MARK SANDLER – THE IMPACT OF SOCIAL MEDIA ON THE JUSTICE SYSTEM

Citations are either reproduced in the notes or in the appended list of authorities.

Social media has fundamentally changed how participants in the justice system do their work – certainly, how they should do their work.

I will briefly outline **four** ways in which this is true.

1) The use of social media to challenge credibility

The widespread use of social media means that parties to litigation have potential access to a tremendous amount of information about the opposing parties and about witnesses in civil, administrative or criminal proceedings.

Witnesses may have made comments relative to the litigation on Facebook, Twitter, Instagram, Linkedin or in any variety of electronic forums.

A search of the internet may identify discreditable behaviour of witnesses or opposing parties or connections otherwise not known between a party and a seemingly disinterested witness.

Such a search may produce critical commentary on experts or their views in otherwise unreported cases – or undermine their purported expertise altogether.

Photo or video images of a purportedly injured plaintiff dancing the limbo on Facebook or TikTok may be inconsistent with that plaintiff's damage claims.

Indeed, the potential value of seeking access to such social media for information is so high that lawyers' duties to their clients (such as the duty of loyalty or duty of confidentiality) may now include, as one commentator described it, the "duty to google." Indeed, in the text, Digital Evidence: A Practitioner's Handbook, the authors state that social media is a treasure trove for defence counsel in order to cross-examine a witness, and that counsel arguably have a duty to research a witness's background on the internet before cross-examining any witness whose credibility is in issue.

To be clear, the "duty to google" while a handy label to describe this obligation, seriously understates the wide variety of opportunities in social media to learn about clients, opponents, witnesses, and experts. That wide variety may be largely unknown to most counsel, requiring them to seek out private investigative, IT or social media expert assistance.

With these relatively new-found obligations for counsel also come formidable challenges for judges and other adjudicators.

For example, trial judges are accustomed to evaluating whether they should grant access to an accused or civil defendant to third party records pertaining to a complainant or witness, particularly in sexual offence-related litigation. We have developed a large body of jurisprudence, as well as *Criminal Code* provisions, to regulate access to such records in a way that balances societal and individual interests, including the reasonable expectation of privacy of those to whom the records relate.

But increasingly, counsel for the accused and other litigants may no longer need to seek third party production of such records, since they can access these records themselves on social media. So, to take one obvious example, to what extent can accused use what they find on social media to cross-examine a complainant?

Recent changes to the *Criminal Code* introduced by Bill C-51 require trial courts to consider, in sexual offence cases, whether certain private records, already in the possession or control of the accused, can be adduced into evidence or their contents otherwise used in sexual offence cases. More specifically, s. 278.92 of the *Criminal Code* creates an obligation on an accused to apply for permission to use such information already in his or her possession in relation to which the complainant has a reasonable expectation of privacy.

The very definition of "records" under s. 278.1 requires the court to determine whether the complainant held a reasonable expectation of privacy in connection with the information. This will be a difficult evaluation for the court to make in social media cases. It necessarily involves a a deeply contextual analysis, rather than a bright-line assessment.

For example, to what extent has a complainant lost a reasonable expectation of privacy in his or her Facebook comments? Does it matter if the accused was previously accepted as a "Facebook friend," or was able to obtain access to those Facebook comments in other ways? When can the police access the Facebook comments of a suspect or accused without prior judicial authorization? In one Ontario Superior Court case, *R. v. Patterson*, [2018 ONSC 4467], the court concluded, in a nuanced, important discussion, that the police acted lawfully in accessing the accused's Facebook communications (through which he lured children), in part, because his profile was public and the police investigator was able to navigate a significant portion of the profile without being accepted as a friend. The court concluded that the information was of a nature that the accused "invited the world to see" it. Accordingly, the accused had no reasonable expectation of privacy in most of the accessed Facebook entries. The court distinguished this scenario from the reasonable expectation of privacy enjoyed by the sender of text messages articulated by the Supreme Court of Canada in *R. v. Marakah*, [2017 SCC 59]. But it is clear from the judgment that not all Facebook entries are created equal – hence, the difficult task left for trial judges to decide.

The courts are just at the early stage of wrestling with the legal implications of access to such social media.

In *R. v. Paxton*, [2016 ABCA 361], the Alberta Court of Appeal considered the Crown's duty of disclosure in connection with social media about the complainant, and whether the Crown failed to take steps as part of its disclosure obligations to preserve social media deleted by the complainant. The Court of Appeal concluded that the Crown does not have an obligation to monitor the social media of complainants or witnesses.

In *R. v. Marshall*, [2015 ONCA 518], the accused/appellant in a sexual offence case wanted to lead purportedly fresh evidence on appeal that the complainant suffered from war-related PTSD, anxiety and depression, indulged in alcohol and cocaine use to cope, and been charged with various assaultive offences. The Ontario Court of Appeal concluded that this was not fresh evidence, in part, because the evidence was available at the time of the trial since it was posted on the internet. This implicitly appeared to impose (consistent with the theme of my

presentation) somewhat of a duty on counsel to determine what evidence is available considering the realities of social media and the internet.

