For those who are unaware, there is a new saying in the electronic age, clearly reminiscent of *Miranda* right: "Anything you post online can and will be used against you." The continuing popularity of social networking sites such as Facebook, and Twitter, along with search engine sites and YouTube, are having a tremendous impact at trial.

Prior to the electronic age, trial lawyers had to search for days just to come up with one piece of damning evidence against an opposing witness. Today, however, a 15- minute Internet search can reveal a vast amount of information which, if properly used, can serve as the basis for a powerful attack at trial. Moreover, conducting an Internet- based search prior to the start of a deposition can allow for a powerful set-up of a witness which can facilitate an effective attack during trial.

There can be no doubt that online searches of this nature will continue to be a vital source of information for years to come. Such sites will unquestionably be used to research not only party opponents, but witnesses and experts as well. In light of the accessibility, quality and quantity of personal information available on social networking sites, it would be foolish to fail to utilize the Internet as a tool to collect information. Indeed, many trial lawyers have already used this tool- and continue to use it- as part of their arsenal in collecting evidence against opponents and witnesses.

Even a cursory understanding of such sites makes clear that users post status updates, personal comments, photos, videos and "tweets" that quite often reveal their recent activities, whereabouts, interests and thoughts. Based on the treasure trove of information available from the Internet, it seems clear that trial lawyers now have to new obligations when preparing a case; First, the trial lawyer must advise his client(s) about the dangers of posting personal information on the Web. Second, the lawyer must make sure that a search is conducted not just of his potential party opponent(s) and his various experts, but also of his own client prior to the time that verified pleadings are exchanged or sworn testimony is given.

Indeed, part of the trial lawyer's obligation is not only to search for information that can serve as the basis for impeachment of a witness' credibility, but to conduct continuing searches at various points in time to determine whether additional information has been removed. Obviously, additional information will only serve to enhance the cross examiner's attack. That information has been removed from such a site can, at times, serve as the basis for an even more powerful attack, exposing a conscious objective to prevent someone from acquiring Web-based information.

Consider the following scenario in which the plaintiff suffered a fractured ankle due to the negligence of a driver. Although the injury was a severe one at the outset, the man made a good recovery. In fact, he recovered to the point where two years after the accident, and while the case was still pending, he was able to take his family on a ski vacation. Unbeknownst to the man, his own son videorecorded him skiing with his cell phdone, "tweeted" his friends about the day and posted the video on YouTube.

Upon learning of this, the plaintiff had his son remove the video and delete the "tweet" in the hopes of not harming his personal injury suit. In reality, in this scenario, the son's post had the same effect as if the defense lawyer had hired a diligent investigator to conduct full- fledged surveillance of the plaintiff. That the item was "deleted" from the Internet does not necessarily mean that it was permanently

removed. An “archive” search can be conducted to focus on relevant time periods which not only reveal historical posts but can, at times, show the date the item was removed.

In this scenario, if the plaintiff tells the truth, he has little to worry about. If, however, he chooses to tell less than the truth about his vacation activities, he has set himself up for a major fall: Here the impeachment would be conducted via a two- pronged attack. First, the focus would be on the activity itself and second the “deletion” might well become an issue analogous to “consciousness of guilt.”

Assume, in this scenario, that the plaintiff chose to tell less that the truth about his ski vacation activities:

Q: Can we agree your recovery was a good one?

A: I wouldn’t say that.

Q: You’ve certainly participated in some challenging activities, haven’t you?

A: What do you mean?

Q: Like skiing, true?

A: I tried, but was unable to ski.

Q: You had great difficult skiing, true?

Q: You weren’t able to make quick turns due to the ankle injury?

Q: You weren’t able to ski advanced slopes, true?

Once the set-up is complete, the attorney can move in for the kill:

Q: Your son was with you, wasn’t he?

Q: You are aware that he had a cell phone?

Q: A cell phone with a videorecorder?

Q: Isn’t it true that he videotaped your skiing?

Q: You are aware that he posted that video on the Internet?

Q: You saw it, didn’t you?

Q: That video fairly and accurately depicted the way you skied on that vacation?

Q: We can agree this vacation took place after the accident, true?

Next the attorney should focus on the second prong of the attack: The attempted removal of the video from the Internet.

