

NEW YORK STATE BAR ASSOCIATION

# Journal

FEBRUARY 2013  
VOL. 85 | NO. 2



## Made for Each Other

Social Media and Litigation



by Andrew B. Delaney  
and Darren A. Heitner

### *Also in this Issue*

Prior Convictions and  
Employment Discrimination

The *Singletree* Forest

Sealed Records

Joint Custody

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# Made for ♥♥ Each Other

Social Media  
and Litigation

By Andrew B. Delaney  
and Darren A. Heitner





## Introduction

Almost half of the people in America are using social media, and their number is rising rapidly.<sup>1</sup> Social media permeates our daily lives. As of 2009, more than 70% of lawyers had accounts on social-media networks.<sup>2</sup> More than 85% of “younger” lawyers use social media.<sup>3</sup> The person who lacks at least one social-media profile will soon become the exception rather than the rule. For the litigator, social media provides a wealth of information – available at one’s fingertips that just a few years ago required hiring a personal investigator to obtain. Though social media contains an immense amount of information, gleaning it and using it is not without pitfalls. This article will discuss the various types of social media and how these can be used, both in the courtroom and for other legal purposes; provide strategies for introducing information obtained through social media into evidence; examine the ethical and legal concerns; and present suggestions for further study.

## Types of Social Media

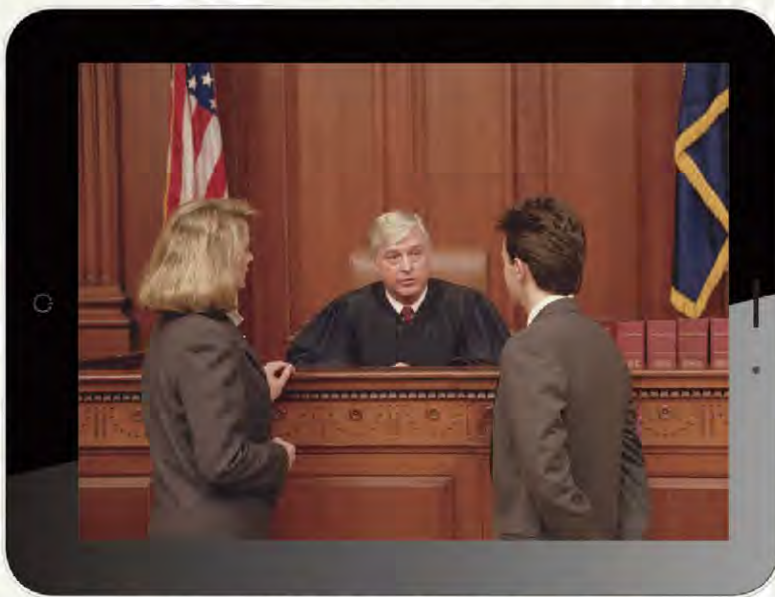
Facebook, LinkedIn, and Twitter are currently the most popular social networking sites. When considering social media, keep in mind that none of the “top three” is even a decade old. Social media is ever evolving. At any point in time, a new social networking site may sprout from the depths of the unknown and become a popular destination for individuals to post content that is shared among the online community. Litigators must stay on top of the latest developments.<sup>4</sup>

## Facebook

Facebook is the most popular social media platform. Facebook, started as a hobby,<sup>5</sup> is arguably one of the most successful businesses launched in recent history.

In 2004, Mark Zuckerberg, while a student at Harvard, started “thefacebook” with some financial help from Edward Saverin. Originally, membership was limited to Harvard students.<sup>6</sup> Access to the social network soon expanded to Stanford and Yale. By August 2006, membership was open to 30,000+ “recognized schools, colleges, universities, organizations, and companies within the U.S., Canada, and other English speaking nations.”<sup>7</sup> That September, Facebook ended its strict exclusivity rules and became open to everyone.<sup>8</sup>

The rest, as they say, is history. As of this writing, Facebook reports that it has more than one billion users who



log in at least once per month,<sup>9</sup> half of whom will log in to Facebook any given day.<sup>10</sup> People share immeasurable amounts of information on Facebook, including status updates, pictures, videos, and links to stories published on third-party websites, which Facebook stores. A 2011 article on Geek.com reports that Facebook stores up to 800 pages of personal information on each user.<sup>11</sup>

That wealth of information can be a valuable resource for the litigator. Depending on the applicable privacy settings, a quick check on Facebook could provide information that could make or break a case. Certain users allow anyone browsing the Internet, with or without a Facebook account, to access information posted on their profile pages. Even information that may at first appear to be unavailable can, however, later be accessed through discovery, subpoena, and court order.

