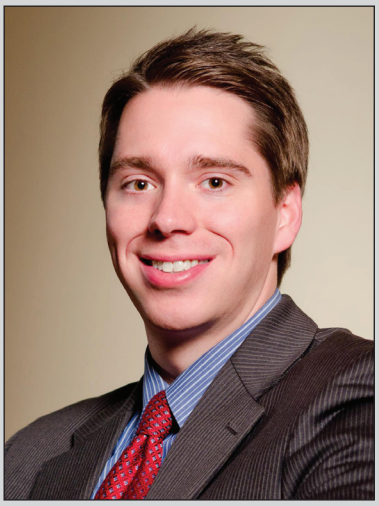
#DISCOVERINGSOCIALMEDIA: NAVIGATING THE UNCHARTED WATERS OF SOCIAL MEDIA DISCOVERY DURING LITIGATION



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INTRODUCTION

Social media are quickly becoming an integral part of our lives. A Pew Research Center 2011 survey reported that 64 percent of American adults used social media in 2011, and its 2009 survey reported that 73 percent of teens used social media.[1] According to The Nielsen Company, 4 out of 5 active internet users visit social media websites and blogs, which account for 23 percent of their total online time.[2] While it may be an overstatement, Gartner, a technology research and advisory company, predicts that social media will replace e-mail as the dominant form of online communication by 2014.[3]

The prevalence and impact of social media simply cannot be ignored in today's world. With the advent of social media platforms such as Facebook, MySpace, LinkedIn, Twitter, Blogger, Flikr, and YouTube come vast databases of information about the everyday lives of individuals. And as a character pointedly declared in the movie *Social Network*, "[t]he Internet's not written in pencil, . . . it's written in ink."[4] This naked truth does not have to be explained to former Congressional Representative Anthony Weiner, who resigned from Congress after an explicit photograph sent to a Twitter user was publicly leaked,[5] or to Congressional Representative Christopher Lee, who resigned after reports surfaced that he emailed a shirtless photograph to a woman he met on Craigslist.[6] Social media have even been credited with spurring revolution and contributing to the fall of governments. Social media are, without a doubt, becoming powerful tools for creating, maintaining, and shaping human interactions and social connections. In so doing, they are concomitantly creating immense repositories of information that can later be discovered.

Social media users post information cataloguing their daily activities and thoughts – often times without considering the consequences of sharing such information. Facebook alone has more than 800 million active users[7] – users who share more than a billion pieces of content each day, including status updates, wall posts, photographs, videos, blogs, "friends" lists, information about "events," political causes and affiliations, leisure pursuits, "likes," and location "check-ins."[8] User profiles contain personal data such as contact information, relationship status, employment history, education, and general interests. Facebook also has an internal communication system that includes both traditional email-type messaging and instant messaging.

Not only do individuals use social media; so, too, do corporations. Recognizing the powerful influence social media have on consumers, businesses regularly market with social media, garnering hundreds of thousands – sometimes millions – of consumer followers. In fact, more than 79 percent of the top 100 companies in the *Fortune* Global 500 index companies are using some form of social media.[9] Many corporations also actively monitor social media communications and work to shape their online reputation with social media campaigns.

The information generated on social media networks may later become relevant evidence in criminal or civil proceedings. Social media are, therefore, an important source of discovery during litigation. But because the social media phenomenon is a relatively new one, it is unclear how courts will treat issues involving discovery of social media information; what is clear, however, is that litigators need to think about social media discovery, develop well-reasoned, consistent strategies for both obtaining and responding to social media discovery, and incorporate social media discovery into a comprehensive litigation plan. Otherwise, they may not only compromise their clients' cases by failing to discover vital information or by revealing damaging details, but litgators may also find

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themselves facing sanctions for spoliation of evidence or ethical complaints for running afoul of the Rules of Professional Conduct.