In *R. v. M.S.*, [2019], a very recent decision of the Ontario Provincial Court, the court engaged in a detailed discussion as to whether certain information including social media in the accused's possession amounted to a "record" for the purposes of the *Criminal Code*, since (as indicated earlier) that impacted on whether the accused was required to apply for permission to use the information. I commend the discussion contained in that decision to you, especially the court's articulation of the factors that might inform whether the information constitutes a record and whether it implicates the reasonable expectation of privacy of an affected individual.

I said that access to information about witnesses and opposing parties through social media has generated (and will continue to generate) a host of issues for judges and counsel.

Interestingly, in the United States, research exists, suggesting that judges are influenced by public opinion, leading to the active use by some counsel, interested parties or interest groups of social media, through legal blogs and other means, to influence public opinion, and thus indirectly, the judiciary on what to do -- especially in high profile litigation. This has caused a number of American counsel to eschew the traditional approach for lawyers, very much the norm here in Canada: namely, that counsel are extremely reticent about advocacy outside of the courtroom in support of their clients' positions. This raises intriguing questions for Canadian counsel going forward, although one could at least argue that our judiciary may be less likely to be influenced by public opinion since none of them are elected, and since our judicial selection processes are less politicized.

An intriguing paper on point in the Georgetown Journal of Legal Ethics concludes by saying:

> Judges may say that they are merely umpires calling legal balls and strikes but, regardless of that assertion, practicing lawyers themselves believe that what the public thinks is a factor in any given judge's decision-making. These practitioners are, as one would predict, adjusting their behaviour and litigation strategies accordingly. They are entering the public forum to champion the image and voice of their client and her

interests. One emerging way in which they are doing so is by capitalizing on the quick and ready information distribution capacity of social media platforms such as blogs.

Even if Canadian counsel do not accept that shift in paradigm, or are challenged by existing ethical rules of conduct, it remains a legitimate tool for counsel to learn as much as they can about the judges they appear before – including what social media tells them about those judges. This is all the more reason for judges in this room to heed the wise admonitions against active involvement in certain types of social media.

2) Reputational impact of social media

A second influence that social media has on the role of counsel and the judiciary relates to reputational impact. Regardless of the result in the justice system, social media that may predate a trial or its disposition has a practical permanence to it that may remain with accused persons or civil litigants well after they have succeeded in court. Thoughtful counsel are mindful of the devastating impact of social media and the internet. This may mean for counsel that they must be more active in attempting to balance what is said about their clients publicly, despite the traditional reticence I have already described in advocating for clients outside the courtroom. It may also mean that we urge courts, in certain limited, appropriate cases, not only to exercise a reasonable doubt, but to exonerate the client.

Arguably, it may also mean that courts should be more mindful of the damaging impact of their reasons: for example, through unnecessary biting commentary on the accused, witnesses or on third parties, especially when some of them had no ability during the trial to challenge what the court might say about them. Of course, these concerns did not originate with social media. However, it cannot be denied that judicial reasons now attract much greater attention in social media and in fully accessible legal websites.

Indeed, there are companies that now exist whose raison-d'etre is to lower the searchability of negative comments about clients on the internet – for example, by seeking to overwhelm negative stories about the criminal charges clients face or faced with positive features about the client – and they must do so in a way that overrides or circumvents algorithms created by Google and other search engines to prevent manipulation of their sites in precisely this way.

3) Change of Venue Applications in Criminal Cases

A third example of the impact of social media comes with change of venue applications in criminal cases. Traditionally, applications for change of venue based on pre-trial publicity turned, in large part, on how much time has elapsed between reporting on the case and the commencement of the trial – the theory being that jurors may have forgotten anything they read many months ago about the matter. But the permanence of social media, its easy accessibility by inquiring prospective jurors and its seemingly omnipresent character may invite a different assessment of what truly matters in change of venue applications. Some courts in the United States have been reticent to consider social media in evaluating potential bias in jury pools – for example, on the theory that social media is known to be unreliable and therefore unpersuasive to prospective jurors. But the reality is that more and more people take their news from social media and equally important, research exists, suggesting that even highly opiniated, non-evidence based social media does persuade. In my view, it is difficult to ignore, for example, social media such as victim memorials with pejorative comments about the accused simply because there are obviously not objective accounts or because of difficulties in ascertaining the extent to which they truly reflect views of the larger community (another consideration on change of venue applications). Several high profile murder cases in Canada (such as *R. v. Durant* and *R. v. Millard* in Ontario and *R. v. Oland* in New Brunswick have considered, to varying degrees, evidence of social media pertaining to these cases in evaluating the merits of change of venue applications. In some cases, evidence of "google hits" or extensive twitter activity associated with the accused or the case has been introduced into evidence, though the limitations on what can be gleaned from this evidence have also been discussed by the courts. My point here is that social media cannot be ignored in the analysis associated with change of venue applications.

