

Firms, courts adapt to changing social media world

April 01, 2012

By Sherry Karabin

Social media opens up a whole new world of possibilities in the way people communicate and exchange information.

Social media gives attorneys in many practice areas new rules to become familiar with, placing an added burden on judges to ensure their jurors leave their handheld devices behind and rely only on the evidence presented during a trial to make their decisions.

To get a handle on the situation, some firms started formal practices; in other cases, attorneys who concentrate in privacy, intellectual property and entertainment-related fields expanded into the social media arena. Law schools responded to the trend as well, creating courses that explore the various issues involved. *Chicago Lawyer* spoke to attorneys, judges and law professors to get a better picture of this emerging area.

A centralized approach

About three years ago, a group of DLA Piper attorneys in varying practice areas decided to form a social media practice.

"The idea was born out of the growing number of legal, marketing and client-related questions that the firm had been getting in this area," said William Rudnick, the Chicago co-managing partner. "A number of the attorneys in our firm had become conversant in this area and decided to self-organize and we decided to seize the opportunity and run with it."

Today, members of the group represent their own clients in their practice areas, while serving as advisers to other attorneys who need help addressing specific social media issues.

"For example, if I work with a client who wants to start a new venture in the entertainment field that has a significant social media component, I might reach out to get advice on compliance issues," Rudnick said. "I would say such instances are becoming more common as clients look to incorporate social media into their business and marketing plans."

He said the firm also uses social media in its own marketing.

"Many of our practice groups have regular (Twitter handles), as do some of our attorneys in particularly cutting edge or specialized areas," he said. "In addition, we have several Facebook pages.

The point is that businesses are exploring different ways to connect with employees, communities and clients, and we're one of those businesses."

Chicago associate Jennifer Baumann is among those who Rudnick relies on as part of the technology, sourcing and commercial practice group and the social media group.

"From my perspective we look at a company from two angles; the company's internal policies or guidelines for its employees regarding the usage of social media and the company's external policies or guidelines from a branding perspective regarding the usage of social media," she said.

Both angles offer ramifications and can lead to litigation if not addressed properly, she said.

"We might be asked to look at what kind of information a CEO should be tweeting about and how much information should be disclosed," she said.

"Trademark and other intellectual property infringement has become a greater challenge to monitor due to the use of social media."

Baumann said social media usage also raises new issues about lawyer/client confidentiality.

"For example, if an attorney tweets that he or she is on the way to New York City for a meeting, that might not raise a concern because it is a fairly large area, but what if the location is specific to a smaller city where a large, well-known company is headquartered, like ESPN or Wal-Mart?" she said.

From an employment perspective, Baumann said members of the group counsel clients on hiring and recruiting issues, encouraging them to craft policies as to what social media information can be used in making these decisions and even deciding whether they want to consider using it.

"For the most part, laws have not changed, but now need to be applied to this new form of communication and policies may need to change as a result," Baumann said.

In October, Much Shelist brought in entertainment and new media attorney Charles Gardner to head the firm's newly created social media law group.

The former director of legal and business affairs for Harpo Studios said many attorneys do not understand this new communications medium.

"What our group does is twofold," Gardner said. "We deal, of course, with social media law, which includes privacy and compliance, but more broadly the group supports the other practice areas in the firm."

Recently, the group did a presentation to the firm's litigation group about electronically stored information (ESI) and social media evidence.

"Litigators in particular need to understand and make use of social media evidence since they have a duty of diligence to investigate all evidence, including the kind that might be found on social media pages," Gardner said. "We all have to realize that social media postings can be used as evidence, and if they are improperly deleted, both the attorney and client may face serious consequences."

Social media also assists in probate cases to locate beneficiaries listed in wills and can be used to investigate business and corporate transactions and domestic relations matters, Gardner said. He also

works with the firm's other lawyers, including those in labor and employment.

"If you are writing a personnel policy, for example, you must be mindful of the National Labor Relations Act and what you tell your employees they can and cannot do," he said. "The National Labor Relations Board has found certain types of social media activities to be protected forms of free association.

"From a corporate perspective, companies have a legal duty to have certain policies prominently posted. And it is also a good idea to have 'house rules' or 'terms of use' in place that address site monitoring as well as take-down procedures in the event that offensive or infringing content is posted."

If a company puts up a blog board, it should have clear "terms of use" in place as to whether offensive content will be edited or removed, Gardner said.

"How a company addresses such content can impact its 'safe harbor' protection under various laws," he said. "Editing can get you into trouble. Most companies either block or allow content but do not edit it."

