

## New Sources of Relevance

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To gain an advantage for your client, understand the issues surrounding the discovery and admissibility of electronic evidence, as well as how best to present it to a jury.

# Technology in Litigation

As technology advances, it changes the way that we learn and communicate. Litigators must adapt to the available technology to make effective use of the resources and information around them and also to communicate mes-

sages to people who expect others to present information in new ways. New technology also means that we have new sources to find relevant evidence. Courts are still assessing the voluminous electronic resources and their relevancy to litigation. In the meantime, it is important to understand these resources and to employ the most effective way to use them to your client's advantage. Technological data has potential relevance to your cases, so become familiar with the proper method for obtaining it and presenting it clearly. It can only serve to assist your clients and to make you a more effective advocate.

### Social Networking and Search Engines

The advent of social networking websites created a wave of personal information that third parties possess and store online. This information can give a much more comprehensive view of an individual's personal life

than was traditionally available. Understanding the discoverability, admissibility, and privacy issues that accompany the wealth of information on social networking websites is critical to using the websites to your advantage. For instance, social networking can be a particularly useful tool to challenge the validity of a plaintiff's claims. A plaintiff claiming various psychological effects on his or her life may provide contrary information on a social networking website. Alternatively, a plaintiff claiming physical limitations may post photographs that evince no limitation. The possible usefulness of this information is virtually limitless and the usefulness of these websites increases as more people use them.

In the last several years, search engines have become more powerful than ever. It is crucial to keep in mind that while a plaintiff's online information may help defense counsel, it is a two-way street. Clients should know that opposing counsel



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will investigate their personal information, corporate history, news articles, and any information available on the web that will offer opposing counsel a bigger picture of how to proceed with a case. While this method of research into available information on the web is important to effective advocacy, make sure that you know what is available about your client, too, so that you do not have any unexpected surprises.

### Social Networking Discovery Issues

Requesting social networking information in discovery may prompt a party to change social network privacy settings so it is best to check the already publicly available information before making the party aware that you want to review the accounts. A party's counsel may alert his or her client to restrict privacy settings because attorneys know that we all use this information more and more in litigation. However, if you find something useful is available, what is the best course of action to preserve it in real time?

Print a hard copy of the information immediately. Additionally, take a screenshot of the information and save it as a file on your computer. Because information on social networking websites can change at any moment, never assume that something that you see at one time will be there when you return. Once you have the information saved, you can authenticate it regardless of changes made to the page by questioning the party at his or her deposition. However, make sure that the obtained information was publicly available. Do not "friend" an adverse party on a social networking website.

If you didn't discover anything useful and publicly available, a discovery request for nonpublic information is the next option. Likewise, if you obtain relevant information through a general search, requesting the remainder of the account is reasonably calculated to lead to the discovery of admissible evidence. Tailoring the information that you seek to meet discovery standards at the outset can prevent a court from viewing a request as a proverbial fishing expedition.

In *EEOC v. Simply Storage*, 270 F.R.D. 430 (S.D. Ind. 2010), the defendant sought access to the plaintiff's entire Facebook and Myspace accounts. The *Simply Stor-*

*age* court found that although the accounts were set as private, they were discoverable to the extent that they were relevant. However, the court agreed with the plaintiff that the entire account was not necessarily relevant. Because the plaintiff's emotional and mental state were at issue in *Simply Storage*, the court limited the discoverable information to communications that revealed, referred, or related to any emotion, feeling, or mental state, as well as communications that revealed, referred, or related to events that could reasonably be expected to produce a significant emotion, feeling, or mental state. *Id.* at 436. The court applied the same analysis to photographs, although it did not include tagged photographs that were added to the website by a third party. *Id.* However, at least one other court has rejected this approach and allowed all photographs, even those that were not uploaded by the plaintiff. *Davenport v. State Farm Mut. Auto. Ins. Co.*, NO. 3:11-cv-632-J-JBT, 2012 U.S. Dist. Lexis 20944 (M.D. Fla. Feb. 21, 2012).

