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Presenter Paper

Litigating in the Age of Social Media

This is a good, practical production with Priscilla giving us answers concerning the use of social media and the law. For example: how may we serve process – social media and juries – proving social media in court – bias and social media – recent cases.

Discussion Includes

- What is social media? What are the current major social media platforms? How pervasive is social media becoming in our everyday lives?
- Can originating process be served via social media? What examples are there?
- What issues can arise in jury trials due to jurors using social media to research the case? What examples are there?
- What issues can arise due to lawyers commenting on social media? What examples are there?
- Can the production of social media information be compelled in litigation? What issues arise? What examples are there?
- What dangers are there of contravening profession conduct rules when lawyers use social media for marketing purposes?
- What dangers are there of judges being perceived as biased due to their social media accounts? What examples are there?

Litigating in the Age of Social Media

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Introduction

FaceBook. Twitter. LinkedIn. Instagram. SnapChat.

These are just a few of the social media platforms which despite being next to non-existent ten years ago, today are an integral part of most people's daily lives. Statistics confirm this.

As at August 2015, Facebook (considered to be the market leader and the first to surpass 1 billion registered world wide accounts) had over 1.49 billion monthly active users. Twitter had over 230 million monthly active accounts. Blogging service Tumblr, had more than 230 registered active bloggers. LinkedIn, the relative newcomer to the fold, has approximately 97 million registered users.[1] Those numbers however continue to rise at a rapid rate.

These figures demonstrate that social media has permeated our daily lives to such a degree that perhaps it was inevitable that the legal system would eventually be impacted. Indeed cybercrimes including, fraud, hacking, cyberstalking, identity theft, child grooming and sexual exploitation along with cyberbullying and online defamation have risen sharply over the years with the increased number of people accessing and engaging on the web,[2] most frequently on social media.

The law naturally finds itself in a position where it has to consider these advancing mediums. Litigation is no exception to this. This paper will give an overview of some of the procedural challenges which have been faced to date, and how practice and procedure is evolving accordingly in this the age of social media.

FaceBook: You've Been Served

With many people actively engaging with social media at least once daily (often several times per day), arguably it is the case that many people check their social media accounts more frequently than their post.

What this means at a practical level is that the social media sites such as LinkedIn, FaceBook and Twitter facilitate an unprecedented level of connectivity both in Australia and internationally.[3] In recent times, this has brought into question whether social media platforms could act as a viable

[1] Statista, *Global Social Networks Ranked by Number of Users 2015*, Available from: http://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/ [14 November 2015]
[2] Australian Government, Australian Institute of Criminology, Cybercrime, Available from: http://www.aic.gov.au/crime_types/in_focus/cybercrime.html [14 November 2015]
[3] Johnston and Skelton, *Mr Process Server Wants to Connect With You,* Available from: http://www.swaab.com.au/Publications/Publications/Mr-Process-Server-wants-to-connect-with-you [14 November 2015]

platform for substituted service orders.

In New South Wales, the relevant procedural rules governing service are set out in the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**). The other States and Federal jurisdiction in Australia have similar rules.

Personal service is required where an originating process (e.g. Statement of Claim, Summons) is to be served on an individual.

What constitutes personal service is set out in Pt 10 r 21 of the UCPR which provides that:

> *(1) Personal service of a document on a person is effected by leaving a copy of the document with the person or, if the person does not accept the copy, by putting the copy down in the person's presence and telling the person the nature of the document.*
>
> *(2) If, by violence or threat of violence, a person attempting service is prevented from approaching another person for the purpose of delivering a document to the other person, the person attempting service may deliver the document to the other person by leaving it as near as practicable to that other person.*
>
> *(3) Service in accordance with subrule (2) is taken to constitute personal service.*

Similarly, service of originating processes on a corporation must be personal as per Pt 10 r 22 of the UCPR:

> *Personal service of a document on a corporation is effected:*
>
> *(a) by personally serving the document on a principal officer of the corporation, or*
>
> *(b) by serving the document on the corporation in any other manner in which service of such a document may, by law, be served on the corporation.*

However, sometimes it is impractical to serve documents personally. For instance if someone is evading personal service or their circumstances dictate that personal service is simply not practical (e.g. a celebrity where access to them can be difficult). In such situations, the party who is trying to serve the document must make an application to the Court for substituted service in accordance with Pt 10 r 14 of the UCPR which states that:

