

CONSULTATION PAPER

USE AND IMPACT OF SOCIAL MEDIA IN LITIGATION

A. INTRODUCTION

1.1 With the increasingly widespread use and reach of social media in Singapore and around the world, it is envisaged that social media has the potential to play a significant role in the civil litigation process. This consultation paper seeks to explore ways of capitalising on social media to improve the civil litigation process.

1.2 This paper also seeks suggestions as to how social media can be effectively used in civil litigation. It is envisaged that such use will permit the practice of law in Singapore to leverage on the latest developments in information technology as well as keep up to date with best practices overseas where appropriate. Tapping on social media in the civil litigation process will also allow our legal procedural system to develop in a manner that best serves the evolving needs of our citizens and residents.

1.3 The paper first sets out the ways that social media may have an impact on the litigation process. Next, it discusses the ways that social media may be effectively used in civil litigation in Singapore. Finally, the paper details the possible implementation of some best practices and guidelines.

1.4 The paper discusses five main ways in which social media can be used in civil litigation and their modes of implementation:

- 1.4.1 To issue a Practice Direction for substituted service of documents in Singapore by social media.
- 1.4.2 To consider the use of social media for service of originating processes out of jurisdiction.
- 1.4.3 To embark on a pilot run for pre-trial conferences to be conducted using online discussion forums.
- 1.4.4 To use the new Integrated Electronic Litigation System (“iELS”) to facilitate online exchange of documents.

Use and Impact of Social Media in Litigation

- 1.4.5 To issue a Practice Direction addressing the safeguards to be taken for discovery of documents; and for preservation and inspection of evidence on online media in the course of obtaining and executing Anton Piller orders.
- 1.5 Please direct your comments and feedback marked “Re: Use and Impact of Social Media in Civil Litigation” via:
- 1.5.1 mail, to The Supreme Court of Singapore, 1 Supreme Court Lane, Singapore 178879 (Attention: Mrs Quek Swee Peng);
- 1.5.2 fax, at 6337 9450; or
- 1.5.3 electronic mail, at quek_swee_peng@supcourt.gov.sg
- 1.6 The closing date for this consultation is **15 September 2010**.

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B. IMPACT OF SOCIAL MEDIA ON CIVIL LITIGATION

2.1 The advent of new media¹ has opened up a new world of communication technologies that have dramatically increased the volume, speed, opportunities and methods of communication across the world. In particular, the use of social media² (for example, blogs, websites and social networking sites such as Facebook³, MySpace and Twitter) has become wildly popular across the globe in recent years⁴ and is a phenomenon that has become virtually impossible to ignore⁵.

2.2 Given that the popularity of social media is on the rise in Singapore⁶, it is timely to consider the possible ways in which social media can make its impact on the litigation process. However, we should also be mindful of the need to prevent misuse or abuse of social media as a new platform in civil litigation. To this end, one view is that social media should be used to complement or supplement traditional steps in the litigation process but should not completely replace them.

¹ According to Wikipedia, “new media is a term meant to encompass the emergence of digital, computerised, or networked information and communication technologies in the later part of the 20th century”: see http://en.wikipedia.org/wiki/New_media

² According to Wikipedia, “social media are media for social interaction, using highly accessible and scalable publishing techniques. Social media use web-based technologies to transform and broadcast media monologues into social media dialogues. They support the democratization of knowledge and information and transform people from content consumers to content producers”: see http://en.wikipedia.org/wiki/Social_media

³ The number of people using Facebook reached 500 million on 21 July 2010: see ‘The Straits Times’, 22 July 2010.

⁴ Nielsen’s Asia Pacific Social Media Report, released in June 2010, “found that three of the seven biggest global online brands are social media sites – Facebook, Wikipedia and YouTube. Close to three quarters of the world’s Internet population (74%) have now visited a social networking/blogging site, and Internet users are spending an average of almost six hours per month on social media sites”: see <http://blog.nielsen.com/nielsenwire/global/social-media-dominates-asia-pacific-internet-usage/>

⁵ The use of social media has become so pervasive that Pope Benedict XVI encouraged the clergy to use social media and digital communications to reach out to its congregations: see <http://www.telegraph.co.uk/technology/news/7070480/Get-blogging-Pope-tells-priests.html>

⁶ A Channel Newsasia article dated 3 February 2010 reported that, according to a recent study by the Nielsen Company, “social media has become a big part of life in Singapore, especially among the younger set”. 52% of the Singapore population participates in at least one social networking website, with Facebook being the most popular, followed by YouTube and Friendster. Of those aged between 15-19, 95% use some form of social networking media while 89% of those in their twenties do so: see <http://sg.news.yahoo.com/cna/20100203/tap-867-social-media-part-life-spore-esp-231650b.html>

Further, care should be taken against the unintended effect of treating significant steps in legal proceedings in a cavalier manner.