It is clear that courts are still grappling with the discoverability of information from social networking websites. A safe approach is to analogize the requested information to nondigital information in a manner that produces the desired result. For example, using the analysis of the *Simply Storage* court, a plaintiff claiming mental or emotional distress would likely need to produce a photograph album containing paper photograph prints from a vacation that the plaintiff took after the incident that would evince her emotional state. The newly labeled concepts of "tagging," "friending," and other social networking terms confuse the issue at hand, making it difficult to apply existing law. Do your best to analogize and fit the new facts into the existing framework that permits discovery of this type of information.

### E-Discovery Issues

Today, more information than ever is created and stored in an electronic form, and some of it will never be transferred to a hard copy. While this facially sounds beneficial for production purposes, it actually has become a roadblock in discovery. Traditional paper files may have been time-consuming to maintain, but that is because they were just that: maintained. Thanks to searchable

files, many clients may not take the time to organize and categorize their files. Perhaps they leave all e-mails in their inbox, only reading what seems important at the time and never organizing by topic or deleting anything. They may dump files into one large folder, never renaming downloaded files so that they can easily identify them. A client can control both of these situations. However, you also must consider the ever-increasing number of places where we can store relevant information. Before computers, we kept information in filing cabinets, boxes, and other tangible systems. Today, visiting a particular website may be relevant, and this information may be stored in the visitor's computer's temporary memory. The more ways that we develop to track our electronic movements, the more information sources we have that leave footprints that we can rely on as evidence.

One of the primary obstacles to producing this information is preserving it. When a client doesn't know that some of this information exists, the client probably hasn't taken steps to preserve it. As a result, e-discovery sanctions are on the rise. One study published in the *Duke Law Journal* found that the federal courts reviewed more e-discovery sanctions cases in 2009 than in all years before 2005 combined. Dan H. Willoughby *et al.*, *Sanctions for E-Discovery Violations: By the Numbers*, 60 *Duke L.J.* 789, 794 (2010). The same study also found that the federal courts sanctioned defendants approximately three times more than plaintiffs, and this three-to-one ratio has remained almost constant over the last ten years, even with the drastic spike in e-discovery sanctions. *Id.* Therefore, it is imperative that when litigation is reasonably foreseeable, you advise your client to preserve all electronic data.

Complications related to preservation and requests for production become even more muddled with the introduction of a third party that possesses the data. Cloud computing is relatively new, but it is already making waves in the legal community in terms of both ethics and discovery. Ethical considerations of third-party mobile data aside, preservation of data may be completely out of the hands of both you and your client if the files are stored with a third party. It is the responsibility of you and your client to see to it that the infor-

mation is preserved because it is unlikely that a third party will have reason to know of the litigation unless the third party and your client have a defined special relationship. Several states have recognized a tort of spoliation of evidence against third parties. The duty arises when a “special relationship” is created, such as by express agreement. Jeffery J. Fowler, *Preserving Electronically Stored Information: A Practical Approach*, BNA’s E-Discovery Portfolio Series, The Bureau of National Affairs, A-16 (2011). A third-party preservation order from a court or a subpoena will usually sufficiently notify the third party of its duty to preserve the information; however, many third-parties are strenuously objecting to having to comply with various court orders, subpoenas, or both, so it is prudent to make every attempt to preserve the information that your client does control at the outset of litigation.

When representing businesses, remember to advise your client of the many areas where relevant information may be stored. Remind your client to check with its IT department about any automatic deletion policies regarding e-mails, temporary files, or archived files. Make sure that the client places a litigation hold on all potentially discoverable information. Also remember to check with cellular providers about stored text messages and voice mails. Other potential areas to consider are personal e-mail accounts, social networking websites, file and print servers, and already deleted files. Jeffery J. Fowler, *Preserving Electronically Stored Information: A Practical Approach*, BNA’s E-Discovery Portfolio Series, The Bureau of National Affairs, (2011) (discussing admissibility issues in social networking evidence).

