

Advising your client about social media checklist

- Ask client what social media sites he/she uses, the frequency of use, and the last time used.
- Discuss with the client that information, pictures, videos, messages, posts, texts, etc. to social media websites may be discoverable and used in the course of litigation.
- The client should never post/share any confidential (attorney/client) communications online.
- Discuss with the client the pros/cons of posting information relating to the litigation online.
- Discuss with the client the pros/cons of posting anything online.
- Discuss with the client that some sites, like FaceBook, have the ability to make the information “private.”
- Discuss with the client that what they perceive to be “private” might still be accessible through various means.
- Advise the client NOT to delete social media.
- Advise the client NOT to deactivate their social media. Deactivated accounts may end up being deleted by the social media site.
- Search for and review client’s social media sites.
- Discuss with your client any inconsistencies between your client’s position and what was obtained from the social media sites.

SAMPLE DISCOVERY REQUESTS

Interrogatory:

Identify all websites, e-mail providers, and messaging services that you have used to communicate with other individuals in the prior two (2) years, and provide, for each, the account and/or user name information associated the website or account (e.g., screen name, log-in name or e-mail address), the names of all individuals who have access to the website or account, the last time the website or account was accessed, and the email address(es) associated with the website or account.

Requests to Produce:

1. All photographs, videos, or other electronic images or depictions posted by Plaintiff, or anyone on Plaintiff's behalf, on Facebook, Twitter, MySpace, and/or any other social networking site to which Plaintiff belongs or in which the Plaintiff participates from 20____ to the present.

2. Electronic copies of Plaintiff's complete profile on Facebook, Twitter, MySpace, and/or any other social networking site to which Plaintiff belongs/participates in (including all updates, changes, deletions, or modifications to Plaintiff's profile) and all status updates, messages, wall comments, causes joined, groups joined, activity streams, blog entries, details, blurbs, comments, photographs, videos, electronic images, and applications for the period from 20____ to the present. (For Facebook, this can be done by going to account settings and selecting "download a copy of your Facebook data." Please produce an electronic copy of this data on CD.) To the extent that electronic copies are not available of such profiles, please provide the documents in hard copy form (e.g., printouts evidencing each account and copies or screen shots of all photographs and messages included with the account).

Reno v. ACLU, 521 U.S. 844, 870 (1997) Well settled that the First Amendment's protection extends to the internet.

Prince v. Mallari, 2010 WL 1626422 (Fla. 5th DCA 2010) Plaintiff does not give up all rights to privacy in every area of her life merely by filing a lawsuit.

Salvato v. Miley, 2013 U.S. Dist. LEXIS 81784 (M.D. Fla. June 11, 2013) Party seeking discovery has the threshold burden of showing that the requested discovery is relevant. The mere hope that an individual's private text-messages, e-mails, and electronic communication might include an admission against interest, without more, is not a sufficient reason to require the person to provide open access to the individual's private communications with third parties.

Holland v. Barfield, 35 So. 3d 953 (Fla. 5th DCA 2010) In wrongful death action, appellate court quashed trial court's order compelling Petitioner to produce all of Petitioner's computer hard drives and cell phone (including evidence of Petitioner's communications through mobile phone messages, facebook.com, and myspace.com.) from 24 hours preceding the date of death as overly broad and deficient in failing to protect against disclosure of confidential and privileged information. More traditional, agreed-upon discovery requests for statements and photographs, constituted less intrusive means to obtain to the same discovery.

Menke v. Broward County School Board, 916 So. 2d 8 (Fla. 4th DCA, 2005) In challenge to suspension of teacher for alleged exchange of sexually explicit e-mail messages with students, and derogatory comments concerning school personnel and operations, appellate court prohibited unfettered access to teacher's computers.

Iglesias v. It's a living, Inc., 782 So. 2d 961 (Fla. 3d DCA 2001) Court quashed an order allowing discovery of the plaintiff's screen names and credit card numbers that he used on the internet. Court held that the order was overly broad and a departure from the essential requirements of law.

EEOC v. Simply Storage Management, LLC, 270 F.R.D. 430 (S.D. Ind. 2010) Discovery of social networking sites requires the application of basic discovery principles in a novel context. The fact that information contained on such sites is password protected does not shield it from discovery if the information is relevant to a claim or defense.

