

Risky Business: The Double-Edged Sword of Social Media - Part 1: Smart Debt Collection and Skiptracing Practices

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ABOUT THIS WHITE PAPER:

When it comes to debt collection and skiptracing, social media is a boon. The amazing amount of information available—at low or no cost—makes it a preferred way to gather intelligence on a person.

However, there are no laws specific to using social media for this—only ones governing older technologies, such as voicemail. This is not expected to change any time soon.

It's best to 1) understand how the outdated laws out there may apply to social media, and 2) take a conservative approach to using this tool—to gather information but not to directly or indirectly contact a person. Speak with a lawyer who specializes in this area to protect yourself.

What a gift social media is to professionals who collect debt and locate people! LinkedIn tells you where they work. Foursquare tells you where they are. Pinterest tells you what they want. Twitter tells you what they're doing. Facebook tells you who their friends are. It's very hard to hide these days.

So, what's the downside?

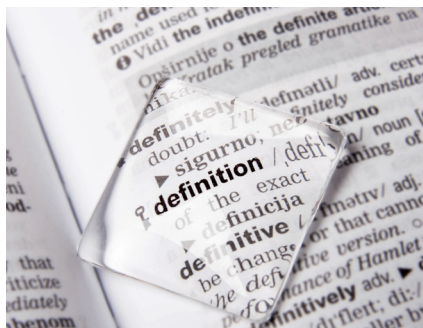


We are operating under rules, regulations and legislation that were formulated before anyone outside of universities or the U.S. military was even *thinking* of using an electronic network to share information. Guidelines were created when voicemail machines were just a few years old—and one even predates the invention of the fax.

This means gathering and using information from social media can be fraught with legal minefields. Even the cases where the debt amassed is sizable or a person being sought is clearly in the wrong, cases can be tossed out because those gathering information crossed an ill-defined line.

That's the purpose of this paper: to offer useful background and best practices for debt collection and skiptracing professionals. (The second paper in this series covers using social media for hiring and firing practices.)

Three Other Useful Definitions



Here is how the Fair Debt Collections Practice Act (FDCPA) defines the first two terms, and Black's Law Dictionary handles the third:

Debt collector – This is any person who 1) uses interstate commerce or the mail in a business whose principal purpose is to collect debts; or 2) regularly collects—or tries to collect—directly or indirectly, debts owed to another.

Communication – This is conveying any information about a debt—directly or indirectly—to any person through any medium. Because the term is so broad, most courts interpret it in favor of the consumer. For example, courts have held that communication need not be a collection attempt—it may only be connected to one. Social media posts are considered communication.

Skiptracer – This is an agency that or individual who locates people—such as delinquent debtors, heirs, witnesses, shareholders—whose contact information is not immediately known. Skiptracers also may be looking for missing assets, including bank accounts.

Useful Background

Before diving deeper, it helps to know about the three relevant acts related to debt collection and skiptracing, and to clearly define social media.

Fair Debt Collection Practices Act (FDCPA)

Passed in 1977, this Act only applies to third-party debt collectors. Its intent is to prevent abusive, harassing and deceptive debt collection practices. The FDCPA has three policy goals:

1. Protect consumers from egregious debt collection practices
2. Remove the incentive to use those practices, so ethical debt collectors don't suffer a competitive disadvantage
3. Prevents invasion of privacy with the intention of shaming debtors in front of others

The Act allows consumers to sue privately or as part of a class action. When it comes to statutory damages, individuals can receive up to \$1,000. Class action members may be awarded either \$500,000 or 1 % of the net worth of the debt collector, whichever is less. Both also may be reimbursed for actual damages, court costs and attorneys' fees.

Courts generally apply a "least sophisticated" consumer test. This is based on the idea that consumers of below-average sophistication or intelligence are the most vulnerable to fraud schemes. So the question becomes, "could the debt collector's activities mislead the least sophisticated consumer?"

The FDCPA is enforced by the Federal Trade Commission. The Consumer Financial Protection Bureau (CFPB), established in 2010, is charged with clarifying and amending the Act. In November 2013, the Bureau signaled that it would be issuing new rules for the FDCPA—but it has yet to propose these.

Telephone Consumer Protection Act (TCPA)

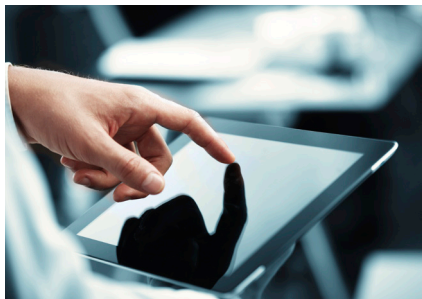
This Act, passed in 1991, prohibits telephone solicitation by using automated equipment: automatic dialing systems, artificial or prerecorded voice messages, text messages and faxes. Consumers can't be contacted in this way unless they already have given their consent. Statutory damages for violations go up to \$1,500 with no cap. That means debt collectors aren't allowed to use automated equipment, because consumers haven't agreed in advance to be reached in this way.

