TORYS LLP

Conducting Litigation in the Social media Age

By Andrew Bernstein and Rebecca Wise

In the past several years, social media has played an increasingly prominent role in individuals' daily lives. At the end of 2011, Facebook had 845 million users worldwide.[1] Around the same time, Twitter boasted approximately 100 million active users.[2] For its part, LinkedIn claims to have more than 150 million members in over 200 countries and territories.[3]

Given the prevalence of these and other social networking websites and the information regularly posted to them, social media has the potential to be an invaluable tool for litigators. Counsel have started to consider social media as a potentially effective means of service. Further, counsel are increasingly demanding that the content of social media accounts be produced on discovery. Finally, when used appropriately, there is no doubt that social media can be a powerful investigative tool for counsel seeking to gather evidence. This paper will outline the key developments in this emerging area of law, as well as the ethical obligations that counsel should consider when using social media as a tool in litigation.

A. Social Media as a Mode of Service

There is no question that many users of social media check their social media accounts at least as frequently as (or more frequently than) their mail, email, and fax. According to Facebook, 483 million of its 845 million users access the site daily.[4] Given the prominence of social media in individuals' daily lives, the question increasingly asked by counsel is whether social media can be used as a means of effecting service, particularly when the party on whom service must be effected has proven difficult to locate or is evading service.

1) Ontario's *Rules of Civil Procedure*: Substituted Service

To date, Ontario's courts have not considered whether service may be effected by social media and under what conditions. However, it is clear that any such analysis would be governed by Rule 16.04 of *Ontario's Rules of Civil Procedure*, which permits the court to order substituted service under the appropriate conditions.

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[1] "Fact Sheet – Statistics," online: Facebook <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last accessed March 16, 2012).
[2] "One Hundred Million Voices" (September 8, 2011), online: Twitter <http://blog.twitter.com/2011/09/one-hundred-million-voices.html> (last accessed March 16, 2012).
[3] "About Us – Worldwide Membership," online: LinkedIn <http://press.linkedin.com/about> (last accessed March 16, 2012).
[4] *Supra* note 1.

Ontario's *Rules of Civil Procedure* set out the modes of service available to parties. Under these rules, service can be effected by personal service and, for documents other than originating processes, by an alternative to personal service, including service by mail, fax, or email.[5] However, the court retains discretion under Rule 16.04 to make an order for substituted service where it appears that it is impractical for any reason to effect service of an originating process or any other document required to be served personally or by an alternative to personal service. There are no limits on a court's creativity in making an order for substituted service.[6] Therefore, it is within the framework of Rule 16.04 that an order for substituted service via Facebook, Twitter, or other social media platforms might be contemplated by the courts.

Substituted service is not intended to spare the inconvenience, expense, or difficulty of more traditional means of service.[7] To obtain an order for substituted service under Rule 16.04, the Court must be satisfied that

1. all reasonable steps have been taken to locate the party in question and to serve him by traditional means;
2. the proposed method of substituted service will have "some likelihood" or a "reasonable possibility" of bringing the action or document to the attention of the other party; and
3. the mode of service proposed is the one most likely to bring the document in question to the attention of the defendant.[8]

As Ontario courts have not considered whether service may be effected by social media under Rule 16.04, the jurisprudence of other jurisdictions in Canada and abroad is instructive with respect to this issue.

2) The International Context

International courts appear prepared to order service by social media under the appropriate conditions. Although Australia was initially reluctant to order service by social media due to concerns over the security and reliability of such websites,[9] it was the first jurisdiction internationally to make such an order. In 2008, the Australian Capital Territory Supreme Court allowed the plaintiffs to serve a default judgment on the defendants by Facebook private messages after several failed attempts to serve the judgment through traditional modes of service. The plaintiff was able to assuage the court's concern that the Facebook profiles indeed belonged to the defendants by providing evidence of names, birth dates, and email addresses listed on Facebook that matched the various court documents filed by the defendants.[10]

Shortly after Australia opened the door to service of documents by social media, New Zealand and Britain followed suit. In March 2009, the New Zealand High Court permitted the service of a summons by Facebook in a case where the defendant's whereabouts were unknown.[11] Likewise, in 2009, Britain's High Court allowed a claimant to serve an injunction against an anonymous Twitter user by posting a direct

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[5] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rules 16.01-16.03.
[6] *Ibid.* at Rule 16.04.
[7] *Chambers v. Muslim* (2007), 87 O.R. (3d) 784 (Master) at para. 13.
[8] *Ibid.*
[9] In a 2008 decision, an Australian court denied a party's request to serve documents by social media because of concerns over the reliability and security of such websites. The judge held that she was "not so satisfied in light of looking at the uncertainty of Facebook pages, the facts that anyone can create an identity that could mimic the true person's identity and indeed some of the information that is provided there does not show me with any real force that the person who created the Facebook page might indeed be the defendant, even though practically speaking it may well indeed be the person who is the defendant." *Citigroup Party Ltd. v. Weekrakoon*, [2008] QDC 174 at para. 6, online: <http://archive.sclqld.org.au/qjudgment/2008/QDC08-174.pdf>.
[10] John G. Browning, "Served Without Ever Leaving the Computer: Service of Process via Social Media" (2010) 73 Tex. B.J. 180, online: Trend Offset Printing <http://trendmag2.trendoffset.com/display_article.php?id=351106>.
[11] *Ibid.*

message containing a link to the injunction on the party's Twitter account.[12] In 2012, Britain's High Court allowed the use of Facebook for service of a claim on a defendant who had proven difficult to locate. The court in that case extended the time for the defendants to respond to the claim, in order to ensure the defendant had enough time to check his Facebook account.[13]