### Ensuring Evidence Admissibility and Presenting Evidence in a Courtroom

Two particularly important things that you will want to consider when preparing for a trial are social networking evidence admissibility and how you will use technology to present it and other evidence types to a jury.

#### Admissibility

Admissibility is central to using social networking evidence in litigation. To present information obtained from a social net-

working website during a trial requires authenticating it. You can authenticate information found on websites with witness testimony or circumstantial evidence such as appearance, contents, substance, internal patterns, or other distinctive characteristics of an item, taken together with all of the circumstances. Fed. R. Evid. 901. It would be easiest for a plaintiff to admit ownership and knowledge of the obtained information, but a plaintiff may not always do this.

Due to the circumstantial element of establishing evidence trial admissibility, the authentication threshold is actually quite low. John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 SMU Sci. & Tech. L. Rev. 465–96 (2011). For example, circumstantial evidence was used in a California case to authenticate a defendant’s Myspace page that linked him to a known gang. *People v. Valdez*, 201 Cal. App. 4th 1429 (2011). The defendant challenged the authentication but admitted that the main photograph on the page was of his face, that a user using a photograph of his sister left him messages addressing him as her brother, and messages on the page were addressed to his name. Also, his listed interests supported suspected links to a known gang. *Id.* at 1435. The court recognized that the trier of fact decides authentication so the trial judge’s decision to admit the evidence was not improper because while “the [defendant] was free to argue otherwise to the jury, a reasonable trier of fact could conclude from the posting of personal photographs, communications, and other details that the MySpace [sic] page belonged to him.” *Id.* Of course, authentication is not the factor that determines admissibility. The evidence must also overcome all other evidentiary hurdles before a trial judge will admit it.

#### Presenting with Technology

For years attorneys expressed concern that using computer technology during trial polarized a jury by creating a perception of a high-dollar legal team. Because we are now immersed in a computer generation, however, most juries understand, and frankly expect, attorneys to use computer technology during trials. However, it is important that you choose demonstrative tools appropriate to your case. You should

avoid alienating the jury with modern, high-tech equipment in a small-value property damage case, for instance. Likewise, you should use technology only to enhance a jury’s understanding of your argument and never simply because you feel obligated to use it. If you routinely use technology without thinking about it, before using it in presentations, take a step back before each trial to assess the applicability and usefulness of the technology you will use to make sure that it facilitates understanding in the particular case.

The American Bar Association 2011 Legal Technology Survey Report identified the three most common forms of technology that the surveyed attorneys reported having access to in courtrooms: 65 percent reported a projection screen, 52 percent reported a DVD player, and 49.9 percent reported a single monitor for the courtroom. American Bar Association, *Litigation and Courtroom Technology*, 3, 2011 Legal Technology Survey Report, III-I, III-27 (2011). In contrast, only 22.6 percent of survey respondents reported the availability of a laptop with presentation software, and only 19.2 percent reported the availability of an evidence or document camera. *Id.* at III-30. As evident by this survey, court facilities may not make many of the tools that you may anticipate using available, so you will want to prepare adequately. It is crucial that you know what is and is not available or permissible to use in a particular courtroom.

### Troubleshooting and Preparation

To make sure that you have adequately readied your evidence and equipment for a trial, survey the courtroom before your trial. Know the fundamentals such as the locations of the electrical outlets. Know the courtroom’s technological capacities, and understand what you will need to provide for yourself. Do you need an easel, ELMO, laptop with Trial Director capabilities, screen, dry erase board, TV/VCR/DVD, or light box for X-rays? You should have backup technical support if possible. For example, if you are preparing a computer presentation, bring a spare computer and an extra disk. If you previously have not obtained a court ruling on whether you may use the demonstrative tool, have alternate plans for presenting your evidence or

argument. Be sure to test everything in advance to ensure that they will perform as desired in the courtroom. Ask yourself if the exhibits are readable, pleasing, exciting, and easily understandable. Next, understand the logistics of your anticipated evidence presentation.

