

eDISCOVERY BEST PRACTICES: SOCIAL MEDIA DISCOVERY IN EMPLOYMENT AND PERSONAL INJURY LITIGATION

While email is still widely used, more people are communicating with social media platforms such as Facebook, Twitter, Snapchat, and Instagram.¹ While using these communications platforms has become second nature to many, they present discovery challenges. A 2017 survey by Robert Half Legal found that 52 percent of lawyers said they've seen an increase in litigation involving social media and mobile devices, while 27 percent reported a rise in cases related to data on personal mobile devices that employees used for work purposes.²

SOCIAL MEDIA PRESERVATION AND COLLECTION COMPLICATE DISCOVERY



Social media evidence is not as easy to preserve and collect as either paper records or other forms of electronically stored information, such as word processing documents or emails. This is in part because social media by its nature resides in a quickly evolving environment, where it can be easy to replace content with updates and changes. The sheer volume of social media, as well as rapidly changing platforms, creates additional complications.

Social media platforms are second nature to many but present discovery challenges.

Both these aspects of social media suggest that attorneys should stay abreast of rapidly changing technologies and that they may wish to consider partnering with experts in preservation and collection at various stages of litigation or pre-litigation.

DUTY TO PRESERVE SOCIAL MEDIA

First and foremost, as with other forms of evidence, if litigation is contemplated, attorneys must inform clients of their duty to preserve social media material and advise them that they cannot destroy potentially relevant information.³ *Allied Concrete Co. v. Lester*⁴ shows the importance of preserving social media, as well as the consequences of advising clients involved in litigation to remove damaging information from their social media pages.



After a car accident with an Allied Concrete truck, Lester sued Allied Concrete for damages related to his personal injuries and the death of his wife.⁵ Allied Concrete sought discovery of Lester's Facebook page, resulting in Lester's attorney instructing Lester to "clean up" his Facebook page, which Lester did. The deleted content was eventually produced, and even though Lester prevailed on his lawsuit, the court ordered sanctions in the amount of \$180,000 for Lester and \$542,000 for his attorney for the discovery violation.⁶ The attorney ultimately agreed to a five-year suspension from practice for his actions.⁷

While relevant social media must be preserved, this should not be misunderstood to require that all social media must be preserved. Rather, only nonprivileged material "that is relevant to any party's claim or defense and proportional to the needs of the case"⁸ needs to be preserved and produced if requested. Assessments of what is proportionally necessary to a case are within the purview of the attorney.

Several steps can be taken by attorneys to help ensure that preservation obligations are met. For instance, prior to litigation, they can make sure clients have in place reasonable policies to ensure preservation should the obligation arise. Also, they can take steps to identify relevant custodians and ask them about the location of potentially relevant social media data and document the preservation process.

While discovery into retention and preservation practices should not be allowed routinely, it may be advisable to discuss these matters with opposing counsel, while being mindful of privilege and confidentiality concerns.⁹

TECHNICALITIES OF PRESERVING SOCIAL MEDIA

The technical aspects of gathering social media evidence are less straightforward than those for email and digital documents. Several methods exist for gathering social media-type communications in the eDiscovery context, though they vary in advisability.



Taking screenshots or printing the images is one method, but it tends to lose context and associated metadata. Self-service export tools can retrieve social media, but they're usually built into the platform being used and may only be available to account holders. Specialized forensic collection software is another option that captures files as well as associated metadata and linked content. It also provides options for searching, sorting, and filtering information.¹⁰

AUTHENTICITY AND ADMISSIBILITY REQUIREMENTS

From a litigation standpoint, electronic communications and information are generally discoverable in the same ways as other types of evidence.¹¹ Anything made publicly available can be collected by any party, while nonpublic materials are obtained through the discovery process, with access depending on privilege, relevance, and proportionality.

Specialized software gathers social media and captures files, associated metadata, and linked content.