> *(1) If a document that is required or permitted to be served on a person in connection with any proceedings:*
>
> *(a) cannot practicably be served on the person, or*
>
> *(b) cannot practicably be served on the person in the manner provided by law, the court may, by order, direct that, instead of service, such steps be taken as are specified in the order for the purpose of bringing the document to the notice of the person concerned.*
>
> *(2) An order under this rule may direct that the document be taken to have been served on the person concerned on the happening of a specified event or on the expiry of a specified time.*
>
> *(3) If steps have been taken, otherwise than under an order under this rule, for the purpose of*

bringing the document to the notice of the person concerned, the court may, by order, direct that the document be taken to have been served on that person on a date specified in the order.

(4) Service in accordance with this rule is taken to constitute personal service.

The question which the Courts have been faced with in recent times is whether bringing a document to the attention of the person/company concerned via social media is sufficient for a court to make an order for substituted service.

Case Studies

MKM Capital Pty Ltd v Corbo & Poyser (Unreported, ACT Supreme Court, Master Harper, 12 December 2008)

The MKM case was one of the first in Australia to consider whether substituted service via FaceBook of a default judgment was permitted.

Briefly the facts of the case were that the defendants (Ms Corbo and Mr Poyser) were mortgagees who had failed to keep up with loan repayments. Neither of the defendants appeared in court to defend the action and consequently, MKM obtained default judgment against them for the loan amount and possession of the defendant's houses.

MKM attempted to personally serve the default judgments on the defendants, however these attempts were fruitless. An application for substituted service was made. In the ACT, r 6460(3) of the *Court Procedure Rules 2006* (ACT) provides that a court can make such orders if it is satisfied that:

(1) it is impractical, for any reason, for the document to be served in the authorized way; and
(2) the alternative way is reasonably likely to bring the document to the attention of the person to be served.

In this case, MKM led evidence that service by way of Facebook would bring the default judgment documents to the attention of the defendants because the evidence demonstrated that:

(1) the dates of birth and the email addresses displayed on the Facebook profiles matched those of the defendants; and
(2) the defendants were 'friends' with each other according to their profiles.

The ACT Supreme Court decided the evidence was sufficient for it to be considered reasonably likely that the document would be brought to the defendant's attention and ordered substituted service of the default judgment be effected by sending a private message to the defendant's Facebook page informing the entry and terms of the default judgment.

Citigroup Pty Ltd v Weerakoon [2008] QDC 174

Around the same time in 2008, the District Court of Queensland was faced with a similar application for substituted service via Facebook. However in this case Justice Ryrie refused the application on

the basis that she was not satisfied that the Facebook page was created by or belonged to the defendant, her Honour stating that:

> *In light of looking at the… uncertainty of Facebook pages, the fact that anyone can create an identity that could mimic the true person's identity and indeed some of the information that is provided there does not show me any real force that the person who created the Facebook page might indeed be the defendant, even though practically speaking it may well indeed be the person who is the defendant.*[4]

Flo Rida v Mothership Music Pty Ltd [2013] NSWCA 268

In 2012, an application for substituted service was made by the promoter plaintiff in the District Court of NSW to serve a Statement of Claim on the US rap artist Flo Rida via Facebook. That application was granted on the basis that the promoter had been unable to personally serve Flo Rida due to the fact that his security and entourage constantly surrounded him.

However, the decision was appealed to the NSW Court of Appeal and the decision overturned on appeal because as stated by Macfarlan JA:

> '*the evidence…did not establish, other than by mere assertion, that the Facebook page was in fact that of Flo Rida and did not prove that a posting on it was likely to come to his attention in a timely fashion.*'[5]

Graves v West [2013] NSWSC 641

In 2013, Justice Davies in the Supreme Court of NSW had to consider an application for substituted service where a defendant in a personal injury case had left Australia and no longer had legal representation in Australia (his previous solicitor in the case had filed a Notice of Ceasing to Act). The evidence on the application demonstrated that personal service on the Defendant was proving insurmountable, however it was clear that the Defendant was contactable via his LinkedIn account and that the account was in fact his.[6]

His Honour was satisfied that 'in circumstances where the defendant has left the jurisdiction without apparently leaving any forwarding address with his solicitor, who at the time was still acting for him, it is clear that there is no other practicable way of serving the Defendant with further documents that may need to be served in the proceedings.'[7] Accordingly orders for substituted service via the defendant's LinkedIn account, as well as service via his personal email account were made.