Since social media law continues to develop, Gardner said people must be proactive, getting internal as well as site policies in place before sites go live.

"If your institution collects personally identifiable information about its clients, customers or end-users, and there is a security breach, it should have a protocol in place to mitigate the damages and minimize the breach as quickly as possible," he said.

"Employees should also receive training on company policies so they do not inadvertently reveal confidential information or unintentionally violate the (Federal Trade Commission's) 'payola' and 'plugola' laws by promoting the company or its products in social media without disclosing the employee's relationship with the company."

At Much Shelist, Gardner's group works together with the firm's professional responsibility department to keep pace with best practices when it comes to liability and social media.

"There is a great deal of uncertainty, for example, about legislation and international agreements addressing the issues of piracy and counterfeiting on the Internet," he said.

"In this new media age, a truly full-service law firm must keep pace with the exponentially growing body of social media law and its immediate impact on all of a law firm's practice areas."

Walking the walk

The Information Law Group devotes much of its time to social media-related issues.

"Our website itself is a blog," said Jamie Rubin, a partner in the Chicago office, who handles new media, advertising and technology matters. "You won't find that at many firms. We not only help our clients navigate issues in this area, but we thoroughly utilize it ourselves. We have a Twitter stream and LinkedIn group, both offering information relevant to our practice areas and clients."

More lawyers use social media as an advertising platform, Rubin said.

"LinkedIn, Facebook and Twitter are the most popular, but I'm seeing more activity by marketers on some of the newer platforms like Foursquare, Instagram and now Pinterest," he said.

Rubin, whose main clients are media- and consumer-product goods companies and marketing agencies, said advertising campaigns became more complicated.

"Thirty years ago, if you wanted to launch an advertising campaign, you might have to understand the laws and rules for advertising on television, radio and in print. Now clients are launching a single campaign at the same time on TV, their website and Facebook page, via their Twitter feed, within their mobile application and via e-mail and text blasts," Rubin said.

"You might have to know the rules and laws applicable to 10 different platforms for a single campaign. And you need to understand how each social media platform works, meaning that you really need to have an account on these new platforms to be able to provide advice. That was not the case 20 or 30 years ago."

Rubin said the use of sweepstakes and contests remain rampant, explaining that when a company decides to launch either, it must not only adhere to federal and state laws regarding false and deceptive advertising, but each state also has its own specific laws applicable to sweepstakes and contests.

"So an attorney has to make sure the client is compliant with federal rules and perhaps those in all 50 states if the campaign is national," he said. "Social games, in general, are taking off and brands are trying to incorporate games or a gaming feel into many aspects of their customers' brand interactions."

Companies don't want to run afoul of regulations when doing these campaigns, particularly when it comes to their users' privacy.

"There are not many general consumer laws in the U.S. applicable to online privacy," Rubin said. "However the Federal Trade Commission is very active in this area and there is a significant amount of chatter at the federal level about passing broad privacy legislation."

Mixing it up

Although a dedicated social media group does not exist at Edwards Wildman, those issues get addressed in a variety of practices — especially advertising, marketing and promotions, a subgroup of the larger media and technology licensing and transactions practice area.

Thomas J. Smedinghoff, a partner whose practice encompasses both the media and technology group and the privacy and data protection group, said social media issues became an integral part of his work.

A large part of his practice involves identity management, which handles identifying and authenticating the participants in all types of online transactions.

"Whether it's access to a low-risk website account or a high-risk national security matter involving very sensitive information, verifying something about the identity of the person you are dealing with is often a key component of the transaction," Smedinghoff said. "Depending on the type of transaction, additional measures might need to be put in place to verify a person's identity."

"For example, setting up an account with the *New York Times* website may be a relatively low-risk application requiring little identity verification, but if I claim to be an employee of a defense contractor and seek online access to the specifications for a new fighter plane, more controls need to be put into place to verify my identity. We are working on developing new legal rules to govern how this would work."

Smedinghoff, who chairs the American Bar Association Federated Identity Management Legal Task Force, said the White House recognized the need for reliable systems to verify online identity. Last year it released a national strategy to encourage the private sector to build identity systems to address this concern.

"In the paper world we often use our driver's license as an identity credential for a variety of transactions, including buying a drink and boarding an airplane," he said. "A digital identity credential would do the same thing for online transactions. We are working on developing the legal policy to facilitate this process online, looking at how existing law affects identity transactions and how we can structure appropriate contracts to make it work online."