SCOPE OF SOCIAL MEDIA DISCOVERY

While social media are an important consideration during litigation, a limited number of published decisions exist defining the scope of permissible social media discovery. A Pennsylvania trial court noted a "void not only [of] binding authority on this emerging area of discovery, but also persuasive authority."[10] A federal court in Indiana stated that the challenge "is to define appropriately broad limits – but limits nevertheless – on the discoverability of social communications . . . and to do so in a way that provides meaningful direction to the parties."[11] What limitations Ohio courts will set concerning the discovery of social media information is less than clear at this point.

The inquiry may focus on whether social media users have a right to privacy. For example, the Ohio Court of Appeals for the Eleventh District in a child-custody case determined that the appellant's MySpace postings stating that she practiced sado-masochism, was a bisexual and a pagan, and planned to use illicit drugs, were admissible because they were open to the public and appellant admitted in open court that she wrote them. The court explained that, under these circumstances, the appellant "can hardly claim an expectation of privacy regarding these writings."[12] Similarly, a New Jersey federal district court ordered disclosure of social media data that had been "shared with others," declaring the plaintiff's "privacy concerns are far less where the beneficiary herself chose to disclose the information."[13] Other courts have rejected arguments that social media communications are, by their very nature, confidential or privileged and therefore beyond the reach of discovery.[14]

Social media networks provide users with privacy settings which permit them to control who may access their social media information. Clients should be advised to restrict access to their social media information. They should also be advised to be mindful of what information they post on social media. Social media information that is open to the public may be accessed by the opposition and used against them during litigation. Moreover, failure to restrict access to social media communications may be viewed as a public dissemination undeserving of protection from the discovery process. A California appellate court, for example, deemed the posting of alleged private facts on MySpace to be a publication to the "public at large," even though the plaintiff may have expected only a limited audience and removed the posting after six days. Accordingly, her invasion of privacy claim failed. [15]

There is also a danger that courts will view *all* social media communications – even if restricted to "friends only" – to be public disclosures. In *Romano v. Steelcase Inc.*, a New York personal injury case, the defense sought access to the plaintiff's current and historical Facebook and MySpace data after viewing the public portions of the plaintiff's social media profiles – which apparently revealed an active lifestyle contrary to the plaintiff's claimed injuries.[16] Specifically addressing the plaintiff's Fourth Amendment privacy concerns, the trial court determined the plaintiff had no reasonable expectation of privacy because MySpace and Facebook contain warnings that complete privacy is not guaranteed, despite the use of any privacy settings. The court took the logical leap that the plaintiff, therefore, "consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings."[17] A Pennsylvania trial court agreed that social media postings are public communications. It explained:[18]

> Facebook, MySpace, and their ilk are social network computer sites people utilize to connect with friends and new people. That is, in fact, their purpose, and they do not bill themselves as anything else. Thus, while it is conceivable that a person could use them as forums to divulge and seek advice on personal and private matters, it would be unrealistic to expect that such disclosures would be considered confidential.

The court emphasized that terms and privacy policies put social media users on notice that their communications are not private because site operators may review and disclose such communications to third parties if they deem it appropriate.[19] Another Pennsylvania trial court observed: "By definition, a social networking site is the interactive sharing of your personal life with others; the recipients are not limited in what they do with such knowledge."[20] A federal district court in California, on the other hand, recognized that social media networks such as MySpace and Facebook not only provide public messaging services but also provide private ones in that the user may select who may access her social media information.[21]

In *EEOC v. Simply Storage Management*, the U.S. District Court for the Southern District of Indiana determined that the designation of social media information as "private" or otherwise blocking it from public view does not – for that reason alone – prohibit discovery. The court noted that privacy concerns may be addressed with an appropriate protective order. [22] In one of the few appellate decisions addressing social media discovery, a New York court of appeals agreed with this line of reasoning when it held that "postings on plaintiff's online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service's privacy settings to restrict access."[23]

While courts do not appear very receptive to arguments that social media communications are private, confidential, or somehow

privileged and, therefore, beyond the scope of permissible discovery,[24] courts have nevertheless imposed boundaries for social media discovery. Most courts consider the issue of permissible social media discovery in light of "basic discovery principles[,]" albeit "in a novel context."[25]

