

Social Media Evidence in Civil Litigation

By Mariel Goetz

As litigators, much of what we do at trial is try to establish (or refute) what happened when, why someone did something, and what someone was thinking when a particular event occurred. We also seek to prove (or disprove) damages—whether physical, emotional, or financial—that flowed from unlawful conduct. Today, social media platforms like Facebook and Twitter offer a gold mine of potential evidence for such purposes. These sites are specifically designed to encourage users to record in writing and share with others what they are thinking or doing—and even where they are located—at any given moment. Accordingly, it is becoming standard practice in litigation today to use social media sites to research parties; to establish or refute facts; to determine or rebut state of mind or health; and to identify, impeach, or bolster the credibility of witnesses.

How do traditional discovery principles apply in this new context? What sorts of traps await the unwary practitioner? This article offers pointers to civil litigators dealing with social media evidence and discusses trends in recent court decisions involving such evidence.

Recognize Relevance Early and Counsel Clients on Preservation Duties

Social media pages and accounts are constantly evolving, with new posts added and, occasionally, others removed. But the fluid nature of social media is no excuse for clients facing litigation to remove damaging photos, tweets, status updates, or other communications in advance of discovery or trial. If litigation is contemplated, be sure to inform clients of their duty to refrain from destroying social media postings or accounts that might contain relevant information.

The recent case of *Allied Concrete Co. v. Lester*, 285 Va. 295 (Va. 2013), demonstrates the importance of preserving social media evidence and the perils of advising clients involved in litigation to remove damaging posts from their social media pages. Following a car accident involving an Allied Concrete truck, Lester sued Allied Concrete for compensatory damages for both his personal injuries and the wrongful death of his wife. *Id.* at 300–301. Allied Concrete sought discovery of Lester’s Facebook page, which included photos of Lester holding a beer can while wearing a T-shirt printed with “I ♥ hot moms.” *Id.* at 302. Lester’s attorney, through his paralegal, promptly instructed Lester to “clean up” his Facebook page because “[we don’t] want blow ups of other pics at trial.” *Id.* Lester then deleted a number of photos from his page. *Id.* at 303. Although the deleted photos were eventually produced and Lester ultimately prevailed at trial, the court ordered sanctions in the amount of \$180,000 for Lester and \$542,000 for his attorney. *Id.* Lester’s attorney currently faces a disciplinary hearing related to his role in the

cover-up. See Peter Vieth, “Sanctions Paid, Murray Now Faces Bar Discipline,” *Va. Law. Wkly.*, July 9, 2013.

The lesson? In discussing preservation with your client, treat social media evidence just like other evidence. You wouldn’t tell your client to shred relevant documents, Enron-style, so don’t advise him or her to get rid of social media posts either.

Even “Private” Posts Are Discoverable

On many social media sites, users have the option to determine who can view their profile and posts: anyone in the public, only those they have designated as “friends,” or some subset of those friends. Clients sometimes are surprised to learn that even the nonpublic aspects of their profiles are subject to disclosure, despite privacy settings they regard as restrictive. The general rule is that, as with other sensitive material produced in discovery, the producing party’s legitimate “privacy or confidentiality concerns” can be dealt with through an appropriate protective order but do not shield social media postings from disclosure. See *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 434 (S.D. Ind. 2010) (holding that “merely locking a profile from public access does not prevent discovery”).

Although litigants can raise Fourth Amendment privacy objections to discovery of their access-restricted social media content, courts tend to reject those arguments. *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010), is one oft-cited example. There, the plaintiff in a personal injury action claimed she suffered permanent injuries that limited her participation in certain activities—such as running and horseback riding—and lessened her enjoyment of life. *Id.* at 653. The defendant sought discovery of the nonpublic portions of the plaintiff’s Facebook and MySpace pages, claiming they could contradict the plaintiff’s claims of injury. *Id.* at 651. The court rejected the plaintiff’s privacy arguments and allowed the discovery, noting that plaintiff could have no reasonable expectation of privacy in her participation in social media sites, whose very purpose is sharing information with others and whose terms of use provide that even “private” content “may become publicly available.” *Id.* at 656 (“[W]hen Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings.”); see also *EEOC v. Original Honeybaked Ham Co.*, 2012 U.S. Dist. LEXIS 160285, at *5–6 (D. Colo. Nov. 7, 2012) (“There is a strong argument that storing such information on Facebook and making it accessible to others presents an even stronger case for production, at least as it concerns any privacy objection. It was [the plaintiffs] who, by their own volition, created relevant communications and shared them with others.”). Moreover, particularly where a plaintiff claims physical and emotional injuries,

[t]o permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial.

