

# Facebook, Twitter and LinkedIn –

# Oh My!

## Litigation Management in the Age of Social Media

By John Browning and Carol Kreiling



**I**t is a scenario that virtually every litigation management professional, risk manager, general counsel and defense attorney has confronted — you just know that there is something about the plaintiff’s case that doesn’t quite sit right, and you need to find the impeaching evidence to prove it. Thanks to the explosive growth and sheer pervasiveness of social networking sites like Facebook, LinkedIn and Twitter, the next “smoking gun” that makes your case is more likely to come from the claimant himself than from a private investigator conducting days of costly surveillance.

People are living more and more of their lives online, and the result is a digital treasure trove of information for the enterprising litigation

management professional and attorney. Would a plaintiff really claim that he hasn’t been able to engage in the hobbies and sports he did prior to the accident for which he is suing, and then share on Facebook the post-accident vacation photos of him rock climbing and waterskiing? You’d better believe it. Would the plaintiff claiming to have been emotionally scarred by the sexually suggestive banter in her workplace really have photos and wall postings on her Facebook page that look like outtakes from a “Girls Gone Wild” video? It’s happened. Would a plaintiff who insists “it’s not about the money” and professes that she just wants your insured to make safer products really be caught dead tweeting before trial about how she’s going to spend the windfall she expects from the jury? Believe it or not, that’s happened, too.



Finding and using incriminating evidence from social networking sites is becoming more prevalent, in part because there is so much out there. Facebook has over 800 million users worldwide with over half visiting the site at least daily. In a typical month, people upload more than 30 billion pieces of content to Facebook. Twitter has experienced near-exponential growth, going from processing 5,000 tweets per day in 2007 to a staggering 140 million tweets each day in 2011. There are over 100 million videos on YouTube, and more are being uploaded every minute.

### A Permanent Record

Once a photo, wall post or video has been put online, taking it back is a little like unringing a bell. A character in the movie, “The Social Network” aptly described this online permanent record, saying that “the Internet isn’t written in pencil, it’s written in ink.” And despite the fact that sites like Facebook offer all kinds of privacy settings and options for users to keep their profiles (or selected portions) out of the public eye, a surprisingly high percentage of information on social networking sites is available for public view. In fact, in a recent USA Today/Gallup poll, only about 26 percent of regular Facebook users described themselves as “very concerned” about privacy.

Whether social media users are unaware of how to utilize privacy settings or simply not that concerned about privacy, the end result is a vast resource for the diligent claims profes-

sional or defense attorney. A study by one e-discovery software company 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. These included not just the expected criminal law, family law and personal injury cases, but also employment law cases, insurance coverage, insurance fraud and even intellectual property/advertising injury claims.

While all of the wall posts, impeaching photos, lists of “friends” who might be potential witnesses and other features that you can expect to find on a typical social networking profile are obviously valuable, the threshold question remains — how do you find it in the first place? Using a search engine like Google will usually lead you to an individual’s social media profile, which may or may not be publicly viewable. If you have relatively little to go on, but have at least a name and email address, you can use a site like [www.spokeo.com](http://www.spokeo.com) to locate what social media presence that person may have (even book preferences and customer reviews on Amazon). For those more comfortable with outsourcing this sort of digital detective work, there are companies that offer forensic data collection services and e-discovery products uniquely tailored to social media.

### Understanding the Ethics

Courts all over the country have held that what is publicly viewable online is available to all, with no expectation of privacy. But when part or all of a social networking

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