3) Canadian Jurisprudence

The Alberta Court of Queen's Bench appears to be the only Canadian court to date to have considered whether service may be effected through social media. In *Knott Estate v. Sutherland*, the court granted an order permitting the plaintiffs to serve a defendant with an amended statement of claim by (1) publishing a notice of the action in the newspaper, (2) forwarding a copy of the document to the defendant's previous place of employment, and (3) sending notice of the action to that defendant's Facebook profile.[14]

4) Practical Considerations for Counsel

Although Ontario courts have yet to rule on whether social media is a valid mode of service, courts worldwide appear increasingly inclined to order service by social media in the appropriate circumstances. It is likely that Ontario courts will follow this trend. In practical terms, counsel seeking an order for substituted service by social media should be prepared to satisfy the court that

1. there is no other effective way to serve the party in question (for example, where the party's whereabouts are unknown);
2. the social media account with which service is to be effected does in fact belong to the party on whom service needs to be made; and
3. the party on whom service by social media is to be effected is reasonably likely to log on to her social media accounts within a reasonable period of time, and will receive actual notice of the document(s) being served.

Further, given the concerns over the security and reliability of social media websites, courts may be more likely to allow service by social media when it is requested in conjunction with other modes of service, as evidenced by the Alberta decision.

B. Use of Social Media for Discovery

Many users of social media share their entire lives online. Accordingly, Facebook, Twitter, and other social media platforms are potential gold mines of information for counsel at the discovery stage of litigation. Given the wealth of information available online, courts have been asked on numerous occasions to rule on whether social media accounts are producible in litigation.

The *Rules of Civil Procedure* require parties to an action to produce all documents relevant to any matter in issue in an action that are in the parties' possession, power, or control.[15] Courts have not hesitated to order the production of social media accounts within this framework, guided by the following principles, which have been articulated by the court:

1. The pages of a social media account are documents for the purpose of discovery and should be listed in a party's affidavit of documents if relevant.
2. The mere existence of a social media account is insufficient to require its production on discovery.

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[12] *Ibid.*
[13] Chris Johnson, "In a U.K. First, High Court Judge 'Likes' Facebook for Serving Legal Claims on Missing Defendant" The Am Law Daily (February 21, 2012) online: <http://amlawdaily.typepad.com/amlawdaily/2012/02/facebookclaimserve.html>.
[14] *Knott Estate v. Sutherland*, [2009] A.J. No. 1539 at para. 2(1).
[15] *Rules of Civil Procedure*, *supra* note 5, Rule 30.02.

3. Whether it is listed in the affidavit of documents or not, the responding party is entitled to cross-examine on the affidavit of documents to determine whether a social media account exists and the relevance of its content, and may seek production of the relevant portions of the account for which privilege is not claimed.
4. Access to the party's social media account through the party's password is overly intrusive unless the party is claiming as part of her damages claim a level of disability that inhibits her computer time. In those circumstances, a forensic examination of the social media account may be necessary.[16]

Arguments have been raised that the obligation to produce social media accounts in litigation conflicts with the privacy interests of the account holders. However, the courts have unequivocally held that the probative value of information contained on social networking websites (when such information is shown to be relevant) far outweighs a party's reasonable expectation of privacy, should one exist.[17] In fact, a court may order production of relevant social media accounts even when the account holder has modified his privacy settings in order to restrict access to the account.[18]

1) Practical Considerations for Counsel

In the context of litigation, employers and their counsel should consider whether relevant information might be available on an opposing party's social media account and, if so, should request production of the content of such accounts.

Although most cases that consider the obligation to produce social media accounts on discovery arise in the personal-injury context, there are a number of ways that information available on an opposing party's social media account may be relevant in employment litigation. For example, in the context of a wrongful-termination case, the plaintiff's social media accounts could evidence the plaintiff's daily activities and therefore any attempts by the plaintiff to mitigate her damages. Production of a plaintiff's social media account could also be relevant in defending a termination for cause, to the extent that the information on the plaintiff's social media account may evidence the cause for termination.

Counsel should be cognizant of their corresponding obligation to produce the content of their clients' social media accounts. At the outset of litigation, counsel should inquire whether their client maintains one or more social media accounts and, if so, whether the content of the account(s) may be relevant to the litigation. If the account content is determined to be relevant, counsel must advise the client to put a litigation hold on the account(s).