Byrne v Howard [2010] FMCAFam 509

Substituted service via social media has also been considered in the federal jurisdiction. In this case, which was essentially an application for declaration of paternity for the purposes of a child support

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[4] *Citigroup Pty Ltd v Weerakoon* [2008] QDC 174 at [50]

[5] *Flo Rida v Mothership Music Pty Ltd* [2013] NSWCA 268 at [38]

[6] *Graves v West* [2013] NSWSC 641 at [14].

[7] At [16]

assessment application, Ms Byrne, the mother of the child and her legal team had exhausted all reasonable measures for effecting personal service on Mr Howard, the child's father so as to bring the proceedings to his attention. Brown FM (as he then was) was asked to consider an application for substituted service via Facebook. His Honour concluded that:

> *I think it is the case that this is a means of communication which is reasonably available to all concerned, and as such, that it is likely to lead to a situation where Mr Howard has become aware of the existence and nature of the documents through which Ms Byrne has instituted these proceedings in this court.*[8]

His Honour also noted that service via electronic means (including social media platforms) is a "cost efficient method"[9] of service, and accordingly as the 21st Century progresses, process servers may well find themselves out of a job as litigants and their legal teams struggle to keep costs to a minimum.

The road ahead for substituted service via social media

In light of the above cases, it seems that courts are increasingly inclined to consider applications for substituted service via social media. That said, it is imperative that any such application be supported by sufficient evidence that connects a social media account with the party to be served. The above cases highlight that courts in Australia, particularly those in NSW, are still reluctant to draw a connection between a party and their social media account or profile where there is a question regarding the provenance or authenticity of that account or profile. However, as the phenomena that is social media continues to expand and infiltrate our daily lives more and more it is perhaps inevitable that the courts and indeed the legislature will need to accept this space and service by social media will become more frequent if not provided for in the rules.

Trial By Facebook: Jury trials

One issue that is arising in this age of social media is many trials are having to be aborted with juries discharged due to improper use of social media. This conduct appears to be occurring despite strict judicial directions. The abortion of trials comes at huge cost to the taxpayer purse but also places additional burden on the court system in having to reallocate time and resources to matters unnecessarily. It can also lead to serious consequences for those who ignore or have no regard for judicial direction, with recent examples in the UK highlighting that such conduct can lead to contempt of court findings which can have custodial sentences attached.

[8] *Byrne v Howard* [2010] FMCAFAM 509 at [27]
[9] At [28].

Juror using social media to communicate with parties in the case

Attorney General v Fraill [2011] EWCA Crim 1570[10]

In 2011, juror Joanne Fraill was sentenced to eight months' prison for contempt of court in the UK after she exchanged Facebook messages with the accused (Jamie Sewart) in a criminal trial. She also searched online for information about another defendant while she and the other jurors were still deliberating. These activities were undertaken in contravention of a specific judicial instruction to avoid using the internet during the trial.

Jurors commenting on social media during the trial

California Bar v Wilson

Harvard's Digital Media Law Project[11] recorded the case of attorney Frank Russell Wilson who was suspended from the Bar for 45 days for blogging about a burglary trial while serving as a juror. He had failed to disclose to the court that he was a lawyer

Jurors searching the Internet for information on the accused

Attorney General v Dallas [2012] EWHC 156

The UK Attorney-General used the expression 'Trial by Google' in a recent speech to describe jurors' use of Internet search tools and social media to conduct their independent investigations into a case. He conveyed a dim view of the practice and cited instances where it had resulted in contempt convictions, including *Attorney General v Dallas* [2012] EWHC 156[12]. In that case, a female juror was sentenced six months' jail for contempt of court for conducting research on the Internet, including definitions of the word 'grievous' and a newspaper report of an earlier rape allegation against the accused, and had shared this with fellow jurors. The judgment provides an extended account of how the British courts brief juries about Internet use and manage transgressions.

