

“But You Said It on Facebook”

Discovery, Evidentiary and Other Legal Issues in Social Media



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Strength ★ Experience ★ Innovation

What is Social Media?



- **Facebook**



- **Twitter**



- **LinkedIn**



- MySpace

- Blogs

- FourSquare

- Yelp

- Location-based platforms

Social Media is Everywhere



- Facebook has over 1/2 Billion users and growing
- Twitter usage climbed to 13% of adult Americans
 - (up from 8% in November)
- LinkedIn claims 100 Million members

Your Clients Are Using Social Media



- **According to Citibank Small Business Survey –**
- **--36% of small business owners use social networking sites such as Facebook, Twitter or LinkedIn to market their business**
- **--Up from just 19% one year ago**

Social Media in Litigation



- **Employment Litigation**
 - “I can’t lift anything (except a keg--see my Facebook pictures)”
 - “To Friend or Not to Friend, that is the question”
- **Products Liability Litigation**
 - Social Media Monitoring proves knowledge of defects
- **Trade Secrets/Non-Compete Litigation**
 - FourSquare check-in at competitor’s location
- **Securities/Corporate Litigation**
 - Tweet about “great news” at work = insider trading tip
 - Incognito tweets about purchase target influence price

Social Media Discovery



- Social Media Discovery – make it part of your overall discovery strategy in all cases, not just the big ones
 - Discovery Requests
 - Deposition Topics
 - Electronically Stored Information
 - Requests for Admission (authentication)
- Direct and Third-Party (Social Media Sites)
- **DATA PRESERVATION OBLIGATIONS**

Social Media Discovery



- **Discovery Requests/Deposition Topics:**
 - **Purposes of Social Media usage**
 - ✦ Marketing? Research? Competitive Intelligence? Customer Service?
 - **\$\$\$ invested in Social Media – marketing/other**
 - **Social Media Policies**
 - **Social Media Sites approved/used by company**
 - **Social Media Monitoring tools used**
 - **Computers used by employees/volunteers**
 - **Identify Social Media users on behalf of company**
 - ✦ Employees only? Course and Scope?
 - ✦ Volunteers? Third-parties? Trade organizations?

Social Media Discovery



- **Electronically Stored Information**
 - **All formats**
 - **Native/metadata**
 - **Hand-held devices**
 - ✦ Smart phones
 - ✦ Laptops
 - ✦ Tablets (iPad, etc.)

Social Media Discovery



- **Requests for Admission/Authentication**
 - Identify/admit computer usage for Social Media posts
 - Deposition questioning:
 - ✦ “Aware of computer’s unique identifying information?”

Social Media Discovery



- Third-Party/Social Media Sites (two-step process)

- 1) Written request for preservation of information
 - Full URL to Facebook profile
 - School/networks
 - Birth date
 - Known email addresses
 - Other identifying info (if known)
 - Period of activity at issue

- 2) Issue subpoena for production of information

Social Media Discovery



- Subpoenas to Social Media Sites
 - Each Social Media site has its own procedures for complying with subpoenas, court orders and search warrants – and they change from time to time. **CHECK THE SITE FIRST.**
 - **Good Resource:**
 - ✦ “SEARCH – The online resource for just and public safety decision makers”
 - ✦ <http://www.search.org/programs/hightech/isp/default.asp#212>

Social Media Discovery



- **Independent Searching**
 - **Consider outside consultant/specialist**
 - **Ensure finding deleted/cached entries**
 - **Test employee search capabilities regularly**
 - **Find alias user names**

Social Media Discovery (the other side)



- Your client's Social Media usage
- Conduct Independent Searches
- Client's Social Media Policies (or lack of same)
- Client's monitoring policies and practices
- Define course & scope of employee activity
- Ensure authenticity/chain of custody/
 - Same issues as other electronic discovery

Admissibility of Social Media Evidence



- Social Media Evidence is simply another form of electronically stored evidence
- Same evidentiary rules apply
- Need to address:
 - Relevance (usually not difficult)
 - Authenticity
 - Not Hearsay (truth of the matter asserted or another purpose)
 - Best Evidence (courts generally accept authentic printouts)
 - Probative Value vs. Prejudicial Effect

Authenticity of Social Media Evidence



- **Personal statement of author**
 - Deposition testimony
 - Interrogatories/Requests for Admission
- **Third-Party authentication**
 - Affidavit/testimony of person who conducted search, found webpage, preserved/printed page/relevant dates
 - Computer forensics experts
- **Social Media Site Authentication**
 - Subpoenas

Hearsay & Social Media Evidence



- **Identify all purposes of Social Media evidence**
 - Evidence can be offered for more than one purpose, and may be admissible for one but not the other
- **Truth of the matter asserted – invokes Hearsay rules**
 - Exception? Statement against party interest
 - Reputation among peers/community – Facebook, MySpace
- **Pattern, knowledge, intent – other non-hearsay uses**
 - E.g., domestic infidelity – not for truth, but to show relationship

Social Media Evidence is Just Evidence



- Don't forget evidentiary basics
- Social Media is really just a new SOURCE of evidence – not really a new TYPE of evidence
- Must still be preserved
- Chain of Custody matters
- Ethical considerations in gathering evidence still apply
 - Perhaps even more so because of ease of access to irrelevant but scandalous information

Other Social Media Legal Issues



- **Intellectual Property**
 - **Copyright**
 - **Trademark**
 - **Trade Secrets**

- **Defamation**
 - **Identity of speaker**
 - **Course and Scope of Employment**
 - **Opinion vs. statement of fact**

Other Social Media Legal Issues



- **Employment Practices**
 - **Hostile workplace (“Friending” subordinates)**
 - **Confidential Information**
 - **Trade Secrets**
 - **Background checks/Private Information**

Contact Information



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