Driver's Privacy Protection Act (DPPA)

Put in place in 1994, this Act prohibits disclosing personal information without first getting the consent of the person to whom it applies.

There are several exceptions. The government may do this when carrying out its functions. Businesses may do this when 1) verifying the accuracy of personal information, 2) correcting information, or 3) getting information to prevent fraud by pursuing legal remedies or recovering a debt from someone. In addition, the information may be used in connection with a federal or state court proceeding, or in research.

Social Media's Staggering Statistics



Here they are for 2013:

- **Facebook** has over 1.35 billion active monthly users¹ and added over five users per second in 2013²
- **YouTube** has 1 billion monthly users³ with 4 billion views per day⁴
- **Twitter** has over 500 million registered users⁵ and adds 11 new accounts per second⁶
- **LinkedIn** has 238 million users⁷ and gets two new users every second⁸
- **Pinterest** has 70 million users⁹
- **Tumblr** has 170 million users and 164 million blogs¹⁰
- **Instagram** has over 130 million¹¹ users storing 4 billion photos
- **Google+** has over 349 million active users¹²

Social Media

According to the Federal Financial Institutions Examination Council (FFIEC), *social media* is “a form of interactive online communication in which users can generate and share content through text, images, audio and/or video.” *Social networks*, on the other hand, are online platforms where people create profiles, post content, share information and socialize with others.

Here are the most common forms:

- Micro-blogging sites—Facebook, Twitter and Google+
- Forums, blogs, customer review websites and bulletin boards—such as Yelp
- Photo and video sites—Pinterest, Instagram and YouTube
- Virtual worlds—including Second Life

Social networks collect a vast amount of personal information and data points about users:

- Full name
- Names of family and friends
- Current employer
- Home address
- Birthday
- Nicknames
- Pets
- Phone number
- Email address
- Hobbies and interests
- Places they go to and like

This is done to customize the user's experience, as well as to monetize the information through targeted ads and offers. The result for debt collectors is that gleaning information from social media has become more cost-effective than running credit checks or social security numbers.

¹ Facebook. “About,” viewed at <http://newsroom.fb.com/company-info/> on November 15, 2014.

² Seghi, Amy. “Facebook: 10 Years of Social Networking, in Numbers,” viewed at <http://www.theguardian.com/news/datablog/2014/feb/04/facebook-in-numbers-statistics> on November 15, 2014.

³ YouTube. “Statistics,” viewed at www.youtube.com/yt/press/en-GB/statistics.html on November 15, 2014.

⁴ Perez, Sarah. “YouTube Reaches 4 Billion Views per Day,” viewed at <http://techcrunch.com/2012/01/23/youtube-reaches-4-billion-views-per-day/> on November 15, 2014.

⁵ Pring, Cara. “103 Crazy Social Media Statistics to Kick off 2014,” viewed at <http://thesocialskinny.com/103-crazy-social-media-statistics-to-kick-off-2014/> on November 15, 2014.

⁶ “Twitter Is Adding 11 New Accounts per Second and Could Pass 500 million in February, Says Report,” viewed at <http://thenextweb.com/twitter/2012/01/16/twitter-is-adding-11-new-accounts-per-second-and-could-pass-500-million-in-february-say-report/> on November 15, 2014.

⁷ Pring, Cara. Op. cit.

⁸ LinkedIn. “About LinkedIn,” viewed at <http://press.linkedin.com/about> on November 15, 2014.

⁹ Pring, Cara. Op. cit.

¹⁰ Costill, Albert. “50 Things You Should Know about Tumblr” viewed at <http://www.searchenginejournal.com/50-things-know-tumblr/84595/> on November 15, 2014.

¹¹ Pring, Cara. Op. cit.

¹² Bullas, Jeff. “22 Social Media Facts and Statistics You Should Know in 2014,” viewed at <http://www.jeffbullas.com/2014/01/17/20-social-media-facts-and-statistics-you-should-know-in-2014/> on November 15, 2014.

When to Use Social Media in Debt Collection



It's okay to collect publicly published information on consumers. That means you may use it to track these items:

- Common names
- Unlisted phone numbers
- Address changes
- Employment/occupation
- Purchasing histories
- Photos
- Banking information
- Assets (collectibles, jewelry, cars, motorcycles, antiques)

But using this data raises a number of legal issues. Invasion of privacy. The use of data for purposes that weren't disclosed—or even thought of—when it was given. The question of enforcing terms of use. The risk of liability for defamation or publishing false information and complying with various rules—such as the FDCPA.

Savvy and Safe Debt Collection Practices

The primary challenge of debt collection—whether handled by a company's internal collections department or a third party—has been finding debtors so they can be asked to pay. Social media has changed the industry landscape. It gives debt collectors an inexpensive, easily accessible, worldwide tool.

However, it can lead to more deception as well as privacy concerns. This also applies to the decision of when to integrate email and text messaging into a collection strategy.