Digital evidence such as emails, web postings, texts, tweets, and Snapchat messages are commonly offered as evidence and must meet standards for authenticity and admissibility.¹² Generally, the standard for establishing authenticity of digital evidence is the same as for traditional forms of evidence.¹³

The authenticity of a text message can be established by the author of the text or by someone who saw the text message being produced or received,¹⁴ while websites present greater authenticity challenges because of their dynamic nature. To authenticate website evidence, a witness may testify or certify that he or she typed in the internet address reflected on an offered exhibit on the date and time stated, that the witness logged on to the website and reviewed its contents, and that the exhibit fairly and accurately reflects what the witness saw.¹⁵

A factor to consider when reviewing authenticity and authorship is that the person identified as being the owner of an account may not necessarily be the person who actually created the content. A third party could have logged in to a social media account under the owner's name. With respect to establishing authenticity, attorneys must be familiar with the standards in the jurisdiction in which their case resides. Maryland and Texas apply different requirements for establishing authenticity, and other states are adopting these standards.¹⁶

Subsections 13 and 14 to Federal Rules of Evidence 902 took effect in December 2017. Under the subsections, the party offering the evidence may provide a certification from a person with knowledge that the evidence is authentic rather than producing witness testimony.

In addition to authentication concerns, electronic communications must meet standards of admissibility. Decisions regarding admissibility are solely in the purview of the judge and include judgments about whether evidence is relevant, constitutes hearsay, or is excessively prejudicial when compared to its probative value.¹⁷

SOCIAL MEDIA IN THE EMPLOYMENT CONTEXT

Case law suggests that access to an employee's social media accounts may be allowed in employment cases. Employers may be able to gain broad access to an employee's private social media accounts if they can articulate a relevant basis for the request.¹⁸

Electronic communications must meet standards of admissibility.

"Courts have reached different results as to whether to compel the production of a plaintiff's 'private' information," said Ryan D. Derry, an associate at Paul Hastings. "In cases ordering production, the defendant typically demonstrates a reason as to why the information is potentially probative."

For example, in *Reid v. Ingerman Smith LLP*,¹⁹ a case where an employee sued her employer alleging emotional distress due to sexual harassment and termination, the defendant successfully obtained private Facebook postings by demonstrating to the court that they contradicted her claims of mental anguish.

"In contrast," Derry said, "courts have denied production where there is not a demonstrable relationship between production and the claim—for instance, in *Howell v. The Buckeye Ranch Inc.*,²⁰ where the court denied the motion to compel social media usernames and passwords because the request was not limited to plaintiff's emotional state or claim of sexual harassment."

*Trail v. Lesko*²¹ provides an extensive discussion of factors for consideration in determining whether to grant access to social media content, as well as a summary of cases from Pennsylvania and other jurisdictions. In *Lesko*, a case involving an automobile accident, the trial court denied motions to compel from both the plaintiff and the defendant seeking access to the other's social media content. The judge reasoned that the social media content would not provide information relevant to the damages issue in the case.

SOCIAL MEDIA IN PERSONAL INJURY CASES

"Social media is important in the personal injury context to test the bona fides of physical and emotional injuries, not just to learn what happened to cause the injury," said Mark Berman, litigation partner at Ganfer Shore Leeds & Zauderer.

As in the employment context, a significant question when requesting social media information relates to the time period covered by the request. "Courts don't usually limit access to social media created after the event but may limit access to information created prior to the event," Berman said.

In *Gordon v. T.G.R. Logistics Inc.*,²² a case involving a collision between the plaintiff's vehicle and a tractor-trailer driven by TGR's employee, the defense requested the plaintiff's entire Facebook history. The court noted that evaluation of the discovery requires a three-part analysis: whether information is privileged, relevant, and proportional. Neither party argued that the sought-after information was privileged.

"Courts don't usually limit access to social media created after the event."

Regarding relevance, the court noted that almost any post could conceivably be relevant with respect to the plaintiff's injuries and emotional distress. Proportionality, though, required the court to undertake a deeper analysis to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense." The court concluded that granting discovery of the plaintiff's entire Facebook account would provide minimal relevant information and would therefore exceed the limits of proportionality.

In contrast, in *McMillen v. Hummingbird Speedway Inc.*,²³ a personal injury case involving a rear-end collision after a stock car race, the court ordered the plaintiff to produce Facebook and Myspace usernames and passwords where public information showed the plaintiff engaging in sporting events that contradicted claimed injuries.