4) Jury selection and trial

Finally, I wish to comment on how social media may profoundly affect jury selection and jury trials themselves. I raise this point for two reasons. First, we have the capacity to know so much more about prospective jurors than ever belore. So query the extent to which the courts should

further monitor or regulate our ability to access information about prospective jurors. It does seem clear that the Crown will have disclosure obligations in this regard that may not be shared by criminal defence counsel.

Second, and more importantly, prospective and sitting jurors have far greater capacity to learn through social media about the cases they hear – of course, that social media may be inaccurate, misleading, self-interested or perfectly accurate but reflective of inadmissible evidence.

So there are much greater difficulties in insulating prospective and sitting jurors from knowledge of a case both before jury selection and during the trial itself. This panel will soon discuss how judges should cope with these added difficulties during a jury trial.

For now, I will focus on jury selection.

The difficulties I have described (the great capacity of prospective jurors to learn too much about the cases they might hear) are, in my view, compounded by the very recent abolition of peremptory challenges in criminal trials through Bill C-75. Their abolition was driven by concerns about stereotypical, discriminatory uses of peremptory challenges to prevent representative juries. However, that abolition also severely limits the ability of parties to eliminate jurors who may have knowledge of the case, but do not meet the threshold for exclusion based on a challenge for cause.

If the constitutionality of the new jury selection provisions is upheld (they are currently being tested in the courts), it is arguable that trial judges should give broader scope for the questioning of prospective jurors either through questionnaires or through developing a lower threshold for permitting challenges for cause or for sustaining challenges for cause, all based on the much greater opportunities for (indeed, some would argue, inevitability of) prospective jurors actively learning about cases through social media.

I have provided a brief list of authorities for participants that provides the citations for the cases and articles that informed my presentation today.

I end with a true story. I defended a very prominent individual facing a sexual assault allegation. Our search of the internet produced evidence that my client's Wikipedia profile had been changed to include the charge he was facing, as well as false allegations that he failed a polygraph and that his wife left him over the charges. My private investigator was able to ascertain when the changes to Wikipedia were made. Through a production order sought by the defence in advance of trial, we were able to learn that the changes were made from the complainant's residence. The complainant's false statements about the accused, demonstrated in this way, resulted in the withdrawal of the charges. One would then need to take the next step: namely, returning to the internet to ensure that relevant entries are updated to reflect the withdrawal of charges (or other successful disposition) to reduce reputational impact.

The duty to google. A brave new world indeed.

Authorities Cited

How Social Media Impacts on the Duties of Counsel and the Court

LEGISLATION

Bill C-75, *An Act to Amend the Criminal Code, Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts,* 1st sess, 42nd Parl, 2019 (assented to 21 June 2019) [s. 269 of the Bill repealed s. 634 of the Criminal Code respecting peremptory challenges]

Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act,* 1st sess, 42nd Parl (assented to December 13, 2018) [see current Criminal Code sections 278.1 and 278.92]

JURISPRUDENCE

R v Durant, 2019 ONSC 3169 [change of venue]

R v Marshall, 2015 ONCA 518 [application to adduce fresh evidence on appeal: impact of evidence available on the internet]

R v Millard and Smich, 2015 ONSC 6206 [change of venue]

R v MS, 2019 ONCJ 670 (released on September 25, 2019) [s. 278.1 and 278.92 of the Criminal Code]

R v Oland 2018 NBQB 253 [change of venue]

R v Patterson, 2018 ONSC 4467 [reasonable expectation of privacy in Facebook communications]

R v Paxton, 2016 ABCA 361 [obligations of Crown re social media affecting Crown witness]

SECONDARY MATERIAL

CP24 “Police say two 16-year-old suspects taken into custody in connection with the fatal stabbing of a teen outside a Hamilton high school have been released "unconditionally."” (9 October 2019 at 10:01), online: *Twitter* < *https://twitter.com/CP24/status/1181932587880734726*>

Gerald Chan & Susan Magotiaux, *Digital Evidence: A Practitioner's Handbook* (Toronto: Emond, 2018)

Leslie Y Garfield Tenzer, “Social Media, Venue and the Right to a Fair Trial” (2019), 71 Bay L Rev 421

Mark J Feaster Jr, “Blogging and the Political Case: The Practice and Ethics of Using Social Media to Shape Public Opinion in Anticipation of High-Profile Litigation” (2016), 29:4 Geo J Leg Ethics 1013

Susan Chapman, *The Duty to Google,* (Toronto: The Law Society of Upper Canada, 2015)

York Regional Police, “VIDEO – IMPAIRED DRIVING CHARGES CONTINUE TO RISE” (undated), online: <https://www.yrp.ca/en/Modules/News/index.aspx?feedId=eec058e4-5b49-437f-89cd-d222d7465de7&newsId=62382bf4-2a25-4952-a615-7bd583f0c688> [example of reputational impact relating to social media]