Rozell v. Ross-Hlet, 2006 WL 163143 (S.D.N.Y. 2006) Plaintiff alleged sexual harassment, computer hacking by her employer, and emotional distress. The employer sought complete access to the plaintiff's AOL account for a specified time period. Court denied request, stating: "to be sure, anything that a person says or does might in some theoretical sense be reflective of her emotional state. But that is hardly justification for requiring the production of every thought she may have reduced to writing or, indeed, the deposition of everyone she might have talked to."

Mackelprang v. Fidelity Nat'l Title Agency, 2007 WL 119149 (D.Nev. 2007) Rejecting request for unfettered access to plaintiff's MySpace accounts, despite argument that it might provide impeachment information or might disclose other factors that caused the plaintiff's emotional distress.

Romano v. Steelcase, Inc., 907 N.Y.S. 2d at 650 (N.Y. Sup. Ct. 2010) New York Supreme Court held, in an action seeking damages for loss of enjoyment of life, social media discovery seeking information regarding this type of loss, as well as the full extent of the plaintiff's injuries is generally permissible. The court further held that additional evidence contained on the profiles was likely to be both material and necessary to the defense of the action. Court determined that the plaintiff did not have any expectation of privacy in the contents of the private portions of her social media sites and the defendant's need for the information outweighed any privacy concerns. Further discovery allowed as plaintiff asserted that she was largely confined to her bed at home despite certain Facebook photographs that showed her engaged in activities outside of the home.

THREE TYPES OF DISCOVERY ORDERS FOR SOCIAL MEDIA

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<u>ADVERSARY FOCUSED</u>	<u>COURT FOCUSED</u>	<u>OWNER FOCUSED</u>
<p>Requesting Party Review. Usually upon a showing of relevance in the public portions of the site, requesting party is given full access to social media site by provision of <i>usernames and passwords or consent</i> to the social media company.</p> <p><i>Thompson v. Autoliv ASP, Inc.</i>, 2012 WL 2342928 (D. Nev. 2012) (vehicular product defect claim with substantial injuries; plaintiff was ordered to provide all Facebook and MySpace account information to defendant for review under a detailed protocol).</p> <p><i>Leduc v. Roman</i>, 2009 CarswellOnt 843 (February 20, 2009) (opposing counsel authorized to review Facebook account in a loss of enjoyment of life claim resulting from a car accident).</p> <p><i>Romano v. Steelcase Inc.</i>, 907 N.Y.S.2d 650 (Sup. Ct. 2010) (Court ordered party to provide opposing counsel a <i>consent and authorization</i> for direct access).</p> <p><i>Largent v. Reed</i>, No. 2009-1823, slip op. (Pa. C.P. Franklin Co. Nov. 8, 2011) (Party ordered to produce <i>Facebook username and password</i> for discovery of physical activity related to damage claims).</p> <p><i>Zimmerman v. Weis Markets, Inc.</i>, 2011 WL 2065410 (Pa. Com. Pl.) (Plaintiff ordered to provide opposing party <i>all passwords and log-in information</i>).</p>	<p>In Camera Review. Judge is given access to the social media site directly (by provision of password or "frending" the litigant), and reviews site content for discoverability. Requires Court time and technological proficiency, as well as exposure to significant irrelevant information.</p> <p><i>Barnes v. CUS Nashville, LLC</i>, 2010 WL 2265668 (M.D. Tenn.) (in a personal injury case, Judge offered to "friend" the plaintiff on Facebook to review her account and disseminate relevant information to the parties involved).</p> <p><i>Offenback v. L.M. Bowman, Inc.</i>, 2011 WL 2491371 (M.D. Pa.) (after conducting full review of Plaintiff's Facebook account, and a very limited production, Judge opined that the account "reveals little beyond routine communications with family and friends, an interest in bluegrass and country music, a photography hobby, sporadic observations about current events, and a passion for the Philadelphia Phillies that was not dampened after he moved to Kentucky from Pennsylvania.")</p> <p><i>Bass ex rel. Bass v. Miss Porter's School</i>, 2009 WL 3724968 (D. Conn.) (Judge ordered plaintiff to release a complete copy of Facebook to the court for review stating that "production should not be limited to Plaintiff's own determination of what may be 'reasonably calculated to lead to the discovery of admissible evidence.'").</p> <p><i>Tompkins v. Detroit Metro. Airport</i>, 2012 WL 1793320 (E.D. Mich. Jan. 18, 2012) (holding that defendant did not prove that plaintiff giving authorization to her Facebook was reasonably calculated to lead to the discovery of admissible evidence and that this request was overly broad).</p>	<p>Producing Party Review. Fashion a searching and review protocol or methodology that locates relevant information, and pre-production review by site owner or their counsel. Direct access or Court review found to be inappropriate and overly broad.</p> <p><i>EEOC v. Simply Storage Management, LLC</i>, 270 F.R.D. 430 (S.D. Ind. 2010) (in case alleging employment discrimination and emotional damages, employer defendant sought full access to complainants' Facebook accounts; Court ordered that "Discovery is intended to be a self-regulating process that depends on the reasonableness and cooperation of counsel. Here, in the first instance, the EEOC's counsel will make those [relevancy] determinations based on the guidelines the court has provided."). Court also noted that discovery of social media content "</p> <p>"requires the application of <i>basic discovery principles in a novel context</i>. ... [T]he challenge is to define appropriately broad limits – but limits nonetheless – on the discoverability of social communications in light of a subject as amorphous as emotional and mental health, and to do so in a way that provides meaningful direction to the parties."</p> <p><i>Mackerprang v. Fidelity Nat. Title Agency of Nevada, Inc.</i>, 2007 WL 119149 (D. Nev.) (Court denied defendant's discovery request for all of plaintiff's MySpace messages because they were overly broad and "Nothing . . . prevents Defendants from serving such discovery requests on Plaintiff to produce her Myspace.com private messages that contain information regarding her sexual harassment allegations in this lawsuit.").</p>