Federal Rule of Civil Procedure 26(b)(1) permits discovery "regarding any non-privileged matter that is relevant to any party's claim or defense." The federal rules provide a framework for conducting electronic discovery, obliging litigants to identify, preserve, collect, and produce electronically stored information ("ESI") very early in a case. The 2006 amendments to Rule 34 of the Federal Rules of Civil Procedure clarify "that discovery of electronically stored information stands on equal footing with discovery of paper documents" and recognize that ESI "may exist in dynamic databases and other forms far different from fixed expression on paper."[26] ESI is arguably anything that can be digitally stored, whether it is stored on a computer hard disk in someone's home or office or on a third-party provider's servers on the other side of the county. The Advisory Committee explained the reasoning behind defining ESI broadly:[27]

> The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically. A common example often sought in discovery is electronic communications, such as e-mail. The rule covers – either as documents or as electronically stored information – information "stored in any medium," to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

Similarly, the Ohio Rules of Civil Procedure provide for discovery of ESI so long as it "is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . ."[28] Certainly, social media fits the definition of ESI.[29]

Social media information is discoverable, then, if the substance of the information is relevant to a party's claim or defense. A party's admissions against interest on social networking websites, for example, would be discoverable.[30] A New York trial court considered relevant a plaintiff's social media postings concerning her dancing activities, which contradicted her claim in divorce proceedings that she was totally disabled and unable to work in any capacity.[31]

The court in the *EEOC* case determined the scope of permissible discovery by analyzing the allegations set forth in the claimants' complaint. The court found that limiting discovery to social media communications directly referencing matters alleged in the complaint was too restrictive and inconsistent with the liberal discovery standard.[32] Rather, the court crafted the scope of social media discovery more broadly "to capture all arguably relevant materials."[33] Because the claimants alleged depression, stress disorders, and other similar injuries, the court held the appropriate scope of discovery was:[34]

> [A]ny profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries), and [social networking] applications for [the plaintiffs for a specified period] that reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state.

The court further held communications from third parties were also discoverable to the extent they put the claimants' communications in context. The court's relevancy test was not only applicable to verbal communications but also to photographs and videos posted on the claimants' social media profiles. Notably, however, the court placed the burden upon the claimants to produce responsive social media information. The defendant could thereafter inquire during depositions "about what has and has not been produced and can challenge the production if it believes the production falls short . . . ."[35]

Given the current state of the law, lawyers should approach social media discovery just like any other object of discovery. Formal requests for social media information should be crafted in accordance with Civil Rules, and impermissible discovery requests should be resisted with appropriate objections and, if necessary, by seeking court intervention.

PROTECTING SOCIAL MEDIA INFORMATION FROM DISCLOSURE

Counsel should be prepared for their opposition to push for broad access to their clients' social media information. In the context of personal injury cases, the defendant will likely argue broad access is warranted because the plaintiff has put her physical and mental health at issue. One court held that "[w]ith the initiation of litigation to seek a monetary award based upon limitations or harm to one's person, any relevant, non-privileged information about one's life that is shared with others and can be gleaned by defendants from the internet is fair game in today's society."[36] The proverbial "fishing expedition" should be resisted, though, and defendants should be pressed to narrowly tailor their discovery requests to relevant information or information likely to lead to the discovery of admissible evidence.

Requests for login credentials or "any and all" social media information simply cast too wide a net, especially when the existence of the information sought is speculative, the information is only tangentially relevant, and there is a high risk that prejudicial, private information will be disclosed. As one court acknowledged, "anything a person says or does might in some theoretical sense be reflective of her emotional state, but that is hardly justification for requiring production of every thought she may have reduced to writing or, indeed, the depositions of everyone she may have talked to."[37] When overbroad requests are made, plaintiff's counsel should demand that the defendant identify what social media information he believes exists, explain why he believes the information exists, and advise why he believes the information is relevant to the case at issue.