## LinkedIn

LinkedIn reports that it “started out in the living room of co-founder Reid Hoffman in 2002.”<sup>12</sup> It officially launched in May 2003 and by the end of its first month had 4,500 members. As of this writing, LinkedIn reports that it has 175 million members in over 200 countries.<sup>13</sup>

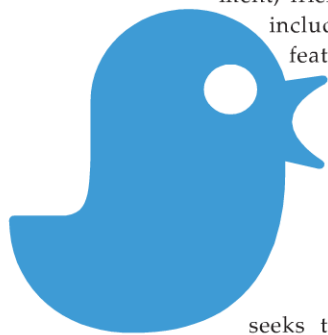
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It is a publicly traded company on the New York Stock Exchange, with the ticker symbol LNKD.

LinkedIn is geared toward professional networking, though it shares attributes with other social-networking sites. LinkedIn users can update their status, add connections, join groups, and network. However, it is specifically geared toward business networking, and users will not find in-site game applications. Nor does LinkedIn boast a chat feature like Facebook's. Users can post their educational and work histories, request testimonials from their connections, and supply information about their specialties and publications. Although LinkedIn is not as ubiquitous as Facebook, it is still useful to the litigator. LinkedIn provides information about employment, friends, and connections, and includes a "recommendations" feature. In a sense, LinkedIn



One might say that Twitter took the  
"status update" from Facebook and refined it.

seeks to enhance the traditional résumé with a more accessible and interactive electronic version.<sup>14</sup>

LinkedIn may also be useful to the litigator in its intended use. While some lawyers might be hesitant to create a Facebook-style social media profile, LinkedIn provides a more-reserved alternative for the legal professional. LinkedIn boasts several law-oriented groups, as well as other networking opportunities.

### Twitter

One might say that Twitter took the "status update" from Facebook and refined it. Users are limited to 140-character "Tweets," which update "followers" on users' activities and other items of interest. Twitter also appears to be premised on the "Do one thing and do it well" UNIX philosophy.<sup>15</sup>

Theoretically, Twitter is the product of a failed podcasting platform.<sup>16</sup> Some controversy exists around its founding. It was a project that started out slowly. During its beginning stages, the platform had fewer than 5,000 users after two months, and the CEO of its parent company bought back investors' stock for an estimated \$5 million. The company is now estimated to be worth in the neighborhood of \$5 billion.<sup>17</sup>

Twitter's value to the litigator lies in the real-time status updates that potential litigants may post. Twitter archives are searchable and largely public. Indeed, the Library of Congress hosts an entire Twitter archive that is continuously updated.<sup>18</sup>

### Other Sites

Myriad other sites are devoted to social networking as well. Google+, a new entrant to the scene, has been described as a "throwback to Facebook 2004."<sup>19</sup> MySpace is still around, although it no longer enjoys the level of traffic it did in 2006, when it was still more popular than Facebook.<sup>20</sup> Further, MySpace has shifted its focus to content instead of pure social networking and has attempted to become "the social network for music."<sup>21</sup>

### Uses of Social Media Before Trial Research

Lawyers are certainly permitted to conduct research on social media networks. "Obtaining information about a party available in a [public] Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through

a subscription research service such as Nexis or Factiva, and that is plainly permitted."<sup>22</sup> And social media can provide invaluable information for initial evaluation of a claim. For example, Facebook and LinkedIn might reveal where a potential defendant works, what kind of assets that person might have, any content uploaded regarding the future claim, and how that person sees himself or herself in the context of the potential case. Performing this research can help the attorney to be more informed prior to filing suit. In some cases, it might help a litigator avoid bringing a claim that sounds great on the surface but breaks down under scrutiny. In other instances, a plaintiff's attorney may uncover valuable information that can be inserted into a complaint's general allegations and perhaps added as exhibits to bolster the plaintiff's count(s). If the attorney is particularly fortunate, a social media profile may contain an admission that will go a long way toward building a case.