OTHER TRIAL ISSUES FOR SOCIAL MEDIA

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<u>PRIVACY OBJECTIONS</u>	<u>FEDERAL LAW</u>	<u>JUROR MISCONDUCT (EXAMPLES)</u>
No Established Exceptions. There are no known cases that recognize a broad social media privacy right that would protect social media from civil discovery process served on the social media site owner.	Barrier to Direct Discovery to Social Media Provider. Federal law will pose a barrier to direct civil subpoenas to many social media providers because of certain restrictions on their ability to produce information.	<i>Dimas-Martinez v. State of Arkansas</i> , 2011 Ark 515, 2011 Ark. LEXIS 593 (Ark. Dec. 8, 2011) (murder conviction overturned on juror misconduct for accessing Twitter during trial and tweeting "Choices to be made. Hearts to be broken.", "if its wisdom we seek ... we should run to the strong tower.", and "it's over" during trial and deliberation). The Court wrote: "Finally, we take this opportunity to recognize the wide array of possible juror misconduct that might result when jurors have unrestricted access to their mobile phones during a trial. Most mobile phones now allow instant access to a myriad of information. Not only can jurors access Facebook, Twitter, or other social media sites, but they can also access news sites that might have information about a case. There is also a possibility that a juror could conduct research about many aspects of a case."
	<i>Stored Communications Act ("SCA")</i> , 18 U.S.C. secs. 2701-11 (imposing various restrictions on the ability of service providers to produce information in civil litigation).	<i>Crispin v. Christian Audigier, Inc.</i> , 717 F. Supp. 2d 965 (C.D. Cal. 2010) (Applying the SCA to Facebook wall postings and comments on MySpace and finding that they are in electronic storage for purposes of the SCA)
	<i>Theofel v. Farey-Jones</i> , 359 F.3d 1066 (9th Cir. Feb. 17, 2004) ("The subpoena power is a substantial delegation of authority to private parties, and those who invoke it have a grave responsibility to ensure it is not abused.")	<i>State v. Smith</i> , No. M2010-01384-CCA-R3-CD (Ct. of Crim. App. March 2, 2012). Court did not overturn a conviction because of communication between juror (Scott Mitchell) and witness (Adele Lewis) as the Court found the following to be a social communication that did not seek improper information: "Scott Mitchell: 'A-dele!! I thought you did a great job today on the witness stand ... I was on the jury ... not sure if you recognized me or not!! You really explained things so great!!' Adele Mauer Lewis: 'I was thinking that was you. There is a risk of a mistrial if that gets out.' Scott Mitchell: 'I know ... I didn't say anything about you ... there are 3 of us on the jury from Vandy and one is a physician (cardiologist) so you may know him as well. It has been an interesting case to say the least.'"