2.4 It is envisaged that social media may make an impact on the litigation process (both civil and criminal) in at least six ways. First, it will provide more alternatives for substituted service of documents, apart from the traditional methods of posting and advertisement. As will be elaborated below, substituted service by Facebook and Twitter has already been permitted in some overseas jurisdictions and it is likely that such developments will continue with the increasing popularity of social media. Second, plaintiffs will be able to rely on social media to effect service of originating processes on local defendants as well as foreign defendants.

2.5 Third, social media will provide more avenues of online electronic evidence for civil and criminal proceedings. It will lead to the uncovering of important evidence that may not otherwise be available offline. For example, the Indiana Supreme Court in *Clark v State* 915 N.E.2d 126 (2009) allowed statements made by the defendant on his MySpace page to be admitted as character evidence, which eventually contributed to his conviction for murder. Such resort to online evidence, in turn, throws up the need for counsel and litigants to be keenly aware of the need to safeguard and preserve online evidence, and to consider issues of reliability and credibility of online evidence.

2.6 Fourth, social media may potentially help to provide alibis for suspects in criminal investigations. In New York City, one Rodney Bradford was charged with robbery but his Facebook status update provided him with a successful alibi, which prompted prosecutors to drop the charge against him⁷. Fifth, criminal acts may be committed on social media⁸. For example, in Tennessee, one Shannon Jackson was arrested for allegedly violating a protection order after a printout from the petitioner's Facebook page showed that Ms Jackson had 'poked' her

⁷ See <http://edition.cnn.com/2009/CRIME/11/12/facebook.alibi/index.html>.

⁸ Cybercrime has increased as countries become more connected to the Internet. In Hong Kong, for example, questions are now being raised as to whether its cybercrime laws are falling behind international trends and whether this will affect "an economy intrinsically linked to electronic communication": see 'The South China Morning Post', 29 March 2010.

on Facebook⁹. In Singapore, three teenagers were arrested by the police in February 2010 for posting racist remarks on Facebook although they were not charged. Back in 2005, three bloggers were charged and convicted under the Sedition Act for posting racist comments on their blogs.

2.7 Finally, it is foreseeable that social media will impact on the conduct of participants in the litigation process, in particular, Judges and Judicial Officers, as well as litigants. Judges and Judicial Officers need to be conscious of potential conflicts of interests or perceived conflicts by members of the public and the Bar when using social media. This issue was considered earlier in Florida when the state's Judicial Ethics Advisory Committee decided in November 2009 that Judges should not add lawyers who might appear before them as "friends" or permit lawyers to add them as "friends" on Facebook. The rationale behind banning such online friendships was to avoid any appearance of impropriety or perception that judges could be influenced by their friends on Facebook in their decision-making¹⁰.

2.8 Litigants may also be at risk of breaching the *sub judice* rule in their use of social media. These risks were played out in the high profile trial of Malaysian opposition leader Anwar Ibrahim, where it was reported that he had been posting on the trial from the dock via Twitter and that many blogs were providing updates on the trial and actively discussing the case. It was also reported that the Malaysian Minister for Information, Communication and Culture had warned that the authorities were monitoring blogs for elements of contempt or *sub judice*¹¹.

2.9 In the United States, some judges have also voiced concerns about the distracting or improper use by litigants, witnesses and counsel of digital communication equipment, such as Blackberries, iPhones and

⁹ See <http://abcnews.go.com/Technology/AheadoftheCurve/tennessee-woman-arrested-facebook-poke/story?id=8807685>.

¹⁰ See:

<http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html>.

¹¹ See 'The Sunday Times', 7 February 2010, p 3.

laptops, to establish instant communication with the world at large during court proceedings¹². These devices can be used to take photographs inside the courtroom as well. At present, different judges tolerate the use of such devices to varying degrees and it is difficult to impose a blanket ban on use of such devices; the presiding judge in each case is left to control the use of such devices.

2.10 The Singapore courts face the same conundrum as their Malaysian and American counterparts in this digital age. The policy decision taken in the Supreme Court thus far is that technology cannot be stopped in its tracks and the legitimate use of technology in the courtroom should not be discouraged in a courthouse that prides itself for being technologically savvy. Hence, the Supreme Court does not impose a blanket ban on the use of digital communication devices in the courtroom but leaves it to individual judges to decide how best to control such use.

2.11 In this regard, paragraph 21A of the Supreme Court Practice Directions provides useful guidance as to the use of electronic devices during court proceedings. For instance, paragraph 21A(1) makes it clear that video and/or image recording is strictly prohibited in all hearings. Similarly, paragraph 21A(2) provides that all communications with external parties and audio recording during a hearing are strictly prohibited without prior approval of the Judge or Registrar hearing the matter. Paragraph 21A(3) also states that court users are permitted to use notebooks during hearings to take notes of evidence and for other purposes relating to the proceedings, provided that such use does not disrupt or trivialise the proceedings.