Another key point in preparing to use technology during a trial is to ensure that the documents, the presentations, or the media files that you intend to use are compatible with the software loaded on the equipment that the court permits the attorneys to use during a trial. Videos edited in a particular software program may not be compatible with a slightly older version. Perhaps a presentation made with a previous version of the presentation software loses some functionality when displayed on newer software. These hiccups are necessary to plan for in advance so that you don't have last-minute surprises that occur in front of a jury.

If you experience a problem, just remember that the show must go on. If you prepare adequately, every digital aid will be supported by a backup hard copy. In preparation, have a hard copy of everything available as if every technological aspect of your presentation may fail. If prepared for the worst, the small snags that may occur will not disrupt a presentation's flow or impair your credibility in front of a jury.

### Preparing for Challenges to Evidence

Computer-generated presentations or images that display evidence can be extremely effective tools in increasing understanding. The problem is that these presentation tools are man-made to a certain extent, and they must be accurate. You should always prepare in case opposing counsel challenges the authenticity of your electronic aids. In a Connecticut case, *State v. Swinton*, 847 A.2d 921 (Conn. 2004), the defendant was on trial for murder, and the state introduced computer-generated evidence of bite mark overlays. The image displayed the defendant's actual dentition over the bite marks found on the victim. The trial court admitted the overlays as trial evidence. The defendant was convicted and subsequently challenged the authentication of the overlays. The Connecticut Supreme Court held that the trial court improperly admitted the overlays because the prosecu-

tion's expert who authenticated the overlays was unable to describe accurately and completely the process by which the computer program had created the overlays. While the witness was an expert in the field of forensic odontology, he could not explain the process Adobe Photoshop used to make certain images transparent. The defense successfully used a black-box phenomenon theory to argue that the person who simply sat next to the machine did not understand what the machine actually *did* to the data. The defense demanded a technical explanation for the difference between the data input into the computer and the output that the computer generated. The court determined that the defense had the right to cross-examine someone with computer expertise who could explain the creation of computer-generated evidence. *Id.*

The lesson to take from *Swinton* is twofold. First, when evidence is particularly questionable, it can be very effective to challenge it. Also, you must prepare to authenticate all computer-generated evidence with experts not only in the field that the evidence means to explain, but also with one who can explain the process by which the computer generated the evidence.

### Appealing to a Jury

Using presentation software to guide a presentation can have the effect of turning what you hoped would help you into a crutch, and ultimately, a hindrance. A plain and monotonous presentation will simply serve as a visual distraction from the speaker that will not effectively reach its target, thereby decreasing the overall effectiveness of the presentation. Worse yet, some speakers rely too heavily on presentation software, and they end up detracting from their stage presence simply by bringing a presentation into the mix. Technology cannot replace a persuasive, competent, and relatable speaker's effect on a jury. If used correctly, however, it can solidify a message.

Research indicates that using visual aids in addition to an oral message can reinforce and increase memory recall. Richard C. Waites, *Courtroom Psychology and Trial Advocacy* (2003). Modern research on the effectiveness of multimedia presentations has developed several principles that aid in creating electronic presentations. Two

important ones are the contiguity principle and the modality principle. *Id.* at 359. The contiguity principle states that presentations are more effective when words and images are presented alongside each other at the same time. The modality principle states that narration increases learning and memory retention more than on-screen text. *Id.* In a study testing the modality principle, students were asked to watch presentations containing a visual component with text or containing a visual component with narration. The presentations explained how lightning was created and the functionality of brakes in cars. The students were tested after these presentations to measure retention and their ability to use the information in problem solving. The students who viewed the presentations with narrations retained an average of 30 percent more information and had 80 percent more creative problem-solving solutions, suggesting a deeper understanding of the information. Richard E. Mayer, *Multimedia Learning*, 141-44 (2001). Therefore, you should use text in presentations close in time and proximity to the images that you use, and narration should accompany anything that you wish a jury to retain and understand.