Debt collectors may use social media. However, they can't use debtors' profiles to contact them about a debt—unless they first identify themselves as debt collectors. Not identifying themselves would violate the FDCPA. It's fine to explore the Internet for public information—without disclosing this to the debtor and collectors may locate debtors through social media as long as they don't harass these people.

What to Know in General

The FDCPA prohibits a number of practices when attempting to collect a debt. Consumers can't be contacted at unusual or inconvenient times and places. Debt collectors must stop communicating with consumers after receiving a written request to do so from them. Collectors can't use unfounded threats of legal action, nor can they use abusive or profane language.

Debt collectors must identify themselves as collection agency representatives. In addition, they have to let consumers know that any information shared could be used to collect on that debt.

What to Watch in Social Media

While there is no case law on this, it's best to be conservative when using social media.

Debt collectors can't disclose the debt to a third party. That would be anyone beyond the consumer, his/her attorney, a consumer reporting agency (if permitted by state law), the creditor and its attorney, and the debt collector's attorney.

This is open to a broad interpretation. Most cases to date have centered on leaving a voicemail that could be heard by others besides the debtor. To be safe, never post information about the debt on social media sites—which can be seen by third parties—to shame or harass someone into paying. This applies to a Facebook wall or public tweet. (It probably doesn't apply to private messages seen only by the debtor).

The Case of the Unfriendly Friend



A debt collector sent a direct message through Facebook to the friend of a debtor who owed a \$362 car loan payment. The collector called himself “Jeff Happenstance” and asked the friend to have the debtor call his phone number. The friend responded and asked the debt collector to contact the person directly.

One month later, the collector sent a Facebook message to the debtor, identifying himself as “Loxley Duffus”. He stated there was an “urgent” matter, and she should call “Supervisor Duffus at MarkOne” by 6:00 p.m. that day, without ever identifying himself as a debt collector.

The debtor filed a civil suit based on this series of messages, and the court upheld her claim.

While debt collectors can see publicly available information, they can’t use social media to initiate a dialog under false pretenses. For example, they aren’t allowed to send a “friend” request on Facebook to the debtor or that person’s friends—unless they first identify themselves as a debt collector. They also can’t use an imposter account or misleading alias to send a message to a debtor or his/her friends.

Debt collectors may, however, send a private note to the debtor using Facebook. There is some risk with this. If the message was sent at 4:00 p.m. and the person read it at 12:00 a.m., the debtor could claim that this was an inconvenient time—and a violation of the FDCPA.

In addition, debt collectors must comply with the terms of service for each social media site. For example, Facebook has an extensive list of reportable offenses, which includes bullying, not soliciting login information, or gaining access to the account of another Facebook user. The Department of Justice considers these criminal activities.

Questions to Consider When Skiptracing



The answers to these questions will help you make better choices during this process:

1. What is my primary objective?
2. How do I expect the news will be received?
3. How am I going to use the information I learn about the person?
4. Has the person consented to be contacted by me or other third parties?
5. Has the person agreed to have me access information about her/him?
6. Do I need their consent?

A Sound Approach to Skiptracing

Most of the same parameters apply to skiptracing—which often is a subset of debt collection. When a business employs a skiptracing professional, it’s important to verify that the person or company complies with all of the appropriate acts. This will protect the business from being sued by the person being located.

What to Watch in Social Media

There are a number of good—and approved—uses for social media. Reviewing publicly available information. Verifying data. Maintaining up-to-date information on a person. Locating a debtor. And, researching where a person lives and works.

However, the list of “don’t”s is longer. Skiptracers can’t send an email to debtors about what they owe. The same is true for instant messaging or direct messaging. They can’t send any communications that may be seen by a third party. That also applies to publishing the names of debtors. Skiptracers aren’t allowed to converse over social media or send a “friend”

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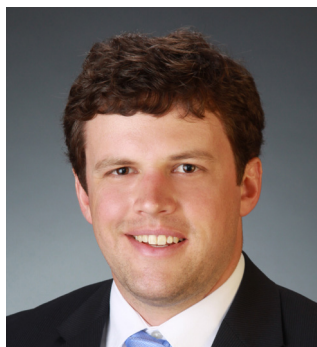
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request, and they can't use a fake name for themselves or their companies to get information from the debtor.

A skiptracer's best tool is common sense. Don't wait for court decisions on every issue. This will take a long time, during which the business will likely suffer. But don't act carelessly without assessing the potential risks. Use social media to gather information—but not for contact, and if it appears the person or others he or she knows sees that you're attempting to make contact, then stop immediately.

Don't Do It Alone

Your job is to collect debts or locate people. Work with someone whose focus is to stay on top of the latest legal developments in your field. There are no clear laws today on the use of social media to snoop. Vagaries abound. You could risk violating one or more federal or state statutes and open yourself up to discrimination and other claims.

When in doubt, ask in-house counsel or consult with an attorney who specializes in this field. An hour of good advice is always better—and cheaper—than one or more years of litigation.

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