Jurors searching the Internet to better inform their role

***Benbrika v. The Queen* [2010] VSCA 281**[13]

In this case, the Victorian Court of Appeal affirmed trial judge's (Bongiorno, J.) handling of a situation where jurors had used Internet sites including Wikipedia and Reference.com seeking definitions of terms related to the terrorism trial (definitions the judge said were not substantially different from those stated in court). The Appeal court said the trial judge had found that "*it was distinctly possible that they had interpreted his directions as meaning that they should not seek information about the*

[10] http://www.bailii.org/ew/cases/EWCA/Crim/2011/1570.html
[11] http://www.dmlp.org/threats/california-bar-v-wilson
[12] http://www.bailii.org/ew/cases/EWHC/Admin/2012/156.html
[13] http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSCA/2010/281.html

case, rather than using the Internet for more general purposes".[14] They noted the important difference between this kind of search and searching for "*information that is both inadmissible at trial, and prejudicial to the accused*", which might prompt the discharge of a jury.[15]

Trial By Facebook: Use of Social Media Related Materials In Evidence

Privacy. It would seem that no matter how strictly that one believes their "privacy" setting on social networking sites is, the reality is that really, there is no such thing as "privacy " in the social media realm. Many users of social media share their entire lives online so it has become the case that social media platforms are potential gold mines of information in the evidence and discovery process. It used to be that gathering information on individuals was difficult, unless expensive private investigators were engaged. In this day and age, many plaintiffs, share their entire world via their social media accounts meaning that litigators lives are made somewhat easier. Indeed Courts are increasingly being asked to rule on whether content sourced from social media accounts can be used as evidence in accordance with the court rules and precedents already in existence.

Position overseas

In the US and Canada, there has been a definite trend in favour of courts compelling the disclosure of material from social media accounts to the other side in litigation.

Kourtesis v. Joris [2007] O.J. No. 5539, 160 A.C.W.S. (3d) 414 (S.C.J.)

Facebook evidence was considered by an Ontario Court in this case for the first time. The case was a personal injury claim by the plaintiff, Ms Kourtesis who had suffered injury in a motor vehicle accident. Her Statement of Claim pleaded *inter alia* that she had suffered a loss of enjoyment of life for which damages were sought.

The defendant's legal team however had come across the Facebook page of the plaintiff, which had many pictures of the defendant out on the town with her friends, dancing and partying, in the post accident period. The plaintiff subsequently deleted the photographs from her Facebook profile. The defence sought to have the photos admitted into evidence.

The Court was asked to first determine whether the photos were admissible into evidence in accordance with the Rules. The Court held that the photos were producible under the Rules, stating that:

> *Further in assessing fairness, it is argued through the plaintiff, that prejudice outweighs probative value. It is argued that the probative value is minimal and I agree that the photos by themselves have minimal probative value but they do relate to a material issue, namely*

[14] *Benbrika v. The Queen* [2010] VSCA 281 at [199]

[15] *Ibid.* at [214]

assessing damages for loss or enjoyment of life. In this particular case, the photos have a probative value outweighing potential prejudice as argued.

I do find, however, that the issue of her enjoyment of life is, as stated, a material element in assessing damages. In fairness, balance is in favour of the photos being introduced, subject to technicalities dealing with admissibility a balance of fairness favours the introduction of the photos with leave granted to the plaintiff to recall the plaintiff.[16]

Accordingly, the defendant proceeded to use the photographs as evidence in the trial. The plaintiff's claim was ultimately dismissed, save for a future financial loss award of $25,000.[17]

Dexter v. Dexter (2005) D.R. 0110 (Ct. Com. Pl. Portage County, Ohio May 1, 2006), *aff'd*, 2007 WL 1532084 (Ohio App. May 25)

This was a family law proceeding in Ohio whereby the Court permitted the father of the child to use the mother's MySpace posts to demonstrate that she was unfit as a mother, namely that she was a bisexual, sado-masochist who engaged in illicit drug use and pagan rituals to help him win custody.

Position in Australia

Palavi v Radio 2UE [2010] NSWDC 332

This was a defamation case in which the plaintiff, Ms Charmayne Palavi commenced proceedings on against the radio station in respect of statements made about her sexual conduct with rugby league players. 2UE sought discovery of Ms Palavi's mobile phone records on the basis it was thought that she had incriminating photos and text messages stored on it. The Court upheld the request for discovery.