In *Muniz v. United Parcel Service, Inc.*, the U.S. District Court for the Southern District

of California quashed, in part, a subpoena for social media information because the subpoena was vague, overbroad, and called for irrelevant information. The court held that there was no basis to obtain private social media information, even though the defendant was in possession of public social media postings that referenced the litigation. Personal feelings, impressions, speculation, and opinions about the case were wholly irrelevant and not "admissions" as the defendant argued. Moreover, the subpoena was "not 'precisely framed.'"[38]

In *Patterson v. Turner Construction Company*, a New York court of appeals reversed the trial court's decision to compel a blanket authorization for all of the plaintiff's Facebook records because "it is possible that not all Facebook communications are related to the events that gave rise to plaintiff's cause of action[.]" The court remanded the issue to the trial court for "more specific identification of plaintiff's Facebook information that is relevant . . . ."[39] Another New York court of appeals, in *McCann v. Harleysville Ins. Co. of N.Y.*, held the trial court properly denied the defendant's motion to compel a blanket authorization for plaintiff's Facebook account because the request was overly broad. The trial court's denial of a second motion to compel social media information was also proper because the defendant failed to "establish a factual predicate with respect to the relevancy of the evidence." The court found that the "defendant essentially sought permission to conduct 'a fishing expedition' into plaintiff's Facebook account based on the mere hope of finding relevant evidence . . . ."[40]

Other courts, however, have granted blanket access to social media information. In *Romano*, for example, the trial court ordered the plaintiff to sign an authorization allowing the defendant to access her Facebook and MySpace accounts, including current and historical information, deleted pages, and other information.[41] Similarly, Pennsylvania trial courts in *McMillen v. Hummingbird Speedway, Inc.* and *Zimmerman v. Weis Markets* compelled production of the plaintiff's login credentials.[42] And while another Pennsylvania trial court in *Largent v. Reed* acknowledged that requests for social media discovery must be made with "a good faith basis that [they] will lead to relevant information[,]" it nevertheless granted the defendant blanket access to the plaintiff's social media account because her profile was, at one time, public.[43]

Yet another Pennsylvania trial court in *Arcq v. Fields* considered the issue of social media discovery. It noted "one glaring distinguishing factor" to the *McMillen*, *Zimmerman*, *Largent*, and *Romano* decisions: they granted broad access to social media only after the public portions of the plaintiff's social media profiles had been viewed and revealed relevant information. Thus, the defendants in those cases had demonstrated a good faith reason to believe that the private portions of the plaintiffs' social networks also contained relevant information. The *Arcq* court denied the defendant's motion to compel because the defendant had not identified a basis for believing the private portions of plaintiff's profile contained discoverable evidence.[44]

A federal district court in New York applied a similar analysis when it denied the defendant's motion to compel the plaintiff's log-in credentials and a release allowing it to obtain the plaintiff's private social media information.[45] The defendant maintained that the plaintiff's profile picture, which apparently depicted her smiling, contradicted her claim that she suffered ongoing effects from osteonecrosis of the jaw and therefore rendered her private social media discoverable. The court found that this was insufficient "to warrant an inference . . . that Plaintiff's private Facebook pages contain information relevant to her claims."[46] It reasoned that "[e]ven if Plaintiff is smiling in her profile picture, which is not clear to the court, one picture of Plaintiff smiling does not contradict her claim of suffering, nor is it sufficient to warrant a further search into Plaintiff's account."[47]

Likewise, a federal district court in Nevada denied the defendant's motion to compel plaintiff's private communications on MySpace because the requested discovery amounted to a "fishing expedition" and the defendant "ha[d] nothing more than suspicion as to what information *might* be contained in the private messages."[48] The court noted that the defendant had no information about the identities of the persons with whom the plaintiff allegedly had exchanged communications or the subject matter of the alleged communications.[49] The defendants wholly failed to identify any relevant basis for compelling production of plaintiff's private communications.[50]

Social media discovery is objectionable on other grounds as well. While courts have declined to recognize a social media privilege, a person's privacy interests may, however, provide a basis to resist discovery as unreasonably burdensome, oppressive, or prejudicial or because the discovery is sought for an improper purpose.[51] Social media discovery may also be resisted because it implicates information that would violate a recognized privilege, such as the physician-patient or attorney-client privilege (so long as the privilege has not been waived).