On Facebook, any person, Facebook user or not, has access to content published on users' Facebook profiles (subject to each Facebook user's privacy settings). The privacy setting may be changed by the subject to restrict access, by blocking others from "subscribing" to one's updates and changing other permissions. However, no privacy setting will completely restrict a party in a lawsuit from access to published Facebook content. Facebook's Privacy Policy, in a section titled "Some other things you need to know," includes the following statement:

We may access, preserve and share your information in response to a legal request (like a search warrant,

court order or subpoena) if we have a good faith belief that the law requires us to do so. This may include responding to legal requests from jurisdictions outside of the United States where we have a good faith belief that the response is required by law in that jurisdiction, affects users in that jurisdiction, and is consistent with internationally recognized standards. We may also access, preserve and share information when we have a good faith belief it is necessary to: detect, prevent and address fraud and other illegal activity; to protect ourselves, you and others, including as part of investigations; and to prevent death or imminent bodily harm. Information we receive about you, including financial transaction data related to purchases made with Facebook Credits, may be accessed, processed and retained for an extended period of time when it is the subject of a legal request or obligation, governmental investigation, or investigations concerning possible violations of our terms or policies, or otherwise to prevent harm.<sup>23</sup>

Similarly, all content published on Twitter may be available for consumption by the general public. While users are given the option to block their Tweets from anyone who has not been admitted as a follower, those same Tweets may be re-published (re-Tweeted) by permitted followers many times over, reaching a much larger audience than intended by the publisher. Further, Twitter has its own "Law and Harm" policy, which states:

Notwithstanding anything to the contrary in this Policy, we may preserve or disclose your information if we believe that it is reasonably necessary to comply with a law, regulation or legal request; to protect the safety of any person; to address fraud, security or technical issues; or to protect Twitter's rights or property. However, nothing in this Privacy Policy is intended to limit any legal defenses or objections that you may have to a third party's, including a government's, request to disclose your information.<sup>24</sup>

In 2010, in a case involving a driver injured in a car accident, a New York court addressed the protection of a Facebook user's posted content.<sup>25</sup> The defendant, Harleysville Insurance Co. of New York (Harleysville Insurance), did not believe that the plaintiff, Kara McCann, had sustained serious injuries and made a request for the production of photographs from McCann's Facebook account as a means of verification.<sup>26</sup> The trial court denied (which the appellate court affirmed) Harleysville Insurance's motion to compel discovery, finding that the motion was overbroad, along with an apparent lack of proof regarding the relevancy of the Facebook photos.<sup>27</sup>

Parties do not have the ability to force the production of all content published on Facebook. In order to require a party to produce published Facebook content, the demand must be specific and demonstrate the relevance of the requested information. In this particular case, the court stated that Harleysville Insurance "essentially sought permission to conduct a 'fishing expedition' into

Plaintiff's Facebook account based on the mere hope of finding relevant evidence."<sup>28</sup> The court did not concern itself with the type of privacy setting the plaintiff attributed to her Facebook content; instead, it denied the motion to compel discovery because the defendant did not make a clear showing of the relevance of the evidence.

However, in another 2010 New York case, the party seeking to compel discovery requests was permitted to receive not only current and historical Facebook content, but also pages that had been deleted by the user.<sup>29</sup> The key question is whether the evidence is *material and necessary*. The court stated that disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" is required.<sup>30</sup> The court also stated that preventing access to *private postings* would be "in direct contravention to the liberal disclosure policy in New York State."<sup>31</sup>

## Defense

Occasionally, a person may claim one set of facts in public, but in the so-called "privacy" of his or her online network an entirely different set of facts will come to light. In such a situation, a litigator has a unique opportunity to, for example, defend against a claim that might otherwise seem unwinnable.

One such case concerned a University of Kentucky student who sued a nightclub in federal court after she slipped and fell while dancing on top of the bar, causing injury. She alleged that the bar was slippery and wet, and that the nightclub should have done more to prevent the accident. The defendant nightclub sought access to the plaintiff's and a witness's private Facebook pages. At one point, in a unique twist on in camera review, the magistrate judge overseeing the case offered to create a Facebook profile and "friend" witnesses "for the sole purpose of reviewing photographs and related comments."<sup>32</sup> The witnesses, however, never responded to the judge's "friend" requests.<sup>33</sup>

Though the judge ordered Facebook "to produce photographs, messages, wall posts and other information on the profiles of the injured patron and a friend who witnessed the accident," Facebook was able to successfully argue that the Stored Communications Act prohibited disclosure of members' information.<sup>34</sup> Eventually, the plaintiff's profile was reviewed in camera pursuant to her consent, and some content was presumably disclosed to the defense. The case settled on the proverbial courthouse steps, one day before it was scheduled to go to trial.<sup>35</sup> One can only speculate as



to the motivation for the settlement, but the potential evidence from social media may have been a significant factor.