Romano, 907 N.Y.S.2d at 655 (quoting *Leduc v. Roman* (2009), 2009 CanLII 6838, ¶ 35 (Can. Ont. Sup. Ct. J.)).

Tailor Discovery Requests to Relevant Time Frames or Subject Matter

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Facebook reports over 1.11 billion monthly active users as of March 2013. *See* Newsroom, [Key Facts](#), *Facebook.com*, (last visited July 22, 2013). Over 699 million users post on average at least once a day, and over 350 million photographs are uploaded to Facebook daily. *See* Craig Smith, [“By the Numbers: 39 Amazing Facebook Stats,”](#) *Digital Marketing Ramblings*, Aug. 4, 2013. The average Facebook user posts over 90 pieces of content (photos, status updates, comments, and the like) per month. Over 170 billion “tweets” have been made since Twitter’s inception in 2006. *See* Craig Smith, [“By the Numbers: 20 Amazing Twitter Stats,”](#) *Digital Marketing Ramblings*, July 21, 2013 (last visited July 22, 2013). Because of the vast amount of material on these types of sites, courts are wary of allowing parties unfettered access to the other side’s social media accounts. As one court put it, “granting carte blanche discovery of every litigant’s social media records is tantamount to a costly, time consuming ‘fishing expedition,’ which the courts ought not condone.” *Fawcett v. Altieri*, 960 N.Y.S.2d 592, 597 (N.Y. Sup. Ct. 2013).

One way courts have dealt with this quandary is by imposing a requirement that the party seeking discovery make a threshold showing that the social media material sought is likely to be relevant to the case—often, by pointing to relevant material in the public portions of the user’s account. *See*, e.g., *Keller v. Nat’l Farmers Union Prop. & Cas.*, No. CV 12-72-M-DLC-JCL, 2013 WL 27731, at *11 (D. Mont. Jan. 2, 2013) (collecting cases imposing threshold requirement); *Zimmerman v. Weis Mkts., Inc.*, 2011 Pa. Dist. & Cnty. Dec. LEXIS 187, at *10 n.8 (Pa. D. & C. May 19, 2011) (noting that the court granted defendants’ motion to compel discovery of the private portions of plaintiff’s social media profiles because defendants made a “threshold showing” that the public portions contained relevant information). As the *Fawcett* court explained,

[a]s a matter of judicial policy, such a fishing expedition is not a sufficient basis to open the floodgates of meandering thoughts or silly postings to be used to impeach a party in a simple assault or negligence action without any good cause to believe that any incriminating statement was ever made and publicized in the social media.

960 N.Y.S.2d at 598.

To these courts, the mere “hope that there *might* be something of relevance in [the party’s] Facebook account” is not enough to justify the discovery. *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012) (emphasis in original) (“Defendant does not have a generalized right to rummage at will through information that Plaintiff has limited from public view. . . . [T]here must be a threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence.”); *see also Salvato v. Miley*, 2013 WL 2712206, at *7 (M.D. Fla. June 11, 2013) (holding that “the mere hope that” defendant’s social media account “might include an admission against interest, without more” is not sufficient).

Other courts, by contrast, have rejected this approach. As Magistrate Judge Tomlinson explained in a recent case in the Eastern District of New York, “[t]he Federal Rules of Civil Procedure do not require a party to prove the existence of relevant material before requesting it. . . . [T]his approach improperly shields from discovery the information of Facebook users who do not share any information publicly.” *Giachetto v. Patchogue-Medford Union Free Sch. Dist.*, 2013 WL 2897054, at *4–5 n.1 (E.D.N.Y. May 6, 2013) (ordering limited discovery of portions of plaintiff’s social networking postings). The notion that access to social media discovery, like more traditional types of evidence, should not be contingent on making a threshold showing of

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relevance has been endorsed by other courts as well as commentators. *See, e.g., Holter v. Wells Fargo & Co.*, 281 F.R.D. 340, 344 (D. Minn. 2011) (holding that defendant was entitled to limited discovery of plaintiff's social media postings where plaintiff claimed emotional distress damages); Steven S. Gensler, "Special Rules for Social Media Discovery?," 65 *Ark. L. Rev.* 7, 19 (2012) (noting that, "[i]n general, a party does not need to make a prima facie showing before it can propound discovery requests" and arguing that courts should not require such a showing for social media evidence).