¹² See <http://www.orlandosentinel.com/news/local/os-courtrooms-blogging-rules-20100125,0,1844360.story>.

C. USE OF SOCIAL MEDIA IN CIVIL LITIGATION

3.1 Having discussed the ways that social media may impact on the litigation process, this section examines the ways that it may be effectively used in the *civil* litigation process. With the extensive reach of social media, it is timely to ascertain how Singapore can engage evolving digital communication technologies to make our civil litigation process more effective and efficient. In this regard, it is envisaged that social media can be effectively used in the five main ways stated below.

I. Service of documents via social media within Singapore

3.2 Social media may be used for service of court documents. Under the Rules of Court (Cap 322), three modes of service are contemplated: personal, substituted and ordinary service. This paper recommends substituted service as the most appropriate manner of engaging social media but does not preclude the use of social media for personal service or ordinary service in certain situations. Each mode of service is dealt with in turn.

Personal service

3.3 Personal service under the Rules of Court entails service of documents by a physical act of delivery to the defendant personally¹³. Apart from physical delivery, the defendant must be informed that the document which is handed over to him is an originating process¹⁴. From the foregoing, it is possible to extract the following legal requirements for effective personal service:

- 3.3.1 That the person effecting service and the defendant are both present at the same “location”; and
- 3.3.2 The defendant is informed of the nature of the document being given to him.

¹³ See Order 62 rules 1-4.

¹⁴ See *Banque Russe v Clark* [1894] WN 203.

3.4 It may be possible to effect personal service via social media if the appropriate social media tool is employed. This requires a deeper understanding of the different types of social media tools which are available. For the purposes of this discussion, the primary features which fall for consideration are:

3.4.1 Non-instantaneous means of communications which may be of a private or public nature. These function as the Web 2.0 equivalent of the electronic mail and discussion forums which we are probably more familiar with. Hence, the relevant features, using Facebook as an example, would be to send a message to a friend (similar to sending an e-mail); or to write something on the “wall” of a friend on Facebook (similar to a public discussion forum).

3.4.2 Instantaneous means of communications which are typically private in nature. These function as the Web 2.0 equivalent of private chat rooms. Hence, the use of instant messaging software such as Google Talk, MSN Messenger, ICQ and Yahoo Messenger, whereby one may chat with a friend, is relevant. These features are also available in social media websites (for eg Facebook chat).

3.5 It is posited that personal service of documents may be possible by way of the instantaneous communications means described in 3.4.2. In an online chat, the interlocutors have to be present online at the same time, which would arguably satisfy the requirement that the person effecting service and the defendant are both present at the same “location”. Many of the instant messaging software also allow a party to send an electronic document over to the other party and for the sending party to explain the nature of the document during the course of the chat with the receiving party. The receiving party has the option of accepting or rejecting it. Accordingly, it appears possible for personal service to be properly effected in a situation where (a) the defendant and the party effecting service are *online at the same time*; (b) the party effecting service identifies the nature of the electronic document *before* he sends it across to the Defendant and (c) the Defendant *accepts* the electronic document thereafter. Whether this interpretation satisfies the legal

requirements for personal service remains, however, an open question until the issue is referred to the courts for their consideration.

3.6 Additionally, parties can agree on the terms of valid personal service¹⁵. The agreement between parties has to be broad enough to encompass the use of social media (whether through instantaneous means or even non-instantaneous means), in order for such service to qualify as personal service under Order 62 rule 3(2).

3.7 However, from a policy perspective, the following considerations have to be borne in mind if we are to consider using social media for personal service in Singapore:

- 3.7.1 Potential prejudice to defendants who do not receive actual notice of the proceedings;
- 3.7.2 Risk of trivialising a fundamental step of proceedings, i.e. the commencement of proceedings;
- 3.7.3 Potentially opening the floodgates to a slew of setting aside applications based on irregular service; and
- 3.7.4 The difficulty of justifying personal service by social media where the defendant is physically located within Singapore and capable of being served physically, since there is no good reason why the party effecting service should be able to commence proceedings in such a casual manner when the defendant can be personally served in the usual manner.

Ordinary service

3.8 It may be possible to use social media for ordinary service of documents that are not required to be served personally under the Rules of Court, as Order 62 rule 6(1)(d) prescribes that documents may be served “in such other manner as may be agreed” between the parties and rule 6(1)(e) states that documents may be served “in such other manner as the Court may direct”.

¹⁵ See *Pacific Assets Management v Chen Lip Keong* [2006] 1 SLR(R) 658.