Electronic Evidence Trial Checklist

- Relevancy
 - Rules of Evidence - §90.401 & §90.402
 - Does the electronic evidence make the existence of a material fact more probable or less probable than it would without the electronic evidence?
 - Low Threshold
 - YES
 - Need to authentic electronic evidence
 - Need to survive hearsay objections
 - Jury will then consider the weight of the evidence
 - NO
 - Electronic evidence will be excluded
- Authentication
 - Rules of Evidence: § 90.901 & § 90.902
 - Electronic Evidence is NEVER self-authenticating
 - Foundation required to for the jury to reasonable find that the electronic evidence is what it is purported to be
 - Reliability
 - Authentication through Author
 - Best Method
 - Person has the knowledge of what is contained in the electronic evidence because he/she created it
 - Circumstantial Authentication
 - 1.) Appearance
 - 2.) Contents
 - 3.) Substance
 - 4.) Internal pattern
 - 5.) Distinctive Characteristics
 - 6.) Consistency
 - 7.) Links to Author
- Hurdles of Evidentiary Rules
 - Hearsay Rules of Evidence - §90.801-§90-807
 - Admission by a Party Opponent §90.803 (18)
 - Business Records Exception §90.803 (6)
 - Foundation through Custodian of Records or Business Records Cert.:
 - 1.) Made near or at the time of the event
 - 2.) By or from information transmitted by a person with knowledge
 - 3.) Kept in the course of regularly conducted business activity
 - 4.) That is was the regular practice of the business to make such a record
 - Spontaneous Statement, Excited Utterance, Present Sense Impression §90.803 (1)(2)(3):
 - Tweets, Checking into a location, Status Updates
 - Best Evidence - § 90.953
 - Printouts of electronically stored information
 - Shown to reflect the data accurately = admissible
 - Probative Value Outweighing Prejudicial Effect
 - Rules of Evidence: §90.403
 - Weighing the probative value of the evidence against the danger of unfair prejudice
 - Evidence that is relevant will not excluded when the probative value substantially outweighs the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence.

Electronic Evidence Caselaw

- Authentication Case Law:
 - U.S. vs. Safavian, 435 F. Supp. 2d 36 (D.C.C.) 2006
- Authentication and Circumstantial Evidence:
 - State of Florida vs. Loyer, 617 So. 2d 620 (5th D. C.A.) 1997 - Evidence may be authenticated by appearance, contents, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances. Circumstances recognized as sufficient to meet the test of authenticity include when a letter is written disclosing information which is likely known only to the purported author.
 - U.S. vs. Siggiqui, 235 F. 3d 1318 (11th Cir.) 2000 – Electronically Evidence can be authenticated circumstantially by way of “appearance, contents, substance, internal pattern, distinctive characteristics, evidence of the process or system that produced it [...] all taken in conjunction with the circumstance”.
 - Just because a name or purports to bear a name on an email is not sufficient authentication. However, a username can be used as circumstantial evidence
 - State vs. Church (Tenn. Crim. App. 2013) –MySpace Nickname, Messages, and Photographs
 - See also
 - Coday vs. State, 946 So. 2d. 988 (Fla. 2006)
 - U.S. vs. Phanknikone, 605 F. 3d 1099 (11th Cir. 2010)
 - U.S. vs. Lebowitz, 676 F. 3d 1000 (11th Cir. 2012)
 - Griffin vs. State, 19 A. 3d 415 (2011) – Need to authenticate through circumstantial evidence because there is the concern that electronic evidence could be created by a third party under the guise of another.
- Authentication of Various Types of Electronic Evidence:
 - Email: Manuel vs. State, 357 S.W. 3d 66 (Tex. App. Tyler 2011)
 - Chat Log: U.S. vs. Simpson, 152 F. 3d 1241
 - Website: Yisrael vs. State, 993 So. 2d 952 (Fla.) 2008
 - Facebook Messages: Campell vs. Texas, (Tex. App.) 2012
- Weighing Probative Value
 - Rice vs. Reliastar Life Insurance Co., 2011 U.S. Dist. LEXIS 32831 (M.D. La. Mar. 29, 2011)
 - Quagliarello vs. Dewees, 2011 U.S. Dist. LEXIS 86914 (E.D. Pa. Aug 4, 2011)
 - U.S. vs. Castillo, 409 F. App'x 250 (11th Cir. 2010)