Social Media Discovery in 2016

Case Law and Practical Solutions[1]

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At the very heart of litigation is a search for the truth, a search for facts, and a search for the evidence that goes beyond the flawed memories of the human mind. Facts will lead attorneys, and ultimately a jury, to uncover what actually occurred during a sequence of events to ensure that justice is served amongst the parties. With each evolution of technology, new and interesting problems must be addressed in arriving at the truth, enabling counsel to uncover those facts to prove their case. Social media as a technology platform is no different. For the last several years, the pervasive nature of social networking websites, such as Facebook, Twitter, and SnapChat, has created a whole new dimension to litigation. With each passing year, new social media platforms sprout, others vanish, and the method of gaining access to the information contained on those platforms becomes even more challenging.

The Rule of Competence

You may have read the first paragraph of this article and thought, "this doesn't apply to me" or "I don't really need this information." If so, you might want to think twice. Every state

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[1] Portions of this paper are excerpts from an article written by the author entitled, "The Ethics of Social Media", American Association for Justice, Trial, Vol. 50 No. 1, January 2014.

has some version of the ABA's Model Rule 1.1 on competency. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." What many attorneys have not yet realized is that the rule goes beyond understanding case law, statutes, and procedure. Attorneys must now be familiar with technology and all the ways it affects our practices, as well as our cases. Comment 8 to the ABA's Model Rule 1.1 states, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology. . ." This same theme can be found in several state bar ethics opinions on the use of technology in the practice of law as well.

No attorney can properly represent a client in litigation without at least a basic understanding of social media. Your duty of diligence requires you to use this knowledge in furtherance of your client's case, whether that is advising a client about the proper use of social media, or reviewing parties', witnesses' and experts' social media pages.[2] Failing to investigate these individuals on the internet, and specifically social media, likely falls below the standard of care. The court in *Griffin v. State* quoted a journal article stating, "It should now be a matter of professional competence for attorneys to take time to investigate social networking sites." 995 A.2d 791 (Md. App. 2011). In *Weatherly v. Optimum Asset Management*, the court held that an attorney was required to perform internet research as part of their due diligence to uncover information that was "reasonably ascertainable." 928 So. 2d 118 (La. App. 2005).

[2] Model R. Prof. Conduct 1.3 (2013) ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

Discovery of Social Media Information

Unfortunately, getting information from Facebook and other social medial companies is not as simple as serving a subpoena. The Stored Communications Act, 18 U.S.C. Sec. 2701 et seq., permits social media companies to refuse non-law enforcement (i.e. civil litigants') subpoenas for information because the Act does not permit disclosure of information by the provider without consent of the user. *Id.* Courts have generally held that there is no civil subpoena exception to the Stored Communications Act. *In re Subpoena Duces Tecum to AOL, LLC,* 550 F. Supp. 2d 606 (E.D. Va. 2008). Thus, obtaining information from the providers must come from litigants themselves through discovery.

Over the last ten years, courts across the country have been largely inconsistent in the application of discovery rules to social media content. However, a few consistent themes have developed. Most courts have not granted unfettered discovery of a party's social media account. The District of Minnesota in Holter v. Wells Fargo and Co. summed up the majority rule:

> This court would not allow depositions of every friend and acquaintance to inquire about every conversation and interaction with plaintiff. So too, the court will not require plaintiff to produce all information from all her social media websites to obtain similar information.

Holter v. Wells Fargo & Co., 281 F.R.D. 340, 344 (D. Minn. 2011).

Courts generally order parties to produce social media information, so long as the request is targeted; it cannot be a fishing expedition. In *Holter*, the court concluded that the defendant was entitled to information from the plaintiff's social media pages that bore on her mental disability and emotional state. The plaintiff's counsel was required to review her social media pages and "produce any content or communications that reveals or refers to . . . any emotion, feeling or mental state, including but not limited to any reference of depression, anxiety, or mental disability." *Id.*

Most courts require a factual predicate showing the relevance of what is being sought and showing that additional relevant information is hidden behind the privacy settings. *Kregg v. Maldonado*, 98 A.D.3d 1289 (NY S.Ct. 2012), *Thompkins v. Detroit Metro. Airport,* 278 F.R.D. 387, 388 (E.D. Mich. 2012), *EEOC v. Simply Storage,* supra. By extension, the requesting party does not have "a generalized right to rummage at will through information that [the responding party] has limited from public view, but instead require a threshold showing that the requested information is reasonably calculated to lead to the discovery of relevant evidence." *Thompkins v. Detroit Metro. Airport,* supra at 388 (E.D. Mich. 2012). For example, the Eastern District of Minnesota held that a plaintiff did not have to provide the "defendant with any passwords or user names to any social websites, so that defendant can conduct its own search and review." *Holter*, 281 F.R.D. at 344.