The research seems to imply that the contiguity principle and modality principle conflict: one suggests using narration as opposed to text and one advises how best to use text. The redundancy principle helps to resolve this dilemma. The redundancy principle states that learning is facilitated more by just combining visual and audio learning than by combining visual and audio with on-screen text. *Id.* at 14760. The recipient of the information will become overwhelmed if information is presented in too many modalities or through too many channels at once; the audio information will compete with the text information. *Id.* Ideally, audio and textual presentations contain the same information, and yet the more ways that you try to convey a message, the less impact your message may have. In a study testing the redundancy effect, subjects who viewed presentations with just visual and audio components retained 28 percent more information and generated 79 percent more creative solutions to questions seeking solutions to problems than did their counterparts who

viewed the audio-visual-text presentations. *Id.* Therefore, use text sparingly, and always use it in close proximity to your visuals. Do not overload a jury with information and force jurors to choose how to receive it. Make the choice for them by presenting visual learning components with limited explanatory text, and verbally explain your presentation to achieve maximum understanding and information retention.

Presentation software generally is easy to use and saves time because it provides simple templates, meaning that all a user has to do is supply the information. It is not wise to rely on a template due to its ease of use, however, because a template may not always offer the best way to connect with a jury. Just remember that the templates provided in common software offer some choices, but a presentation creator has the power to create an intriguing slide from scratch. While this sounds time intensive, creating slides from scratch offers a great way to maximize an electronic presentation's usefulness, and there is no point to using presentation software if how you use it doesn't enhance your message.

When preparing a slide presentation, it is helpful to start at the end and work back to the beginning. The end that you want to achieve is that jurors will understand the presented message. So the first step is to decide exactly what message a juror should take from each slide. Then build each slide as a mini-advertisement for that

message. Effective advertising appeals to the senses with appropriate color, pleasing spacing and orientation, and direct word choices. Use colors that balance each other, and do not produce negative associations. For example, do not use a dark green background when a plaintiff's attorney has emphasized your client's wealth to the plaintiff's advantage.

Avoid using images and clip-art that risk unfair prejudice or distraction. *State v. Robinson*, No. 47398-1-I, 2002 Wash. App. Lexis 339 (Wash. Ct. App. Feb. 25, 2002), addressed whether the prosecutor's use of a slide containing curtains engulfed in flames next to the elements of first-degree arson was prosecutorial misconduct warranting reversal of the case. The court of appeal found the trial court should not have allowed it, and although the prosecutor "should have known better than to use it," the court of appeal stopped short of reversal. *Id.* at \*9-10. Find a way to convey your message clearly without jeopardizing the credibility of your presentation.

Graphs and images can very usefully help jurors understand a point that you can have difficulty conveying verbally. For instance, you should consider using graphs and photographs (1) to illustrate the relationships between parties or witnesses in a case with multiple parties or voluminous testimony; (2) to organize a timeline of events when they may become confusing or overwhelming to remember; (3) to show the

spatial relationships that enable an understanding of the facts, with maps, blueprints, or diagrams; and (4) to demonstrate relative size of an object, file, distance, or any other quantifiable comparison.

Making a comparison is one of the most effective tools to facilitate understanding, and visual aids can achieve this successfully. Richard C. Waites, *Courtroom Psychology and Trial Advocacy*, *supra* note 14, at 353-54. Comparison is really the meat of all adversarial proceedings so purveying your message in a visual as it contrasts to the opposing argument can increase understanding of the big picture. You can also use comparison to win the little points. For example, using just about any presentation software, spreadsheet, or graphics software, it is rather simple to create a table with columns comparing customer service ratings, awards, safety certificates, or any other pertinent information to emphasize your client's standing in its industry. This is a great way to use an electronic presentation effectively to solidify your oral message.

Overall, the goal is to support your oral argument, engage a jury, and facilitate understanding. To do this, do not think about what you want to convey, but think about how you want a jury to understand information. Remember, the ultimate goal of a trial is to have a jury understand your message. 