3.9 The premise for ordinary service under Order 62 rule 6(1)(d) is agreement, which means that the terms of agreement are paramount. It is not uncommon, within the context of a contractual relationship for the terms and conditions to deal with the issues of giving notice and service of process. Thus, ordinary service of documents via social media would be permitted where an appropriately drafted clause in the contract is broad enough to include social media as an *agreed means* of ordinary service¹⁶.

3.10 Similarly, under Order 62 rule 6(1)(e), where the court is convinced that social media is a suitable means for effecting ordinary service, it may so order. In making such an order, it would be prudent that the manner of service is properly identified. For example, an order should state that ordinary service will be properly effected by emailing a copy of the document to a particular email address, or by posting on the wall of a specified Facebook account which has been established to be accessible by the party to be served.

3.11 However, short of agreement between the parties and sanction by the court, it seems clear that the ambit of ordinary service does not otherwise extend to the use of social media. Practically speaking, short of a suitably drafted clause in an agreement signed between parties before the dispute arose, it is highly implausible that the party to be served will agree to any form of service *after the dispute has arisen* since such parties are usually uncontactable or uncooperative; otherwise, ordinary service would usually be more conveniently carried out via one of the other specific methods under Order 62 rule 6(1).

Substituted service

3.12 Substituted service of court documents by social media has already been allowed in other jurisdictions. In the unprecedented case of

¹⁶ It is arguable that the courts should give effect to the principle of party autonomy, unless policy considerations dictate otherwise. The policy considerations which should be considered are, *inter alia*, the equality of bargaining power in standard term contracts.

*MKM Capital v Corbo & Poyser*¹⁷, the Supreme Court of the Australian Capital Territory allowed the plaintiff to effect substituted service of a default judgment on the defendants using Facebook. In *Knott v Sutherland*¹⁸, an Alberta court allowed a plaintiff to give notice of its action via Facebook. The New Zealand High Court, in an unreported decision, also permitted substituted service on a defendant using Facebook¹⁹, while in the United Kingdom, the High Court allowed substituted service of an injunction via Twitter²⁰.

3.13 Given that other jurisdictions have used social media effectively for substituted service of documents, there is no reason why we should not consider doing so since it is permissible under our existing laws. Moreover, of the three methods of service, substituted service is the most appropriate way of tapping on social media for service of documents in Singapore. It may only be possible to use social media for personal and ordinary service in very limited situations.

3.14 The object of substituted service is to bring the documents in question to the notice of the defendant where reasonable attempts at personal service have been made and the court is satisfied that personal service would be impracticable. Hence, where it is shown that the defendant is an active user of social media, service via social media is clearly one way of bringing the documents to his notice. It may even be more effective than the traditional modes of substituted service such as posting at the Supreme Court's notice board or advertisement in the daily press.

3.15 At the same time, the aim of substituted service is not only to notify the defendant of court proceedings but also to inform the applicant of his options when faced with an evasive or unresponsive defendant. Substituted service by social media gives the applicant more options and provides him with a more cost-efficient way of substituted

¹⁷ The decision appears to have been made in December 2008 but is unreported.

¹⁸ February 5, 2009, Edmonton 080302267 (Alta. QBM).

¹⁹ http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10561970.

²⁰ <http://www.guardian.co.uk/technology/2009/oct/01/twitter-injunction>.

service, in contrast with expensive options like advertisement in the daily press.

3.16 The nature of substituted service requires the court to be satisfied that any proposed manner of service may bring the documents to the notice of the defendant. Thus, the court's supervisory role ensures that substituted service by social media is only permitted in deserving situations; not as a matter of course; and that social media is not employed willy-nilly to prejudice a defendant in court proceedings.

3.17 There have been attendant concerns raised by the Bar that there may be security or reliability issues on certain sites and in relation to a person's real identity; the person being served could be away from the computer and simply set his system to receive all incoming files; he may not actually see the messages posted on his Facebook wall; or he may not log into Facebook regularly. These are valid concerns but may be addressed by the court ordering substituting service. Further, it is important to note that substituted service via social media would not replace the traditional methods of substituted service but would only be an additional option for use in suitable circumstances.

II. Service of documents via social media out of Singapore

3.18 A second way to use social media is for the service of originating processes on foreign defendants, particularly where it is the only known way of effectively establishing contact with the defendant. If a plaintiff is able to obtain leave of court under Order 11 to serve the defendant out of jurisdiction, he may also be able to obtain leave of court under the existing Order 62 rule 5 to effect substituted service via social media in appropriate cases, provided that it is not contrary to the law of the country in which service is to be effected. The policy reasons as mentioned at 3.15-3.17 would similarly be applicable here.