Attorneys must object to overly broad discovery requests, or privacy protections will be waived. In one Louisiana personal injury case, the defendant propounded interrogatories asking for virtually unimpeded access to the plaintiff's social media accounts. *In re White Tail Oilfield Servs., LLC*, 2012 WL 4857777 (E.D. La. Oct. 11, 2012); *see also Higgins v. Koch Dev. Corp.*, 2013 WL 3366278 (S.D. Ind. July 5, 2013) (The court forced the plaintiffs to turn over their entire Facebook archive material from June 20, 2009, to Apr. 29, 2013, concerning the plaintiff's employment, outdoor activities, and enjoyment of life.). Initially, the plaintiff objected, but ultimately withdrew the objection and agreed to produce the information in the face of a motion to compel. The defendant asked the plaintiff to produce a complete copy of the Facebook archive: a file that contains a record of the user's activity, including all wall posts, pictures added or tagged in, and private messages with other users. After agreeing to produce the entire archive, certain technical difficulties prohibited the plaintiff from doing so. The court granted the

defendant's motion to compel and ordered the plaintiff to produce the information within seven days.

Generally, privacy arguments will not preclude discovery of social media content, even if the user attempts to limit access to the content to a select group of "friends". A user who places information on a social network, but who also implements the service's privacy settings, does not shield the information from discovery or otherwise place it outside of the court's reach. *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 434 (S.D. Ind. 2010).

Advising Your Client

The social media revolution has created a new challenge: what instruction to give clients. Failure to properly instruct your client and inquire into his or her social media usage clearly fall below an attorney's standard of care. N.Y. Co. Law. Assoc. Comm. on Prof. Ethics, Op. No. 745 (July 2, 2013) (What advice is appropriate to give a client with respect to existing or proposed postings on social media sites). Early in the representation, advise clients to refrain from posting any case information on social media sites, because the posts may be discoverable during the course of litigation, regardless of whether privacy settings have been set to allow only limited access. I require all clients to sign an agreement at the same time they sign the contract of representation, stating that they are aware that social media postings may be discoverable and that they will no longer post anything that could be considered relevant to their claims.

I further instruct clients not to delete any information that has already been posted that might be relevant to their case. A Virginia lawyer was suspended from practice for five years for advising a client to "clean up" his Facebook photos after the defense requested screen shots and other information. After the plaintiff received a multimillion-dollar award, the judge learned

what the attorney had advised, imposed a $500,000 sanction on him, and reduced the damages award. The court ruled that the attorney violated his obligation of candor toward the tribunal and fairness to the opposing party and counsel, and committed misconduct. *Allied Concrete Co. v. Lester*, 285 Va. 295 (Va. 2013).

Clients should also avoid deleting social media accounts entirely. In a New Jersey case, the court granted defense counsel a jury instruction that the plaintiff failed to preserve his Facebook account and intentionally destroyed evidence. *Gatto v. United Airlines, Inc.*, 2013 WL 1285285 (D.N.J. Mar. 25, 2013). Finally, stress to your clients that their social media activities can ruin settlements, provide harmful information to opposing counsel, and break attorney-client confidentiality.

Practical Solutions for Gathering Information

It is important that attorneys also understand the logistical aspects of obtaining information from social media in order to comply with their ethical requirements. Understanding the practical aspects of obtaining access to the information will enable the attorney to ask better questions and know when they are getting the right answers.

Because the Stored Communications Act allows companies to avoid the costly job of responding to civil subpoenas, they have shifted the burden of production over to the users themselves. Facebook has done this by allowing users to download from the settings function. Any user has the ability to download their Facebook data by going into the settings function of Facebook and downloading a complete archive of their information which will contain a treasure trove of data. The download will contain everything from posts made by the user, posts made on

the user's page by others, to IP addresses of the devices from which the user logged on.[3] Again, however, prior to being entitled to all of this data, a party must have a good faith basis the information is relevant to the litigation. The Facebook archive can also help you protect yourself from potential exposure to discovery sanctions. At the outset of litigation, download the archive to avoid any issues if you are subsequently faced with a spoliation motion for failing to produce the information.

Twitter has a similar function which allows the user to download an archive of all informational particular account.[4] This archive contains information such as the text of the tweet, date and time of tweets, whether or not it was in response to a particular user, hyperlinks to any link content, and the source of the tweet; like whether it came from the Twitter app on a phone, the Twitter website, or from a content management app such as Sprout Social or Hootsuite. All of the information can be downloaded in an off line archive for viewing.

Many applications market themselves as being encrypted or containing features that make it impossible for users to gather information after it has been read. For instance, SnapChat allows users to send photographs to one another, but after they are viewed, they are permanently deleted and unable to be seen. Snapchat does include a chat function that does not delete messages immediately, however, the only way to access this information is directly from the application unless you're with law enforcement.

If you're unable to obtain access to a user's social media platform for some reason, another option for gathering evidence is to conduct a forensic examination of their devices. A cell phone, for example, can be sent to a forensic examiner, and for as little as $500, the

[3] For a complete list of information obtained from a Facebook download visit, https://www.facebook.com/help/405183566203254.
[4] For more information on downloading a Twitter archive visit, https://support.twitter.com/articles/20170160.

examiner will provide the attorney with a disc containing all the information that was able to be retrieved from the phone, including text messages, messages posted via social media, and other valuable information.   Unfortunately, obtaining social media information from cellular devices is difficult as the information is deleted much more quickly than text messages and other information that would be contained on the phone.