Another key portion of his practice involves the impact of social media on a variety of corporate issues.

"There is a risk for employers who check social media sites for information about job applicants," he said. "If the information they find is something they cannot take into account, for example, a disability, and then the person is not hired, this could be used to support an unlawful discrimination claim."

At Winston & Strawn, the advertising, marketing and entertainment law group helps clients with social media-related matters.

Liisa Thomas, a partner in the group, said she advises more and more consumer brand companies and their advertising agencies about privacy and other rules related to social media marketing campaigns.

"I get a lot of questions about how to set up mobile applications for smart devices and the rules involved with text messaging, including consumer consent issues," Thomas said.

She said while social media itself is not that new, what is different is the "mobility of the devices, which allow companies to be with consumers all the time."

The mobility gives rise to consumer tracking lawsuits that may eventually set precedents, including whether consumers must be put on notice when being tracked, she said.

Affecting different areas

Family law practitioners also see their cases affected by social media.

"It's made it easier for people to stray from their marriages because it is easier to meet people or rekindle old flames and it has also made it easier for spouses to catch those who are cheating," said Jason Adess, a partner at Berger Schatz.

A 2010 study by the American Academy of Matrimonial Attorneys says 81 percent of the nation's top divorce lawyers saw an increase in the number of cases where social media evidence played a role.

Facebook pages and tweets also serve as evidence in custody hearings, Adess said.

"In some instances, this evidence makes winning a case easier, but it can also create an encumbrance to settlement since it raises emotional issues that might make it difficult for the parties to focus on the substantive issues needed to resolve their divorce or custody proceeding," he said.

The federal judiciary's Committee on Court Administration and Case Management issued

recommended jury instructions to federal district court judges on the topic of social media.

"We recommended two instructions, one at the beginning and one at the end of trial, that warn jurors not to use social media to communicate about the trial in any way," said U.S. District Judge Amy St. Eve, a member of the committee.

"From the point of view of a judge, this is something that we need to be aware of and monitor since social media is now a way of life for many jurors. We created the instructions a few years ago because we saw this trend coming."

Chief U.S. District Judge James Holderman said he instructs all jurors to refrain from the use of social media, whether discussing what's going on in the case or independently verifying the facts presented.

"There have been a number of cases over the past few years where jurors have not understood this and have disclosed or gathered information using social media, compromising the trial," Holderman said.

"I have not had this happen in my court. I tell my jurors that I understand their need to use their handheld devices to get information, and the way that I address this is by telling the jurors that if there are questions that come to mind that they feel have not been answered, they can submit them in writing and I'll make a determination if the information is admissible, and if it is, I will ask the lawyers and provide the information."

Becoming educated

Last fall, The John Marshall Law School offered an accelerated course that covered topics ranging from social media to intellectual property law.

The two-day course featured a variety of heavy hitters, including Edward Palmieri, lead privacy counsel for Facebook, and Global Policy Manager Judson Hoffman, who offered remote presentations.

"Our goal was to give students an overview, while raising awareness," said Panagiota Kelali, who serves as administrative director for the Center for Information Technology and Privacy Law. "For example, if you are a litigator who befriends a judge on Facebook, what will happen if he is the presiding judge on a case?"

IIT Chicago-Kent College of Law professor Lori Andrews started teaching "The Law of Social Networks" last spring.

"I realized that lawyers were not ready to deal with the tsunami of legal cases where social media was being introduced as evidence," said Andrews, director of the Institute for Science, Law and Technology.

When she started the class, she said she wanted to keep it small, but demand for the course by students grew significantly.

"One student worked for a firm that represented municipalities that were considering putting up Facebook pages," she said. "Another student wanted to start a Web business and was concerned about how he could collect data."

Andrews' new book, "I Know Who You Are and I Saw What You Did: Social Networks and the Death of Privacy," explores the impact of social media in cases from family law to corporate law. She said the

current climate provides the chance for students to develop their own social media specialty practices.

"This new generation of graduates who have been using the new technology are in a great position to move into the area," she said.

Jaclyn Hilderbrand took Andrews' class last year.

"The class made me more aware of my social media footprint and how your postings can make you appear to the outside world," said Hilderbrand, now an associate practicing in the area of community associations at Keough & Moody in Naperville.

Although she said social media does not largely factor into her current work, she said it may in the future.

"My law contacts all have Facebook pages and new social media networks are being developed all the time," she said. "I think this area could become a specialty within privacy law in the future."

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