3.19 While the plaintiff may be able to obtain an order for substituted service of the originating process out of Singapore by social media, there may, however, be delays that would defeat the entire proceedings if failed attempts at personal service have to be shown before a plaintiff

may apply for substituted service – once the defendant has an inkling of the impending proceedings, he may remove all presence on social media to evade substituted service²¹. As the Honourable the Chief Justice observed in his Opening of the Legal Year 2010 speech, parties should not be saddled with wasted time and costs in going through what they know will be futile attempts at service. Accordingly, another issue for consideration is whether a rule permitting personal service out of jurisdiction via social media may be feasible.

3.20 Such a rule would be a speedy and effective way of effecting service on a foreign defendant, particularly where the plaintiff knows for certain that the other party cannot be physically served or served in the traditional manner prescribed under the laws of that country but is active on social media. However, the twin issues of the court's potential long arm jurisdiction as well as potential breaches of foreign law and international comity may arise. Research of the position in other Commonwealth jurisdictions has shown that service by social media is not a generally permitted form of personal service overseas although it has been allowed for substituted service in some countries. Thus, any attempt to effect personal service by social media on a foreign party may be against the laws or public policy of the foreign country; perceived as an exercise of exorbitant jurisdiction by the issuing court; and possibly impinge on treaty requirements.

3.21 Further, as Order 11 rule 3(2) provides that no order of court can be taken to authorise the doing of anything contrary to the law of the country where service is to be effected, it follows that any personal service of an originating process out of Singapore by social media will not be allowed by the Singapore courts to stand under existing laws²². Even if the defendant does not apply to set aside service of the originating process or to set aside any judgment obtained by the applicant in Singapore, it is likely that any attempt by the applicant to enforce in the foreign country a judgment obtained in contravention of that country's law will be extremely problematic.

²¹ In *MKM Capital v Corbo & Poyser* the defendants' Facebook profiles had disappeared from public view by the time the plaintiff's lawyer sought to effect substituted service.

²² See for example, *United Overseas Bank Ltd v Tjong Tjui Njuk* [1987] SLR(R) 275.

3.22 Hence, where the plaintiff is able to obtain leave of court under Order 11 to serve the defendant out of jurisdiction, and social media is the only known way to establish contact with the defendant, the central issue for consideration is whether substituted service via social media (not precluded under our existing laws) or personal service via social media (to be made permissible by enactment of a rule) would be more appropriate. This will ultimately be a policy decision to be made after consultation with the respective stakeholders, and upon balancing the need to provide legal protection to our citizens and residents with the need to act according to international norms in the interests of the comity of nations.

III. Conduct of pre-trial conferences (PTCs) on online discussion forums

3.23 Social media, particularly online discussion forums, may also be used successfully to conduct PTCs. It may be feasible to conduct PTCs via online discussion forums where counsel could log onto a forum within a certain time window and contribute to a discussion thread as to the management of their case. The court would either log on at the same time as counsel or at a later time after counsel had given their full input; consider counsel's comments; then give final directions before ending the discussion thread.

3.24 While this particular use of online discussion forums would allow lawyers to give real-time input on the status of their case, there were potential pitfalls to be addressed, namely, that:

3.24.1 Unless clear timelines were given for lawyers to provide their final input, there would be uncertainty as to the finality of the comments that could be given. For example, the court could issue directions but one side might still ask to respond to the court's directions on the discussion forum or ask to give more input on the basis that circumstances had changed since their last post.

3.24.2 Unless the court logged on to the discussion forum at the same time as counsel, the court might not be able to obtain specific

information that it required from the lawyers in order to properly issue case management directions.

3.24.3 If the court did not log on to the discussion forum at the same time as counsel, there would be less incentive for counsel to keep to the appointed schedule on their own accord.

3.24.4 It would be important to ensure that there were no doubts as to the identity of the persons posting their comments. For example, it would have to be ensured that the lawyer posting a comment was really the lawyer in question and not someone assuming his identity.

3.25 Initial feedback from the Bar was that:

3.25.1 Conduct of PTCs by the Justice Online System might be preferable to an online forum if the former was more expedient, although it might be cheaper to use an online forum.

3.25.2 There might be a lag in terms of the time that messages were posted as the messages would only be visible when the user clicked on the "Post" button. A real-time online conference chat function might be preferable.

3.25.3 The court should be present on the online forum at the same time as counsel to moderate the discussion.

3.26 To resolve these potential issues, a pilot run may be conducted for PTCs for a select group of cases,²³ to ascertain if the potential pitfalls highlighted by the registrars will indeed materialise in practice, and if so, whether these pitfalls may be minimised to reap the benefits of convenience and savings of time.