In *Ledbetter v. Wal-Mart Stores, Inc.*, the U.S. District Court for the District of Colorado denied the plaintiff's motion for a protective order concerning his communications on Facebook, MySpace, and Meetup.com because the spousal privilege was waived when his wife alleged loss of consortium and the physician-patient privilege was waived when he alleged physical and mental injuries.[52] A federal district court in California viewed the plaintiff's social media communications concerning her attorney's impressions and her discussions with her attorney to have waived the attorney-client privilege as well.[53]

Litigants have also sought protection from social media discovery pursuant to the Stored Communications Act ("SCA"), which is

part of the Electronic Communications Privacy Act, Pub. L. No. 99-508, 100 Stat. 1848 (1986). The SCA prohibits "providers" of communication services from divulging private communications to certain individuals and entities unless the divulgence is to an intended recipient or express permission from the sender is obtained. The SCA "creates a set of Fourth Amendment-like privacy protections by statute . . . ."[54]

The SCA divides providers into two categories: electronic communications services ("ECSs") and remote computing services ("RCSs"). An ECS is "any service which provides to users thereof the *ability to send or receive wire or electronic communications*."[55] The statute prohibits an ECS provider from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service."[56] An RCS is "the provision to the public of computer *storage or processing* services by means of an electronic communications system . . . ."[57] The SCA prohibits an RCS provider "from knowingly divulg[ing] to any person or entity the contents of any communication which is carried or maintained on that service . . . ."[58]

In *Crispin v. Christian Audiger, Inc.*, the plaintiff moved to quash subpoenas seeking specified information from Facebook, MySpace, and another social networking provider.[59] The plaintiff argued, among other things, that the SCA prohibited disclosure of his social media communications.[60] The court found that depending on the particular function of the social media provider, it acts as an ECS and/or an RCS.[61] The court, therefore, quashed those portions of the subpoenas seeking private messages and remanded the matter for further discovery on the issue of whether the plaintiff's privacy settings were utilized concerning his wall postings and comments.[62] The SCA may not, however, apply to discovery requests submitted directly to a party litigant because the SCA only prohibits ECSs and RCSs from disclosing private, electronic communications.[63]

When seeking court protection during a social media discovery dispute, an in camera inspection may always be requested as a fallback position. One court even suggested that it would create a Facebook account and "friend" two non-parties so their profiles could be reviewed for relevancy.[64] Notwithstanding disagreements about what social media information may or may not be discoverable, the parties may also enter into a mutually agreeable protective order.

PRESERVING RELEVANT SOCIAL MEDIA INFORMATION

It is well established that a duty to preserve relevant evidence arises once a party reasonably anticipates litigation. Because social media communications are discoverable, counsel would be well advised to implement protocol, at the outset of litigation, to deal with their clients' relevant social media information.

Lawyers cognizant of social media issues will advise their clients to make "private" social media information and, more importantly, refrain from posting potentially relevant information on social networking websites. Such information might include photographs of their post-incident activities and commentary about the factual circumstances supporting (or not supporting) their claims, the nature and extent of their injuries, their course of treatment, and their impressions about the litigation process in general or the lawyers and judges participating in that process.

Despite their lawyers' best advice, though, clients will most certainly continue to be active on their social media accounts and, consequently, may generate social media information relevant to their lawsuits. It is important to develop a framework for determining what social media information is germane to a particular matter and must be preserved for litigation. Common sense considerations and application of basic discovery principles should guide decisions concerning social media. From the perspective of the party responding to discovery requests, the focus should be to control disclosure of social media information. So long as the opposing party's request for social media information is properly tailored to elicit relevant information, it is incumbent upon the responding party to produce such information.

Counsel should implement a reasonable and defensible legal hold with regard to social media information. This will better position the responding party to resist overbroad discovery requests since he will be able to show his opposition – and the court – that he has taken measures to protect and produce relevant social media information. It is a good practice to advise clients in writing that they have a duty to preserve all potentially relevant information, including their social media communications. A similar letter can be sent to opposing parties advising them of their duty to preserve such information.