Once information is available on social media sites, removal can be difficult – and in certain cases, disastrous. The plaintiff in a recent wrongful death action from Virginia<sup>36</sup> had potentially damaging material posted on his Facebook profile. His attorney advised the plaintiff to “clean it up,” and deactivate the account. Although the plaintiff received a substantial jury verdict, the amount was cut post-trial due to the plaintiff’s and counsel’s behavior, and both were ordered to pay significant sanctions, including the defense attorney’s fees and costs.<sup>37</sup> In addition to more than \$500,000 in sanctions, the attorney was fired from his firm. Allegedly he no longer practices law and faces possible further sanctions from the state bar association.<sup>38</sup>

### Trial Preparation

If a claim appears headed to litigation, then social media can prove invaluable for trial preparation. If the percentages noted above hold true, then roughly half the witnesses will have a social media profile. Gleaning information from social media profiles can help an attorney be much better prepared for cross-examination of adverse witnesses, by providing ideas for questions that will keep the adverse witnesses off balance. A lawyer can give the impression that he or she knows things about the witnesses that the other side does not. This can provide an insurmountable tactical advantage, and the jury will notice. Another, more subtle, advantage is the corollary: The more you know about your witnesses, the better prepared you will be when the other side tries to put one of these witnesses off balance.

The key to being prepared is to prepare. The more you prepare for trial, the better you will come across to a jury. Being prepared brings with it a sense of confidence that cannot be feigned. Social media can be an excellent aid in preparation.

### Uses of Social Media and Litigation

While social media provides a source of information useful in preparation for trial, how can it be used in the courtroom? After all, are not most statements made on a social media site the very definition of hearsay?

#### Authentication

There are no hard and fast rules when it comes to authenticating social media-based evidence. For example, in 2011, a defendant in a criminal law case sought to

impeach a prosecution witness with printouts from her Facebook account. The court refused to allow the evidence, holding that “it was incumbent on the defendant, as the proponent, to advance other foundational proof to authenticate that the proffered messages did, in fact, come from [the prosecution witness] and not simply from her Facebook account.”<sup>39</sup>

A recent whitepaper from an e-discovery processing firm notes the problem of authenticating social media-based evidence. How, exactly, does a lawyer make the jump from the computer screen to the courtroom? The author explains:

Under US Federal Rule of Evidence 901(a), a proponent of evidence at trial must offer “evidence sufficient to support a finding that the matter in question is what its proponent claims.” Unless uncontested and cooperative witness testimony is available, the proponent must rely on other means to establish a proper foundation. A party can authenticate electronically stored information (“ESI”) per Rule 901(b)(4) with circumstantial evidence that reflects the “contents, substance, internal patterns, or other distinctive characteristics” of the evidence. Many courts have applied Rule 901(b)(4) by ruling that metadata and file level hash values associated with ESI can be sufficient circumstantial evidence to establish its authenticity.<sup>40</sup>

As the paper further explains, metadata and file level hash values are not easy to preserve when collecting social media-based evidence.<sup>41</sup> Preservation and authentication of ESI is a highly technical and specialized field.

One option to help ensure eventual authentication of social media-based evidence is, of course, to hire a professional engaged in the business of preserving this data. Although it may be expensive to hire an e-discovery expert, the initial expense is likely to be outweighed by the future benefit. To keep the cost of litigation manageable, it may make sense to have an investigator or paralegal perform the initial research and then follow up with a professional, if appropriate.

#### Admission by Party Opponent

The most natural use for social media in the courtroom is the admission by a party opponent. The admission by a party opponent is not an exception to the hearsay rule but is actually considered non-hearsay under the Federal Rules.<sup>42</sup> New York recognizes the same exception.<sup>43</sup> Accordingly, one of the first places to look for possible evidence is the opposing party’s or parties’ social media profiles. Something highly relevant to a claim or defense could be out there in hyperspace.