CONCLUDING THOUGHTS AND PRACTICAL TIPS

Litigators need a thorough understanding of the communications platforms used by their clients and opposing parties, as well as a strategy for how to access social media information. The information above, coupled with the tips below, is a good place to start.

Ensure Preservation

Because social media content changes rapidly, attorneys must act

quickly to protect potential evidence. As soon as possible and according to relevant rules, they'll want to place the opposing side on notice that social media will be sought and should be preserved.²⁴

Review Publicly Available Social Media

From a defense perspective, routine practice includes immediately conducting a broad search of publicly available social media information related to a plaintiff. Social media postings often contain statements related to employment, information regarding mitigation, and evidence relevant to claims of emotional distress. "It is also important to periodically monitor social media throughout the course of litigation," Derry said.

Also, attorneys might consider searching social media generally for references to the event at issue. Relevant information may not be posted by parties known to counsel. Searching for location, date, and event can sometimes reveal information that would not otherwise be found.

Limit and Structure Requests

Social media content, like all discovery, is limited to what is relevant. However, broad requests for social media content that are not moored to the case subject matter or limited to the relevant time period will likely be denied.²⁵ "Keep requests proportional to what is at issue with respect to relevance and cost. Break requests down into pieces so that if you lose one request, you don't necessarily lose everything," Berman said.

Protect Privacy

Opposing counsel may object to social media content access based on privacy concerns. A protective order can preserve privacy while also ensuring access to relevant information.²⁶

Request Metadata

Screenshots may seem like a good way to capture social media content, but they are challenging to authenticate, and the information portrayed is difficult to put in context. Metadata containing information such as author, time of posting, recipients, and location can help provide context and establish authenticity. Attorneys will want to be sure to specifically request metadata and specify that it be collected in a forensically sound manner.

Avoid Communications With Represented Parties

Generally, state ethics rules prohibit lawyers from communicating with represented parties. As such, lawyers (and their agents) should avoid engaging in social media communications with persons whom the lawyer knows to be represented by counsel. Practically, this means a lawyer may not send Facebook friend requests or LinkedIn invitations to parties represented by counsel.

However, viewing publicly accessible social media content that does not precipitate communication with a represented party is generally not prohibited.²⁷

Use Caution When Communicating With Unrepresented Third Parties

Publicly viewable social media content is generally considered accessible. However, information sheltered by privacy settings raises ethical constraints that limit the lawyer's options for obtaining it. The consensus among courts appears to be that a lawyer may not attempt to gain access to nonpublic social media content by using subterfuge, trickery, dishonesty, deception, pretext, false pretenses, or an alias.²⁸ "Counsel cannot use ethically impermissible 'backdoor' methods to access private posts," Berman said.

Staying up to date with social media changes can seem daunting. However, being proactive, staying abreast of rules and practice requirements related to electronic discovery, and seeking the expertise of those with technological backgrounds can ease the process when counsel is faced with a case involving social media discovery.

