News

Social media postings creating a litigation 'gold mine'

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It wasn't many generations ago when a handful of photos may have documented someone's entire life. Now a handful might only cover an hour at a New Year's Eve party.

And odds are, they've all been posted to Facebook.

The sheer volume of information available on social media sites has made it "a gold mine" for litigation, said Steve Benmor, a Toronto divorce lawyer and former chair of the Ontario Bar Association's Family Law section.

"I have clients every day of the week who are sending me info that they learned about their ex online," said the principal of Benmor Family Law Group.

From party selfies to vacation snapshots to postings about a new boyfriend or car, sites like Facebook and Twitter provide a social media sleuth with a wealth of intelligence.

That bounty of disclosure is particularly useful in family law cases, where child custody and access issues require the courts to look at the lifestyles and judgment of the parties involved.

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"It's almost like there's a tracking device on people these days," said Benmor. "You know what they're doing, what they're thinking about, what they're talking about and who they're talking to."

Toronto divorce lawyer Harold Niman, who edited the 2010 text *Evidence in Family Law*, said that affidavits that once were filled with 'he said, she said' allegations are now documented with digital examples.

"With all this electronic evidence, there's no longer any room for denial," he said. "All there is perhaps is some room for contrition or some context."

The enduring and undeniable nature of what is posted online can also be a boon during cross-examination, Niman added.

He often looks to LinkedIn for overstatements of qualifications or background that can be used to attack credibility.

Warning clients about the potential pitfalls of social media has become routine for many lawyers. Kingston, Ont., lawyer Mary-Jo Maur, who also teaches family law at Queen's University, hands out tip sheets. "It's not dos and don'ts," she laughs. "It's all don'ts."

And while a judges panel at last year's Law Society of Upper Canada family law summit offered conflicting opinions on the weight that judges give to social media evidence, Maur said she warns clients to avoid posting anything that might end up in an affidavit.

She also cautions lawyers to double-check their own privacy settings before conducting online research, as searching for someone may cause Facebook to offer them your name as a possible friend.

Simran Bakshi, an associate with Wise Law who has researched family law proceedings involving social media, said clients may be dismayed at what can be exhumed from electronic archives.

"Things that you've written, even years before your family law litigation, can end up being used as evidence in your case," she warns people.

Despite that, she also cautions clients in litigation against eradicating previous posts they may have made about the other party. "I'm not quite sure where a court

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Maur: Serving documents using social media may be acceptable as last resort

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would land on that, but it certainly does seem to offend the rules of evidence, just in general."

Given the newness of social media evidence, there are still grey areas in how it should be used.

For example, Maur points to the need for clarification on how the courts should deal with social media postings that include third-party comments.

While the comments might be useful in providing perspective on someone's friends or social circle, she notes that both privacy issues and the possibility that such comments are inadmissible hearsay remain largely unresolved by the courts.

If evidence contained in the comments is really important, Maur suggested tracking down the Facebook friend or Twitter follower to get the information in a form certain to be admissible.

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Lawyers also have to exercise caution when dealing with electronic information that may have been gleaned surreptitiously or even illegally.

From outright hacking an account, to guessing a password, to "creeping" a person by employing a variety of search tools, clients may turn to unscrupulous means to collect damaging material on their former partner.

If the evidence is important enough—for example, proof of the existence of an unreported offshore bank account—it will likely be admitted, said Niman.

"I think the state of the law is that there should be a compelling reason," he said. "If there's significant probative value to admit illegally obtained evidence, you can get it in."

But Maur noted that lawyers need to balance the value of the information against the risk to their reputation and the potential wrath of the court. "It has to be really important evidence to override a sneak attack."

Whether admissible or not, simply having certain information can be a trump card in settlement negotiations. "When you get strong evidence early, it's very helpful," said Benmor.

As valuable as social media is for gathering intelligence, it has also found its way into the courtroom in other contexts.

In cases where parties have been unreachable through conventional methods, some judges have found it acceptable to serve documents to an active Facebook or LinkedIn account, says Maur.

While a last resort, the messaging tools in social media sites do offer a potentially effective way to notify people of court processes. And there's another advantage, Maur added: "It is way cheaper than taking out an ad in the *Globe and Mail*."

Family courts are also starting to recognize social media and other forms of digital communications within their orders, Bakshi said.

Judges may prohibit certain types of communications for the parents, or order digital access to children via social media or video-conferencing services like Skype.