#### Impeachment

Social media might be used to impeach a witness. A lawyer representing his or her client in litigation may access and review the other party’s published social media content to search for potential impeachment material.<sup>44</sup> As an





example, in *Eleck*, the criminal case discussed above, the defendant likely could have introduced the contradictory Facebook printouts for impeachment purposes had the evidence been authenticated properly.

### Effect on the Listener

One of the broader exceptions to the hearsay rule is the effect it has on the listener. For example, if a client saw a Facebook post that infuriated that client, then the attorney might be able to inquire as to how a certain post made the client feel. It can help to give context or to explain why a client acted in a certain way in a given situation.

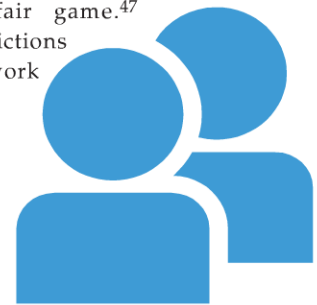
An additional benefit to the effect-on-the-listener exception is that it is “hard to unring the bell, once that bell has been rung.”<sup>45</sup> As a practical matter, evidence introduced for the effect it has on the listener – although not offered for its truth – still gets before the jury. On very

starting point. It should never be regarded as a substitute for further research.

Social media profiles are not, as a rule, overly easy to access. Various privacy controls can prevent a member of the general public from viewing a person’s personal profile. In most cases, the lawyer using social media to investigate a claim, prepare a defense, or prepare for trial will fall into the member-of-the-general-public category. In addition, at least one ethics opinion has held that it is unethical for an attorney to “friend” an adverse party or potential witness in a case without disclosing the purpose for the friend request.<sup>46</sup>

The New York State Bar Association, however, has clearly held that publicly available Facebook and MySpace postings are fair game.<sup>47</sup> That said, various jurisdictions have stated that social network

## While social media provides a source of information useful in preparation for trial, how can it be used in the courtroom?



rare occasions, it may be counsel’s best bet for getting effective and relevant – yet technically inadmissible – evidence before the finder of fact.

### Independent Legal Significance

If a statement has independent legal significance, then it is admissible, even though it might otherwise be considered hearsay. Contracts can be created online through social media. Libel, slander, and threats can all be expressed via social media. It matters only that the thing of independent legal significance was said, not that it is true.

### Courtroom Closing Notes

Our discussion has focused on some of the more common methods one might employ for introducing social media into evidence. This is not an exhaustive list. The argument could be made, for example, that Facebook postings are business records. Ultimately, whether or not social media-based evidence will be allowed in a courtroom setting will depend on the trial judge, the other litigants, and your own creativity.

### Pitfalls

No matter how enticing the information gleaned from a social media profile, it must always be viewed with a healthy dose of skepticism. People lie. It can never be absolutely certain that the person behind the profile is the same person he or she purports to be. Content may be posted on someone’s social media profile by a third party without the owner’s permission and/or knowledge. Social media’s greatest value lies in providing a

information must be discovered ethically, and that lawyers are prohibited from using deception to gain access to such material.<sup>48</sup>

Ultimately, the attorney will have to vet social media-based evidence using the same criteria that would be used for any other type of evidence. This is an exciting and developing area of the law, but attorneys must exercise professional judgment in using social media in the courtroom and otherwise.

### Suggestions for Further Study

The Electronic Discovery Reference Model is a group created in 2005 “to address the lack of standards and guidelines in the electronic discovery (e-discovery) market.”<sup>49</sup> The group, in conjunction with FindLaw, provides an “Interactive Guide to Electronic Discovery,” which is a helpful resource for understanding the e-discovery process and best practices.<sup>50</sup>

Regarding the ethical considerations associated with use of social media, a recent *Delaware Law Review* article argues that competency and diligence require attorneys to account for social media in investigation and discovery.<sup>51</sup>

Another recent law review article explores sanctions for e-discovery violations and ESI, identifies “230 sanction awards in 401 federal cases”<sup>52</sup> and provides an excellent overview of the issue of pitfalls in preservation of ESI and sanctions.