IV. Exchange of documents on websites

3.27 Currently, the exchange of discoverable documents between parties does not necessarily have to be done by physical exchange of papers but can be done by storing one party's documents on CD ROM, DVD ROM and thumb drives, and exchanging those media physically. With the development of newer technologies, it is arguable that parties

²³ The registry had previously done pilot runs of PTCs by email for the admiralty and assessment of damages PTC lists.

should be able to tap on newer media such as ftp sites and online file sharing sites (for example, yousendit) for electronic exchange of discoverable documents. This facilitates the exchange of documents between parties since they can exchange documents with just a click of the mouse through these additional platforms.

3.28 There are two concerns, however, that need to be addressed. First, the security of the process has to be ensured as documents exchanged may be confidential and only made accessible to the receiving party subject to the Riddick principle. If a third party site is used for the exchange of documents online, the terms of use of the site may allow the site owner to access any documents uploaded onto the site. Hence, issues of confidentiality may arise. There is also the attendant risk that documents exchanged on websites may be hacked into by third parties who may be able to access any sensitive information contained therein.

3.29 Second, the integrity of the exchanged documents has to be ensured. If the document files have to be converted to other formats before they are uploaded and exchanged on the websites, there is a risk that the files may get intercepted or corrupted or inadvertently changed so that the receiving party receives faulty documents. If the parties do not realise that the integrity of the documents has been breached, there may be repercussions during the later stages of proceedings when it transpires that parties have been referring to different versions of what they thought was the same document.

3.30 Currently, there is ongoing development work in *iELS* that will provide lawyers with a means to exchange documents (for example, affidavits of evidence-in-chief). It is possible to expand the functions of *iELS* to promote the goals of Practice Direction No. 3 of 2009 by making it easy for lawyers to exchange discoverable documents: inspection and the provision of copies of discoverable documents can be online and in the native format of the electronic documents. The Bar has commented that the use of a single, trustworthy platform such as the *iELS* would be desirable. If this is not possible, the Bar notes that there are other options available on commercial terms provided by online

service providers, but the choice of platform should best be left to each law firm to decide.

V. Safeguards for Discovery of Documents and Preservation of Evidence

3.31 The process for discovery of documents and preservation of evidence has developed along with the evolution of digital communication. It is now established law in many jurisdictions, including Singapore, that electronic discovery of documents in a computer database and preservation of such electronic evidence are acceptable steps of the civil litigation process²⁴. The Canadian courts have gone on to find that apart from documents and evidence contained in a computer database, posted content contained on social media such as Facebook are also “documents” capable of being discovered if the postings are relevant and fall under the party’s control or power. The position remains the same regardless of whether the content on the website is maintained for public, private or limited viewing²⁵.

3.32 While applications for discovery of documents and preservation of evidence on social networking websites have not arisen for the court’s consideration in Singapore, these issues should be considered since social media may be used in this context as well.

Discovery of Documents on Social Media against Parties to the Proceedings

3.33 Under Order 24 rule 1 of the Rules of Court, the court may order any party to a cause or matter to make and serve on any other party a list of documents “which are or have been in his possession, custody or power” if the documents relate to the matters in question. The meaning of “documents” is not limited to paper but includes electronic

²⁴ See for example, *Alliance Management v Lane Pendleton* [2007] 4 SLR(R) 343; *Alliance Management v Lane Pendleton* [2008] 4 SLR(R) 1; and *K Solutions v National University of Singapore* [2009] 4 SLR(R) 254.

²⁵ See for example, *Leduc v Roman* [2009] CanLII 6838 (ON S.C.)

information on a computer database²⁶. Given the expansive definition of the term “documents”, posted content on a website that is capable of being retrieved and converted into readable form may similarly constitute “documents” for the purposes of Order 24 rule 1.

3.34 It may be contended that Order 24 is usually concerned with the physical possession or custody of documents and that online content cannot be said to be in a party’s physical possession or custody and capable of production. However, the court in *Leduc v Roman*²⁷ addressed this point squarely when it held that a party’s online postings can fall under his control or power since the party can post or remove content.

3.35 Given the wide ambit of our Order 24, it is certainly arguable that a party to an action may be allowed discovery of content on social media if it is proved to the court’s satisfaction that a party’s online postings are under his control or power and the content is relevant to the issues in question. In practice, parties can refer to Practice Direction No. 3 of 2009, which addresses the practical issues of making electronic discovery applications.

Discovery of Documents on Social Media against Third Parties

3.36 It has been discussed at 3.33-3.35 that discovery of documents on social media may be obtained against a party to the action. It is pertinent to consider the related issue of whether a party may seek discovery from the owner of the social media site who is a non-party to the action but with access to the documents in question. For example, where there is relevant information on the defendant’s Facebook account, can the plaintiff bypass the defendant and seek discovery of those documents directly from Facebook instead?