Through the discovery process, it was found that Ms Palavi had attempted to delete the materials on her phone, with a text message to a friend that read: "*this is gonna sound stupid but how do I get pics off my iphone that I don't want? Like ones that have synced from computer?*"

Important lessons

Nowadays, material from social media accounts is discoverable and can be admitted into evidence. Even Facebook's policy recognizes that material may be the subject of discovery or a subpoena.[18]

But lawyers must adhere to the rules of the court to which they are practicing in. For example, lawyers cannot engage in fishing expeditions on social media, as per the normal constraints of the discovery process. There must be some cause to argue that the materials are relevant to the case

[16] *Ibid.* at paras 22, 23 and 27.
[17] *Kourtesis v. Joris* [2007] O.J. No. 2677 (S.C.J.)
[18] See Facebook Terms of Service, Available from: https://www.facebook.com/terms.php [14 November 2015]

at hand. Subpoenas and categories for discovery need to be drafted with express precision as the courts have wide powers to limit their scope so as to prevent unnecessary costs and delays in proceedings.

Further, parties to proceedings may think that they can simply delete materials from social media websites which will prevent it being the subject of an order for discovery, production or subpoena. Whilst the Palavi case involved a mobile phone and its content, the same rules would apply to social media sites. Destruction of content, especially when proceedings are on foot would have the same effect as that of shredding documents; it may well amount to contempt of court, especially given the social media platforms have clear policies that where compelled by law to assist in a case, they will do so.

It is for these reasons that social media can be an effective tool for a litigator in the litigation process, especially in the evidentiary process. However, this must always be considered against the backdrop of lawyer's ethical obligations and professional conduct rules to which they must abide.

Social Media: effective business tool or an ethical minefield for lawyers?

Many individuals post freely about their lives (including their professional lives) on Facebook. Further, many companies and businesses have seen the opportunity that social media provides to expand their reputation within the marketplace. Lawyers are not immune from this, with many law firms and lawyers electing to have a presence on social media, whether it be a personal Facebook page, or a professional LinkedIn profile.

Unfortunately what many lawyers forget is that they are bound by professional conduct rules and duties to the court and the administration of justice. Accordingly, there can potentially be a myriad of negative consequences which flow for lawyers if social media is not used appropriately. Whilst we are yet to see a lawyer in Australia reprimanded professionally for their conduct on social media, there are some overseas examples which highlight that ethical considerations need to be at the forefront of lawyer's minds when engaging on social media.

Communications with the Bench

Whilst there is nothing inherently wrong with adding a judge as a 'friend' on social media or visa versa, it can send the wrong message to opponents and potentially can have dire consequences for a trial, particularly if communications are had via that social media account during a trial or worse if the social media friendship implicates the judicial conduct of the case.

Case Studies

Domville v State of Florida 103 So.3d 184 (Fla. 4th DCA 2012)***; State of Florida v Domville*** 110 So.3d 441 (Fla.2013)

This was a criminal case in which the accused (Domville) brought a motion for the trial judge to disqualify himself on the basis of apprehended bias due to the fact that he was "friends" with the prosecutor on Facebook. Domville alleged that the judge could not be "fair and impartial" in the case due to the nature of his friendship with the prosecutor. Domville led evidence that as a Facebook user, his "friends" list consisted of people and associates with whom which he "could not perceive with anything but favour, loyalty and partiality". At first instance, the judge dismissed the motion on the basis that the application was "legally insufficient".

The appellate court overruled the trial judge. The Fourth District Court of Appeal determined that the judge's social networking "friendship" with the prosecutor was sufficient to create a well-founded fear of not receiving a fair and impartial trial in a reasonably prudent person.[19]

Chace v Loisel (Florida Court of Appeal, 24 Jan 2014) 2014 WL 258620

This was family matter (divorce) that came before a Florida Court. The judge presiding over the case attempted to "friend" one of the parties, Ms Sandra Chace. The "friend" request came prior to the final ruling in the case. Chace sought advice of her Counsel and declined to respond to the invitation. Soon after, the Court entered a final judgment in the dissolution of the marriage, with terms that were highly unfavourable to Ms Chace. Following the entry of orders in the final judgment, Ms Chace filed a formal complaint against the judge, which alleged that the Court sent her a Facebook "friend" request and then retaliated against her when she did not accept it. Ms Chace also filed a motion for the judge to be disqualified, which was summarily denied. Ms Chace subsequently appealed. The Florida appellate court granted the appeal, disqualified the judge and remanded for further hearings to address previous rulings, which it deemed were arguably tainted. The appellate court explained its decision as follows:

