in that mountain. We as advocates need to tell our clients that if they don't want a judge to see it, don't write it down.

Also, either spouse can subpoena the text messages from all numbers by subpoenaing the records from the cell phone provider. The records are usually only kept for a specified amount of time, but often the most recent is the most useful, so do it quickly at the beginning of a case. If a spouse leaves his/her cell phone on the kitchen table, or in a public spot, unlocked, a spouse can review the entire record freely and copy the record. So tell your clients: be careful where you leave your phone. And stay alert for opportunities.

Cell phones also offer other avenues for interesting discovery. Look at a spouse's **cell phone bill**: what are commonly called numbers that are unknown to the family? An inquiry by reverse checking those numbers may tell what other persons or businesses have occupied the time of the spouse when not involved in family affairs. (www.freephonetracer.com, eHow.com, and reversemobile.com; for blocked numbers, try http://www.ehow.com/how_69490501) This may provide information on marital indiscretions, obsessions or interests that can be useful in managing the case. How does the practitioner protect a client from getting into the same kind of trouble as the spouse they're researching? Tell your client to use a disposable cell phone that cannot be traced (i.e. do not charge the purchase to a credit card) for any calls that may later prove undesirable to explain or damaging to their case.

There are also opportunities for a) tracking a spouse by activating a **GPS service** on his/her cell phone and b) **recording conversations** wherever the phone is. Although stalking is illegal in Illinois and the ramifications should be carefully examined before taking any action, your client can activate the tracker on his/her spouse's cell phone if it is a family account, and can check to make sure his/her spouse has not done the same thing in turn. (Call your phone provider to ensure that locations service has not been enabled.) These GPS services can issue updates with whatever frequency you request. And although also illegal in Illinois, there are voice-activated programs that will automatically start recording whenever there is conversation where the phone is located. It can be difficult to prove that information was obtained via such an application, even if it's hard to determine how a spouse would have gotten the information otherwise. Inform your client of the dangers of leaving their phone on the dinner or lunch table (or anywhere out in the open) when out of earshot of the other spouse, especially when embarrassing or divorce-related matters are the subject of discussion.

The number of new applications for cell phones grows daily. This writer does not claim to be knowledgeable about those newer apps that may be useful. Good management requires keeping your cell phone where there can be no embarrassing information revealed by its presence.

If your client has a new cell phone, he or she should ask: where is the old phone? If not accounted for, it could become a nightmare, hidden inside a car, purse, or briefcase, becoming a bug providing a road map of activities and conversations.

Computers and Email

Email is another minefield, or goldmine, depending on whose emails are being used in the case. If one party has legal access to the other party's email account, the transmissions sent by the address owner will be evidence admissible in court. There are objections to emails received by the owner (hearsay and authentication), however they can be managed by subpoenas to the internet service providers for their records to demonstrate who owns the accounts from which the emails were sent. The information contained in the email is a constant source of information in a case, and can be helpful or harmful to your client. He or she can best protect himself by not using a home computer for any confidential transmissions, or ones to which he or she may be vulnerable. Likewise, work computer records are susceptible to subpoena for those transmissions that are not work related.

To prepare a subpoena for a specific email account, you need to have the account holder's personal details. If you do not have them, you can sometimes look through fee-based online email tracing services. You can issue a subpoena directly to the email account's service provider, who will be obligated to provide all required information about the account. Be prepared to have a court review for relevancy these responses to email requests.

The laws regarding email are a quagmire, and can be a sinkhole if you violate federal or state laws or privacy expectations. Initial question: does your spouse have a password? if so, does the other spouse know it? If an account is password protected, the use of key loggers and spyware is illegal without subpoena. And attorneys who know about illegal interception of electronic spying are also at risk (both personally and for malpractice). These cases are rarely prosecuted, but you do not want to expose you or your client to liability. That being said, it is very common for a spouse to find it irresistible to keep tabs on the email communications of someone who has become the enemy. Again, this can often be a ripe and fruitful opportunity to reveal private thoughts, ideas and indiscretions. Remember Petraeus. If there is any doubt, have your client open a new account with new passwords, and keep the account and stored emails in a computer not used by the other spouse. Do not share the new account information with the other spouse, and keep your secrets to yourself!

Lastly, remember, there are "cookies" on your computer which show each email whether you've deleted it or not. Also, the servers will have preserved all erased and deleted emails. So, despite what you may think, know that there is no hiding. You can never be certain of what is stored or archived, so if you do not want to see it in court, do not write it.

How do you know if your computer is safe? How can you tell if your spouse has somehow triggered a program so he or she can copy every communication, web search, dating-service transmission, etc.? You can't. Some programs are so sophisticated, spyware so good, the devices to get into your information so subterranean, that not even experienced techies can detect them. If you want to be sure, don't use your computer for any purpose you do not want to haunt you later.

Social Media Websites

There is a veritable bible of do's and don'ts when going through a divorce or custody proceeding. The chapter on social media websites is one that every lawyer should walk their client through, in the interest of protecting their case and discovering hidden treasure troves of information about the spouse. Facebook, Myspace and similar sites were seemingly designed to be the divorce advocate's dream in providing information that every litigant wants in preparing for war with the enemy.

These sites tell us where the registrant has been, where they're going, with who, what they did when they arrived, how they behaved, what surprises were awaiting them, what they expected, and often even has photos--from friends and enemies alike--showing them in their best and worst of times. Dating websites--eHarmony, Match.com, JDate, etc.--also provide profiles and let the world see the participant claiming that he or she is the full-time devoted parent or spouse.

How do you get it? Several courts have held that social media is discoverable for three main reasons:

1. It does not violate any privacy as there is no expectation of privacy
2. It can be relevant
3. It does not violate any privilege.

Some courts have, however, disallowed “fishing expeditions” and excessive requests. So, ask the other litigant to produce his or her usernames and passwords, and to print the entire page from its inception including contacts, friends and any deletions ever made. As long as the request can be argued to appear reasonably calculated to lead to the discovery of admissible evidence such as hidden assets or information relevant to custody, a court should allow the request.

Also, an attorney or the client may “friend” the account holder. How does someone become her friend and gain access to that wall? Make a friend request. The Bar Association Ethics Committee has opined that an attorney may use their real name to send a friend request to the opposing party without disclosing the reason for making such a request. This follows for the attorney’s agent as well. Nevertheless, it is impermissible and improper for the attorney to assume a false identity to gain access to the opponent’s Friends page. Obviously the spouse can make a request, but will be unlikely of having the request accepted. Having a friend do so on his or her behalf, however, is fully acceptable.

Be certain to advise your client to withdraw from the public eye and refrain from speaking about divorce, attending activities, spending, partying, or partaking in good times and bad times where the comments are memorialized and can be used, misused or twisted. There is no venting, no party, no opinion, no activity where you are undertaking risk or expense, no pictures of you or your friends that look happy or sad or mad that cannot be distorted by a good lawyer in trial.

And do we need to say more about what might be made of someone’s dating service profiles and communications with respondents in that milieu? Your profile may live much longer than your subscription. There are questions about whether the service would have to comply with a document request; there is not, however, much question that the subscriber would be forced to produce the questionnaires and other materials supplied to the services. Lawyers can ask for the names of all sites which a litigant uses, including LinkedIn, Twitter, MySpace and the like, as well as the usernames, passwords and IP addresses.

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