²⁶ See *Derby & Co Ltd v Weldon (No 9)* [1991] 1 WLR 652 and *Megastar Entertainment Pte Ltd v Odex Pte Ltd* [2005] 3 SLR 91.

²⁷ [2009] CanLII 6838 (ON S.C.)

3.37 In this regard, it seems that the discovery of documents by a non-party under Order 24 rule 6(2) is possible where the non-party is within the jurisdiction of the Singapore courts; the documents are in the non-party's power, control or possession; and meet the criteria of relevance, necessity and sufficient identification. This would probably be a useful option for the plaintiff where the defendant is unable to produce the content sought for but there is reason to believe that the content is still existing and retrievable, for example, on Facebook. This power extends to compelling a non-party *within* jurisdiction to produce online material situated *outside* jurisdiction.

3.38 However, while the court has wide powers to order a non-party to produce the documents in the interests of justice, the court will not have jurisdiction to order discovery by a non-party located *outside* Singapore. The plaintiff's recourse in that situation is to proceed against the defendant.

Preservation and Inspection of Evidence on Social Media

3.39 The issue of preserving and inspecting evidence contained on social media is fairly novel and far reaching but important, as the party seeking the evidence has to ensure that the evidence is not tampered with or destroyed. It cannot be gainsaid that if documents on social media are discoverable, the obligation of litigants to preserve documents on social media will follow once litigation is reasonably contemplated²⁸.

3.40 It is thus important to consider if the Rules of Court allow the court to order either the party to the action or the non-party site owner to preserve evidence on social media for inspection. While a party has the option of hiring computer forensic experts to verify if another party has tampered with the evidence, there may be prohibitive costs consequences in taking this approach. Hence, the availability of court sanction for non-compliance with the court's order for preservation of evidence may be an important weapon in a party's litigation arsenal.

²⁸ See for example, *K Solutions Pte Ltd v National University of Singapore* [2009] 4 SLR(R) 254.

3.41 Using the Facebook example at 3.36, can the plaintiff apply for a court order compelling the defendant to preserve his Facebook page in his possession for inspection? Under Order 29 rule 2, the court has the power to make an order for the preservation of any property which is the subject matter of the cause or matter, or for inspection of property in the possession of a party to the cause or matter. As property may include property in the form of a document²⁹, and the term “document” has a wide meaning as explained above, a case may be made out for the court to grant such an order against the defendant. It is less likely that the plaintiff can succeed in getting the court to compel Facebook to preserve the defendant’s Facebook page for inspection since Facebook is not a party to the cause or matter³⁰.

3.42 As Anton Piller orders complement the court’s jurisdiction and power under Order 29 rule 2, the plaintiff may apply for an *ex parte* order to search and seize the defendant’s computer to ascertain if the evidence has been tampered with, if he is a party over whom the court has jurisdiction. Documents in the possession of the defendant would include all electronic documents on a computer located in the premises specified in the Anton Piller order.

3.43 In this regard, it is arguable that the ambit of the Anton Piller order extends to social media, or following from the earlier example, the defendant’s Facebook account. If the Facebook documents are accessible from a computer within the premises, it is the copy of the documents *downloaded from Facebook and residing on the computer in the premises* that the Anton Piller order attaches to. When a Facebook page is accessed, (at least) one copy will reside in the internet browser cache. This copy would be within the possession of the defendant and hence subject to the Anton Piller order. Furthermore, by accessing Facebook on the computer, a copy of the Facebook page will also be in

²⁹ See *Re Saxton (dec’d)* [1962] 1 WLR 859.

³⁰ See *Douihech v Findlay* [1990] 1 WLR 269, although it may be possible to argue that Facebook should be joined as a defendant to the action if it has facilitated the wrongdoing by which the party seeking inspection of property has suffered: see *Singapore Civil Procedure 2007*, at 29/8/7.

the computer's Random Access Memory (or RAM). This is in addition to the copy in the cache which resides on the hard disk.

3.44 Accordingly if copies of the defendant's Facebook page already exist in the computer's RAM or the cache at the time of the search, a strong case can be made out that these fall within the scope of the Anton Piller order. Otherwise, the challenge in the execution of the Anton Piller order is whether the defendant can be compelled by the party executing the order to access his Facebook page in order to bring the defendant's Facebook page into his possession within the premises specified in the Anton Piller Order.

D. BEST PRACTICES AND GUIDELINES

4.1 With the foregoing discussion in mind, this section of the paper sets out some best practices and guidelines in the use of social media in civil litigation. Comments are invited, in particular, for the following suggested best practices and guidelines.

4.2 First, guidelines relating to service of documents via social media may be issued by way of a Practice Direction as follows:

4.2.1 The use of social media for substituted service of documents in Singapore should only be allowed as an option of last resort, where personal service and more traditional/reliable forms of substituted service (such as posting on the defendant's front door) are impracticable.