C. Social Media as an Investigative Tool: Ethical Considerations

The amount of information posted by users to social networking websites makes such websites a potentially powerful investigative tool for counsel seeking to obtain evidence. However, counsel's use of social media as an investigative tool raises a variety of ethical considerations, and counsel intent on using social media to obtain evidence must ensure that their actions do not breach their professional obligations.

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[16] *Ottenhof v. Ross*, 2011 ONSC 1430 at para. 3(e). Note that the test articulated by the court in *Ottenhof v. Ross* was in respect of production of a Facebook account. However, the test would likely apply equally to production of the other social media accounts.

[17] *McDonnell v. Levie*, 2011 ONSC 7151 at paras. 15-16. In this case, the plaintiff alleged various activities that she was unable to do. The defendant sought production of photographs of the plaintiff's social life and activities, which the plaintiff conceded were on her Facebook account. The plaintiff argued that she was entitled to a degree of privacy regarding Facebook that outweighed any probative value of the photographs. The court held that the photographs were producible, and left the question of admissibility to the trial judge.

[18] *Frangione v. Vandongen*, 2010 ONSC 2823 at para. 38. In this case, the plaintiff had intentionally restricted her Facebook profile so that only 200 of the plaintiff's "friends" could access the account. Notwithstanding these privacy settings, the court ordered production of the content of the account.

The *Rules of Professional Conduct* provide some general guidance relevant to understanding counsel's obligations when using social media to gather evidence. These rules prevent a lawyer from approaching or communicating directly with another party who is represented by a lawyer.[19] Further, lawyers are required to be courteous and civil and to act in good faith with all persons with whom they have dealings in the course of their practice.[20] In utilizing social media as an investigative tool, counsel must ensure that they are not contravening these professional obligations. However, how such obligations manifest when using social media as a tool for gathering evidence bears further consideration.

Bar associations in other jurisdictions have helped to clarify counsel's professional and ethical obligations in this regard. Various bar associations in the United States have issued opinions that consider counsel's professional and ethical obligations when using social media for evidence gathering. The opinions all appear to conclude that counsel seeking access to the social media accounts of opposing parties or witnesses for the purpose of gathering evidence for use in litigation – whether done directly or through an agent – will violate professional-conduct rules if the lawyer (or agent) seeking access to the account does so deceptively.[21] The Bar Association of the City of New York has opined that counsel may contact unrepresented parties through a social networking website as long as counsel disclose their real names and use only truthful information to obtain access to the unrepresented person's social media account.[22] The San Diego County Bar Association requires counsel to disclose not only their real names but also the purpose for the request.[23] Of course, represented parties cannot be contacted except through their counsel.

1) Practical Considerations for Counsel

As the rules that govern counsel's use of social media as an investigative tool remain somewhat unclear, counsel would be well advised to adopt a conservative approach. In practical terms, any information that can be accessed by an online search engine should be "fair game." Individuals who do not restrict the privacy settings on their social media accounts do not have any reasonable expectation of privacy over the content of those accounts, as such content is publicly accessible. However, counsel would be ill-advised to "friend" or otherwise request access to an individual's social media accounts for the purpose of gathering evidence for use in litigation. This is especially so where the individual is otherwise represented by counsel. In the event that counsel do request access to the individual's accounts, the request should not be made under false pretenses, and counsel should clearly disclose their identities to the individual.

D. Conclusion

Counsel and courts alike appear open to the use of social media as a tool in litigation. Given the prevalence of social media in individuals' daily lives, social media has the potential to significantly alter the landscape of litigation.

Service is one area of litigation that has been altered by the rise of social media, with courts worldwide showing an increasing tendency to order substituted service by social media under the appropriate conditions. The scope of parties' discovery obligations has also grown in this age of social media. Courts have unequivocally held that, to the extent that material contained on Facebook, Twitter, and other social networking websites is relevant to an action, such information must be produced on discovery.

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[19] The Law Society of Upper Canada, *Rules of Professional Conduct* (adopted by Convocation June 22, 2000), Rule 6.03(7), online: <www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486159>.
[20] *Ibid.*, Rule 6.03(1).
[21] See The Philadelphia Bar Association, Professional Guidance Committee, Opinion 2009-02, online: <http://amlawdaily.typepad.com/amlawdaily/2012/02/facebookclaimserve.html>; The Association of the Bar of the City of New York, Committee on Professional Ethics, Formal Opinion 2010-2, "Obtaining Evidence from Social Networking Websites," online: <www.nycbar.org/pdf/report/uploads/20071997-FormalOpinion2010-2.pdf> [New York Opinion]; San Diego County Bar Association, Legal Ethics Committee, Legal Ethics Opinion 2011-2, online: <www.sdcba.org/index.cfm?pg=LEC2011-2> [San Diego Opinion].
[22] New York Opinion, *ibid.*
[23] San Diego Opinion, *supra* note 21

There is no question that as social media continues to develop, counsel will find new ways to use social media in litigation. However, counsel must always be wary of their ethical and professional obligations, and ensure that their conduct does not run afoul of their professional obligations. T