> *The trial judge's efforts to initiate ex parte communications with a litigant is prohibited by the Code of Judicial Conduct and has the ability to undermine the confidence in a judge's neutrality. The appearance of partiality must be avoided. It is incumbent upon judges to place boundaries on their conduct in order to avoid situations such as the one presented in this case.*

That said, the Court was highly critical of the decision in the Domville case stating that:

> *We have serious reservations about the court's rationale in Domville. The word "friend" on Facebook is a term of art. A number of words or phrases could more aptly describe the concept, including acquaintance and, sometimes, virtual stranger. A Facebook friendship does not necessarily signify the existence of a close relationship. Other than the public nature of the internet, there is no difference between a Facebook "friend" and any other friendship a judge might have. Domville's logic would require disqualification in cases involving an acquaintance of a judge. Particularly in smaller counties, where everyone in the legal community knows each other, this requirement is unworkable and unnecessary. Requiring*

[19] *State of Florida v. Domville,* 110 So.3d 441 (Fla.2013), see: http://www.4dca.org/opinions/Sept%202012/09-05-12/4D12-556.op.pdf

disqualification in such cases does not reflect the true nature of a Facebook friendship and casts a large net in an effort to catch a minnow.

NSW Professional Conduct and Practice Rules 2013 (Solicitor's Rules)

In accordance with rule 18 of the Solicitors Rules in NSW (or r 44 of the NSW Barrister Rules 2014), legal practitioners must *not, in the presence of any of the parties or solicitors, deal with a court on terms of informal personal familiarity which may reasonably give the appearance that the solicitor (or barrister) has special favour with the court.*

On reading this rule, one could see how interactions with a judge on social media throughout the course of a trial could be in breach of this rule.

Lawyer's Status Updates

Lawyers also need to consider the implications of posting status updates about cases which they are involved in. For instance, posts about a big win in a case or the outcome of a difficult negotiation may be in breach of professional conduct rules, or it may jeopardise the outcome of a case.

Case Studies:

People v. Armstrong (California Court of Appeal, Jan. 13, 2014) 2014 WL 125939

This case was a criminal case in which the accused was ultimately convicted of a number of domestic violence related crimes against his wife. After he was convicted, he sought appealed the decision on the basis that there had been prosecutorial misconduct in the running of the matter. This was alleged because shortly before the trial commenced, the Court ordered the prosecutor make its key witness (a minor) available for an interview with Counsel for the defence. Shortly after the orders were made, the prosecutor posted on Facebook:

> *After I spent the day trying to prevent my 13 year old star witness from being kidnapped, I found out that I am getting the Prosecutor of the Year award from the Victims Service Centre.*

The Court said that the Prosecutor's Facebook post was "an incredible display of poor judgment and violated the California Rules of Professional Conduct, which explicitly prohibit members of the Bar from making extra judicial statements when "*the member knows or reasonably should know that [the extrajudicial statement] will have a substantial likelihood off materially prejudicing an adjudicative proceeding in the matter.*"[20]

The Court was of the view that the prosecutor's Facebook status update about her "key witness" presented a substantial likelihood, according to the court, of prejudicing the matter if any juror learned of the comment.

[20] Rule 5–120 of the *California Rules of Professional Conduct*

That said, even though the Court admonished the prosecutor for her "foolishness", the court found no prejudice actually occurred in this instance, thereby not justifying a mistrial.

Conclusion

Social media provides lawyers with an invaluable research tool. But it can also be a potential minefield of ethical issues. That said, many of the issues faced are really nothing new in terms of lawyers obligations and duties. Perhaps the most important message for lawyers is not to treat social media as some new frontier which changes the legal landscape and the way in which practice is conducted, rather it is yet another medium to which many of the old rules and procedures can easily apply. Used effectively and in accordance with professional conduct rules, it is a valuable and powerful tool for a litigator, but one must always use it within the confines of their professional obligations and duties.