

CLOUD PRESERVATION BLOG

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5 Tips to Keep Your Social Media-Addicted Clients Out of Jail

6th January by Jason Krause

Nicholas Emond says he is a misunderstood young man. Emond, aka "Sin Demon" says he is not a criminal, but has been unfairly maligned for his tattoos and general appearance. However, he chose the wrong way to defend himself- by commenting on his own wanted poster on Facebook.



Don't judge me on my looks...or Facebook posts!

Emond was wanted for a relatively minor infraction, "violations of conditions of supervised release." However, once he began to post increasingly angry comments on his wanted poster ([published on a local TV station's Facebook page](#)), his case suddenly got a lot of local attention. Acting on tips from the public, [police arrested Emond in Somersworth, N.H.](#)

Emond's public commenting is just one of the new and possibly unexpected ways social media can get clients into trouble. Below are five common sense (but often ignored) tips for staying out of trouble with the law on social media.

1. Do Not Delete Posts

We understand that when someone is in trouble, the first instinct is often to hide evidence. That's proven to be especially true in the digital world. But lawyers should tell their clients, not only is deleting evidence a crime, but all their are doing is calling attention to whatever they think needs to be hidden. Electronic evidence is hard to delete and the first place investigators will look is wherever data is missing. They might as well be taking a highlighter to the evidence for the opposition to find.

In the recent case [Gatto v. United Air Lines, Inc., \(D.N.J. Mar. 25, 2013\)](#) the court sanctioned a plaintiff for deactivating and deleting his Facebook account. The important question is, why was this man still using his Facebook account? The parties had established it was going to be an important piece of evidence in this matter, meaning it should have been preserved and archived in a forensically secure repository for review later.

2. Do Not Fake Posts

In family law and other emotionally charged battles, overzealous clients are very likely to break boundaries in order to get the dirt on their opponents. This can often include clumsy attempts at entrapment. Angela Voelkert created a [fake Facebook profile](#), "Jessica," and friended her ex-husband in order to get some dirt on him in their child custody battle. Her ex, David, posted a chat message to "Jessica" that he was going to track his ex-wife with a GPS device and kill her. The FBI arrested him for these statements, until he showed an affidavit stating that he knew who was behind the profile and that he had set out to trap her:

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“the lies that I am placing in this chat [are]... proof what my ex-wife has been doing, so this will be part of such. In no way do I have plans to leave with my children or do any harm to Angela Dawn Voelkert or anyone else.” ~David E. Voelkert

Now Angela Voelkert is the one with some serious explaining to do.

3. Do Not Comment on Anything Related to Your Case

We’ve already shown how Facebook comments from an individual can jeopardize their case. But now we’re talking to you, lawyers, judges, and other legal professionals who should know better.

In one recent ruling, [the court found](#) that Tweets from one prosecutor during trial of a child rapist could have jeopardized the trial. The court did not reverse the conviction, but noted the Tweeting was a cause for concern. In addition, the ABA has now published an ethics opinion, warning that judges who use social networking have to follow the ABA Model Code of Judicial Conduct. (See [Formal Opinion 462](#) for details). If your case is going before a particular judge, be aware of the communications you may have with them. Are you Facebook friends with the judge or opposing counsel? Are you Tweeting them? Those communications are likely discoverable and potentially prejudicial.

4. Do Not Threaten Anyone

This one should be obvious, but people may not be aware that their speech takes on a heightened level of scrutiny once the law is involved. It might seem like harmless fun to make idle threats online most of the time.

In another case involving public comments on a Facebook, [Matthew Oliver](#) commented on his [Pasco Sheriff’s Office](#) wanted photo on Facebook:

“You guys are going to pay for... believing a crackhead and... slandering my name,” Oliver wrote on the sheriff’s office Facebook page. “Pasco County has nothing but fools investigating crimes for them that’s why these mix up[s] happen.”

As can be expected, Oliver was arrested and now faces even more charges. Thanks to his online activity, he doesn’t have to worry that the police are taking the word of an unreliable “crackhead.” They have his own words to use against him.

5. Don’t Let Evidence Slip Away

Many lawyers and clients have learned the hard way that social media is vaporous, changing, and often disappears. And you cannot count on tools like Facebook’s export feature to obtain important evidence. The bottom line is that it is simply a snapshot of a Facebook page at a given point in time, and not a complete, forensically sound piece of evidence. If a user downloads a copy of content from Facebook after they receive a discovery request or regulatory inquiry, it may not contain all of the information associated with a post, like who shared a post. In addition, once a post is deleted, it’s deleted forever and likely unrecoverable.

As noted in the commonly cited case [Griffin v. Maryland](#), there is “potential for abuse and manipulation of a social networking site by someone other than its purported creator and/or user.” In that case, the court concluded that a printout from a social media site, “requires a greater degree of authentication than merely identifying the date of birth of the creator and her visage in a photograph on the site,” to determine that if a person was the person who published a post. Because the prosecutors failed to authenticate the social media evidence, the case fell apart.

Bottom line: If there is potentially exculpatory evidence in social media, make sure you archive it before the evidence is lost forever.

For More Information...

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