Even if no threshold relevance showing is required, litigants should tailor discovery requests to specific time frames and, if possible, subject matters, to maximize their chances of obtaining the requested discovery. Courts are less likely to view social media discovery requests as unwarranted "fishing expeditions" if they are limited to dates relevant to the events at issue in the case (for example, in an employment discrimination case, the dates of employment) or specific topics (such as "all photos of Plaintiff engaging in activities outside the home" or "all communications referencing Defendant"). *See, e.g., Kear v. Kohl's Dep't Stores, Inc.*, 2013 WL 3088922, at *17–18 (D. Kan. June 18, 2013) (finding "Defendant has sufficiently limited the scope of this request by seeking limited access during the relevant time frame rather than seeking unfettered or unlimited access to Plaintiff's social media accounts") (citation omitted); *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 436 (S.D. Ind. 2010) (refusing access to entire account and instead ordering employees to produce postings that relate to "any emotion, feeling, or mental state").

Don't Forget the Big Picture

As evidence emerges in discovery, remember to keep the big picture in mind. Although much social media material will meet the broad Rule 26 standard, and thus will have to be produced in discovery, numerous factors may undermine the usefulness of such evidence at trial. Social media evidence must pass the same barriers as other types of trial evidence: relevance, authentication, and Rule 403, among others.

In particular, emerging social science research provides new ammunition for parties seeking to combat potentially damaging social media evidence at trial. As one commentator has noted with respect to the probative value of photographs posted on Facebook,

[L]itigants' internal sentiments do not necessarily manifest in observable form, and therefore emotionally damaged or remorseful litigants would likely not post pictorial evidence of their true feelings on Facebook. Because social norms encourage taking photographs of happy moments, individuals are unlikely to capture shameful, regrettable, or lonely moments with a camera.

Kathryn R. Brown, Note, "The Risks of Taking Facebook at Face Value: Why the Psychology of Social Networking Should Influence the Evidentiary Relevance of Facebook Photographs," 14 *Vand. J. Ent. & Tech. L.* 357, 381–82 (2012).

Likewise, one court has observed that "[t]he fact that an individual may express some degree of joy, happiness, or sociability on certain occasions sheds little light on the issue of whether he or she is actually suffering emotional distress." *Giachetto*, 2013 WL 2897054 at *8. Moreover, studies have shown that many users exaggerate or lie on social media to portray themselves in a more favorable light. *See, e.g., Andrew Hough*, "[Why Women Constantly Lie about Life on](#)

[Facebook](#),” *Telegraph* (London), Mar. 12, 2013; Press Release, Badoo, [Generation Lonely? 39 Percent of Americans Spend More Time Socializing Online Than Face-to-Face](#) (Apr. 25, 2012).

In addition to seeking to preclude admission of evidence that is irrelevant, unfairly prejudicial, likely to mislead a jury, or otherwise inadmissible, litigants should consider whether lay or expert testimony about social media users’ motivations and behaviors could help explain ostensibly harmful evidence that is admitted. *See* Brown, *supra*, at 385 (“Just as evidence of eyewitness identification errors aided fact-finders in assessing the weight of a given identification, social science on Facebook pictures—such as research concerning users’ motivations for posting or removing photographs—may serve a similar purpose in aiding fact finders to assess the relevance of such pictures.”).

Conclusion

Ultimately, social media evidence deserves the same attention and prudence as other, more traditional, forms of evidence. While some judges have treated the online environment differently, many have been quick to apply the lawyer’s traditional duty to counsel on preservation, limit overbroad discovery requests, and require production of all relevant materials, regardless of the author’s attempt to control access to those materials. Although social media evidence is largely subject to these traditional rules of discovery, lawyers should also be proactive in addressing the novelty of this evidence and should consider the special context in which social media content is created in assessing its relevance and potential prejudice.

Keywords: litigation, trial evidence, social media, discovery, relevance, privacy, duty to preserve

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