Many blogs are devoted to e-discovery and social media as these relate to the practice of law.<sup>53</sup> E-discovery and the use of social media in litigation are fast-develop-



ing – perhaps the *fastest* developing – areas in the practice of law. New resources become available every day and the potential for innovation is wide open.<sup>54</sup>

1. See Nadine R. Weiskopf, *Tweets and Status Updates Meet the Courtroom: How Social Media Continues to be a Challenge for E-Discovery in 2011*, 2 (2011) (citing a study by Arbitron Inc., which finds that 48% of Americans age 12 or older have a profile on one social networking site – a 100% increase from 2008).
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14. Indeed, one of the features of LinkedIn is that users are encouraged to upload a traditional "paper" résumé in order to complete their profile.
15. See Scott Merrill, *Do One Thing, and Do It Well: 40 Years of UNIX*, TechCrunch.com (Aug. 21, 2009), <http://techcrunch.com/2009/08/21/do-one-thing-and-do-it-well-40-years-of-unix/> (explaining UNIX's underlying philosophy).
16. Or so the story goes. See Nicholas Carlson, *The Real History of Twitter*, Bus. Insider (Apr. 13, 2011), [http://articles.businessinsider.com/2011-04-13/tech/29957143\\_1-jack-dorsey-twitter-podcasting](http://articles.businessinsider.com/2011-04-13/tech/29957143_1-jack-dorsey-twitter-podcasting) (explaining that Twitter evolved from the failure – or unfeasibility – of the Odeo podcasting platform, which was intended originally to be used with Apple products).
17. *Id.*
18. Matt Raymond, *How Tweet It Is!: Library Acquires Entire Twitter Archive*, Lib. of Cong. Blog (Apr. 14, 2011), <http://blogs.loc.gov/loc/2010/04/how-tweet-it-is-library-acquires-entire-twitter-archive/>.
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38. John Patzakis, *Facebook Spoliation Costs Lawyer \$522,000; Ends His Legal Career*, Next Gen. eDiscovery L. & Tech Blog (Nov. 15, 2011), <http://blog.x1discovery.com/2011/11/15/facebook-spoliation-costs-lawyer-522000-ends-his-legal-career/>.
39. *State of Conn. v. Eleck*, 23 A.3d 818 (Conn. App. 2011).
40. John Patzakis, *Overcoming Potential Legal Challenges to the Authentication of Social Media Evidence*, X1 Discovery (2011), [http://x1discovery.com/download/X1Discovery\\_whitepaper\\_Social\\_Media\\_2011.pdf](http://x1discovery.com/download/X1Discovery_whitepaper_Social_Media_2011.pdf).
41. *Id.*
42. Fed. R. Evid. 801(d)(2).
43. *Satra Ltd. v. Coca-Cola Co.*, 252 A.D.2d 389 (1st Dep't 1998).
44. N.Y. State Bar Ass'n, *supra* n. 22.
45. As another saying goes, "If you throw a skunk into the jury box, you can't instruct the jury not to smell it."
46. Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02 (Mar. 2009).
47. NYSBA Comm. on Prof'l Ethics, Op. 843 (Sept. 10, 2010).
48. See N.Y. City Comm. on Prof'l Ethics, Formal Op. 2010-2; Phila. Bar Ass'n Op. 2009-02.
49. ERDM, *Frequently Asked Questions*, <http://www.edrm.net/joining-edrm/frequently-asked-questions>.
50. FindLaw's Interactive Guide to Electronic Discovery, Findlaw.com, <http://technology.findlaw.com/electronic-discovery/electronic-discovery-guide/>.
51. Margaret M. DiBianca, *Ethical Risks Arising From Lawyers' Use of (and Refusal to Use) Social Media*, 12 Del. L. Rev. 179 (2011).
52. Dan H. Willoughby, Jr., Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 Duke L.J. 789, 790 (2010), at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1487&context=dlj>.
53. One such blog that was very helpful in writing this article is the Next Generation eDiscovery Law & Tech Blog. Though it is a commercial project, the blog provides an excellent resource for getting up to speed on social-media and e-discovery issues. Next Gen. eDiscovery Law & Tech Blog, X1Discovery, <http://blog.x1discovery.com/>.
54. We encourage readers to enter the discussion on the EASL blog. Please send your comments to [checkeresq@checkeresq.com](mailto:checkeresq@checkeresq.com) for inclusion in the blog.