Q: At some point you learned of the existence of this video, true?

Q: You knew that video might harm your case?

Q: You didn't want anyone involved with this case to see it, right?

Q: We can agree that video was removed from YouTube, wasn't it?

Q: It was removed at someone's direction, wasn't it?

Q: Would I be correct in stating that it was removed at your direction?

Q: So you could come to Court and try to make a jury believe your present condition is worse that it really is?

Finally with the access of the video from an "archive" search the video can be show to the claimant and authenticated. Even if he denies the accuracy of the video, a subpoena could be issue to compel testimony from his son based on his "tweet"

Use With Experts

Use of the Internet as a weapon at trial is not limited to one side of a case. Internet- based searches have the ability to hurt adversarial experts.

Consider, for example, the scenario in which a defense medical expert set up a website for his practice which discussed, among other things, the fact that he testified on behalf of doctors, had never testified for a plaintiff aznd set forth his fees for materials review and testimony. During a previous trial, he was cross- examined at length about his website and the areas of attack focused on his bias in favor of doctors, his refulas to testify for plaintiffs and his fees. As a result of that cross, the doctor immediately deleted those items from his website.

During the next trial testimony, the doctor denied ever having had a bias in favor of one side or another and "fudged" about his fees for litigation- related matters. By deleting these facts from his website, the doctor assumed (wrongly) that the information could never be accessed again. Here, an Internet archive search (such as Google or "the way back machine" and others) could not only bring up the website as it existed in hard copy, on a set date, but could also spell out the date on which the deletion was made. Here, the use of the information gained from the Internt can serve as the basis for a destructive cross.

The set-up on cross examination, if done properly, will serve to significantly undermine the credibility of the doctor:

Q: doctor, you told us you are here to render your objective opinion, true?

Q: it's not as if you have aken sides in a litigation such as this, right?

Q: After all, you're here to testify truthfully no matter who it helps, correct?

Q: Or who it hurts, true?

Q: That's because you're open minded, right?

Q: You would never work just to support one side of alitigation?

Q: For example, you wouldn't work to only help doctors?

Q: That would clearly show a bias toward one side, right?

Q: Something you would never do?

Q: Something you never have done, true?

Q: Doctor, this isn't the first time you've testified in Court?

Q: In the past, you were questioned about your website, right?

Q: A website that says you only work for doctors?

A: That's not what my website says.

Q: Isn't it true that you purposely removed that fact from your website?

A: No.

Q: Isn't it ture that you were cross examined on this fact on June 6, 2007?

Q: Isn't it true the only changes you made to your website were two deletions?

Q: First, the fact that you testified for doctors and enver for patients, true?

Q: And second, the fact that your website no longer spells out anything about your fees, true?

To solidify the point, the cross examiner should now confront the doctor with a printout of his own website as recorded on various dates:

Q: Let's look at the documents together, Doctor (handling).

I show you plaintiff's Exhibit 122 for identification (handling). This is your website as it appears today, true?

Q: I now show you plaintiff's Exhibit 13 for identification (handling). This is our website as it appeared June 6, 2007, true?

I offer both in evidence.

Q: Now, I'll ask you- based on the print out of your own web-site, you would agree with me that the only changes that were made wereexactly what I said, correct?

Q: Thsese changes were certainly done for one reason- to protect you at trial, true?

Q: To conceal your bias, true?

Q: To prevent others from fining out that you only work for one side of a case, true?

Ethical Considerations

While a general search of the Internet is proper and permissible, attorneys must be mind-ful about the ethical implications of obtaining information from a social networking site by secretive or deceptive methods. New York Rule of Professional Conduct 4.1 titled "Truthfulness in Statements to Others," holds imply "In the course of representing a client, a lawyer shall no knowingly make a false statement of fact or law to a third person."

Thus a lawyer who, for example misrepresents his true identity to "friend" a witness on Facebook for the purpose of gaining damning information regarding a party or witness may not only be precluding himself from using such material at trial, but could also find himself facing a disciplinary complaint as well.

Conclusion

We live in a time in which people are literally telling the whole world private information about themselves on a daily basis, ranging from their relationship status to professional endeavors. For the savvy trial attorney, the Internet represents just another opportunity to gain an edge that can mean the difference between success and failure when the verdict is rendered.