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- ¹ Amy J. Doyle and Ann S. Jacobs, "Social Media Discovery: Changing the Face of Civil Litigation" 8 *Inside Track* 17, Wisconsin Bar Association, September 2016, <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/article.aspx?Volume=8&Issue=17&ArticleID=25043>
- ² Robert Half Legal, "Survey: Lawyers Report Surge In Litigation Related To Social Media And Mobile Devices," June 1, 2017, <http://rh-us.mediaroom.com/2017-06-01-Survey-Lawyers-Report-Surge-In-Litigation-Related-To-Social-Media-And-Mobile-Devices>
- ³ Mariel Goetz, "Social Media Evidence in Civil Litigation," *Trial Evidence*, American Bar Association, 2013,
- ⁴ *Allied Concrete Co. v. Lester*, 285 Va. 295 (Va. 2013); see also, Final Order, *Lester, et al., v. Allied Concrete*, Case No. CL08-150/CL09-223 (Cir. Ct. Va. 2010), <https://abovethelaw.com/uploads/2011/11/Final-Order.pdf>
- ⁵ *Allied Concrete*, 285 Va., pp. 300-301
- ⁶ *Ibid*, pp. 302-303
- ⁷ Bryan McKenzie, "Charlottesville Attorney's Law License Suspended," *The Daily Progress*, July 30, 2013, https://www.dailyprogress.com/news/charlottesville-attorney-s-law-license-suspended/article_8c84b89a-f990-11e2-91d5-0019bb30f31a.html
- ⁸ Fed. R. Civ. P. 26(b)(1) (2015)
- ⁹ *Commentary on Proportionality in Electronic Discovery*, 18 Sedona Conf. J. 141, 152-53 (2018)
- ¹⁰ See, generally, William Hamilton, "Social Media: #RealDiscovery," *Litigation Journal*, American Bar Association, Winter 2015, https://www.americanbar.org/content/dam/aba/publications/litigation_journal/winter2015/social-media-discovery.authcheckdam.pdf; Margaret DiBianca, "Discovery and Preservation of Social Media Evidence," *Business Law Today*, American Bar Association, January 2014, and Joe Dysart, "6 Tools To Help Firms Track Social Media," *ABA Journal*, American Bar Association, September 2013,
- ¹¹ See, Fed. R. Civ. P. 26(b)(1): Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.
- ¹² Hon. Paul Grimm, Gregory P. Joseph, and Daniel J. Capra, "Best Practices for Authenticating Digital Evidence," (West Pub. 2016), p. 1, www.jha.com/us/filemanager/authenticatingdigitalevidence.pdf, (hereinafter "Best Practices")
- ¹³ *Ibid*, p. 2
- ¹⁴ *Ibid*, pp. 11-13
- ¹⁵ *Ibid*, pp. 15-19
- ¹⁶ Daniel R. Miller, Ivan L. Ascott, Bree Kelly, "Discovery of Social Media: Legal and Practical Considerations," K&L Gates, July 16, 2015,
- ¹⁷ *Ibid*, p. 2
- ¹⁸ David E. Gevertz, "Social Media Developments: Employers' Access and Discovery," Section of Litigation, American Bar Association, Oct. 8, 2015,
- ¹⁹ *Reid v. Ingerman Smith LLP*, No. CV 2012-0307 (ILG) (MDG), 2012 WL 6720752 (E.D.N.Y. Dec. 27, 2012)
- ²⁰ *Howell v. The Buckeye Ranch Inc.*, No. 2:11-CV-1014, 2013 WL 1282518 (S.D. Ohio Mar. 27, 2013)
- ²¹ *Trail v. Lesko*, 2012 WL 2864004, No. GD-10-017249 (C.P. Alleg. Co. July 3, 2012 Wettick, J) <https://docs.google.com/file/d/0B83Pxa3TYcXMMF96MHEIYQtCVFE/edit>
- ²² *Gordon v. T.G.R. Logistics Inc.*, No. 16-CV-00238-NDF, 2017 WL 1947537 (D. Wyo. May 10, 2017)
- ²³ *McMillen v. Hummingbird Speedway Inc.*, No. 113-2010 CD, 2010 WL 4403285 (Pa. Ct. of Common Pleas Sept. 9, 2010)
- ²⁴ Christiansen Davis, "Social Media As a Source of Discovery in Employment Litigation," Oct. 20, 2014, <https://cdfirm.com/social-media-as-a-source-of-discovery-in-employment-litigation/>, citing Jessica Neufeld and David S. Weber, "Using Social Media Content to Defend Employment-Related Lawsuits," 29 *The Corporate Counselor* 6, September 2014, <https://www.employmentlawgroup.com/wp-content/uploads/Sept14-Corp.pdf>
- ²⁵ *Ibid*
- ²⁶ *Ibid*
- ²⁷ Christina Vassiliou Harvey, Mac R. McCoy, Brook Sneath, "10 Tips for Avoiding Ethical Lapses When Using Social Media," *Business Law Today*, American Bar Association, January 2014, (citing Oregon Ethics Opinions 2013-189 and 2005-164 (analogizing the viewing of public social media content to reading a magazine article)), https://www.americanbar.org/publications/blt/2014/01/03_harvey.html
- ²⁸ Harvey, et al., "10 Tips for Avoiding Ethical Lapses When Using Social Media" (citing Oregon Ethics Opinion 2013-189, Kentucky Bar Association Opinion E-434, New York State Opinion 843, and New York City Opinion 2010-2)