4.2.2 The use of social media for substituted service of documents in Singapore should usually be in addition to other modes of substituted service, such as posting on the defendant's front door.

4.2.3 The use of social media for substituted service of documents in Singapore should be allowed subject to the applicant proving that the party's account was actively used at the time of service and the person to be served was actually operating that account. For example in the UK, service of an injunction was allowed via Twitter for the simple reason that the defendant was only locatable via Twitter since his offending acts took place via Twitter.

4.2.4 There should be some restrictions imposed on the types of cases for which service via social media is possible. For example, service on social media should not be permitted in matrimonial or land dispute cases since there may be highly sensitive information involved that could affect third parties.

4.2.5 Where it is intended that substituted service be effected via Facebook or other websites with distinct public and private notification functions, the plaintiff should first proceed to serve via the private notification function.

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4.3 Second, as to the proposal to allow the service of originating processes out of jurisdiction by social media where it is the only known way of establishing contact with the defendant, the following issues should be considered if it is decided that either personal service by rule or substituted service would be feasible in such situations:

4.3.1 If personal service by social media is allowed, legislative amendments would be necessary to create this *sui generis* means of personal service by rule. This *sui generis* rule has to result in significant savings of time and costs otherwise incurred in substituted service proceedings.

4.3.2 Alternatively, if substituted service by social media is allowed, an amendment to Order 62 rule 5 to expressly include social media as a mode of substituted service should be considered. While it is arguable that the existing Order 62 rule 5 does not preclude such forms of substituted service, it would be beneficial to clarify the prevailing policy position on the use of social media in the court process. In an application for an order to effect substituted service via social media, the applicant has to show that the other party is known to be active on such media and provide relevant evidence of the same.

4.3.3 Where service (whether personal or substituted) is effected by social media and the defendant subsequently applies to set aside service of the documents, the plaintiff has to show proof of successful transmission of the documents.

4.3.4 Where transmission is concerned, the timing of service of the documents has to be stipulated in the Rules of Court. One way of addressing this is to deem the documents served either (i) when the electronic communication first enters the defendant's information system; or (ii) where the electronic communication becomes capable of being retrieved by the defendant.

4.4 Third, these safeguards should be considered if pre-trial conferences (PTCs) are conducted using online discussion forums:

4.4.1 To ensure that there are no doubts as to the identity of the persons posting their comments on the discussion forum, counsel is to

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give a solicitor's undertaking at the commencement of each forum discussion that he or she is really the person he or she purports to be.

- 4.4.2 The use of such discussion forums should be restricted to lawyers who are registered users on the website. For instance, it was suggested by a member of the Bar that users of the discussion platform could be issued with user-ids upon pre-approval of a law firm's application to be a registered user.
- 4.4.3 The discussion forum tool will not be applicable to cases with litigants-in-person.
- 4.4.4 The court will issue clear timings for counsel to log onto the discussion forum to provide their updates of the case, for example between 3pm to 3.30pm on any given day. Counsel will be informed of the cut-off time for participation on the forum, after which no further comments will be entertained.
- 4.4.5 Where the court has specific questions it wants parties to address, it may choose to log onto the discussion forum at the same time that counsel is present.

4.5 Fourth, these safeguards should be considered if documents are exchanged on online platforms:

- 4.5.1 The court may restrict the online exchange of documents to only platforms of greater repute and reliability on a case-by-case basis.
- 4.5.2 Even then, the onus is on each party to be alert to any possible interception, corruption or change to the documents provided to the other side, and to re-send the documents to the other side in a more traditional manner if necessary to ensure the integrity of the documents.
- 4.5.3 The parties should not exchange documents online where the need to protect the documents' confidentiality from third parties outweighs any benefits derived from the online exchange.
- 4.5.4 To consider the feasibility of expanding the soon-to-be-launched iELS to provide an online portal for the exchange of soft copies of documents during discovery and inspection.

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4.6 Last, guidelines relating to discovery of documents, and preservation and inspection of evidence on online media may be issued by way of a Practice Direction or *aide memoir*. These guidelines should be accompanied by clear preservation standards as well as safeguards to which supervising solicitors may have reference in the course of obtaining and executing Anton Piller orders.

E. CONCLUSION

5.1 A previous edition of the paper was circulated for comments amongst members of the Bar viz. the Civil Practice Committee and the IT Committee of the Law Society. The present paper has been refined and incorporates, where appropriate, the views received during the earlier period of consultation.

5.2 The suggestions and ideas contained herein are expected to undergo further consideration and refinement once additional comments and feedback are received during the public consultation. Concurrently, there will be continual assessment as to the most appropriate ways of using social media in civil litigation in Singapore.