Preservation of social media information posits certain practical issues, though. Other than the data that may be located in clients' internet browser cache files, social media information is owned, maintained, and operated by the social media networks themselves. Moreover, social media information is dynamic, not static, in that the information is constantly changing with updates and deletions and is scattered across the internet and connected by different users or custodians.

This can make it difficult to "capture" all relevant social media information. Social media users may print their social media information as it appears on their computer screens or use software such as Adobe to capture social media webpages at a particular moment in time. These methods, however, fail to capture metadata and changes made to social media information over time. Facebook offers a "download your information" tool that can be used to download an entire copy of a user's profile, including the user's friends list, any photographs or videos that have been shared, wall posts, messages, chat conversations, and comments.[65] This procedure will not preserve, however, over 20 unique metadata fields associated within each Facebook item.[66] Services exist to preserve and capture social media information, including services offered by Iterasi, Smarsh, Arkovi, and LiveOffice. These options are better suited for institutional clients who have integrated social media into their business practices and wish to ensure preservation of potential discoverable social media information. Remember, however, that under the Federal Rules of Civil Procedure, a party is not obligated to provide discovery of ESI "from sources that the party identifies as not reasonably accessible because of undue burden or cost."[67] The Ohio Rules of Civil Procedure likewise protect parties from discovery requests that would subject them to "undue burden or expense."[68]

Failure to preserve relevant social media information presents legal and ethical hazards. Under no set of circumstances should lawyers advise their clients to delete relevant social media information. A Virginia lawyer was sanctioned for instructing his client to "clean up" his Facebook and MySpace pages (and later de-activate his Facebook page altogether) because he felt they might prejudice his client's wrongful death claim.[69] The court ordered the attorney to pay the defendants $542,000 in fees and expenses relating to the spoliation of evidence (his client was ordered to pay $180,000 in fees and expenses).[70] The court also permitted an adverse inference to be submitted to the jury.[71]

Even if spoliation of evidence is not the product of nefarious, deliberate conduct but, rather, results from indifference, ignorance, or negligence, sanctions may still be imposed.[72] While not specifically dealing with spoliation of social media evidence, a New York federal district court sanctioned 13 plaintiffs for failure to preserve electronic evidence.[73] It held that "[w]hile litigants are not required to execute document productions with absolute precision, at a minimum they must act diligently and search thoroughly at the time they reasonably anticipate litigation."[74]

DISCOVERING SOCIAL MEDIA INFORMATION

Most of the cases cited in this article involve plaintiffs resisting social media discovery. Obtaining social media evidence, however, is not only important to the defense but it is also important in prosecuting claims as well. In *Goldsmith v. Cooper*, the plaintiff alleged the defendants committed tortious acts, in part, by publishing that he was a "faggot" and "pedophile" on Facebook. In *Wolfe v. Fayetteville Arkansas School District*, the plaintiff brought claims against the school district arising out of being bullied by his peers. The plaintiff alleged his fellow students formed a Facebook group called "Everyone Hates [WW]," posted Facebook comments that were threatening and anti-homosexual, and even video recorded their physical assaults on him and posted them on YouTube.[75] For obvious reasons, social media discovery would be vital to proving these types of allegations. Social media discovery also "provide[s] an entire new avenue to show that a corporation had knowledge of product defects or other issues reported on social media sites" due to corporate monitoring of social media content for business purposes.[76]

Social media information may be obtained through both formal and informal discovery. Informal discovery might include web searches or reviewing publically accessible social media information. Lawyers should be careful not to cross the ethical-line boundaries, though, such as "friending" – either directly or through an agent – an opposing party or deceptively "friending" a third party to gain access to private social media information. Various bar associations have issued opinions calling this sort of behavior unethical.[77]

The safer route is to obtain social media information through formal discovery, such as through the use of interrogatories, requests for production of documents, requests for admission, and depositions. Lawyers may also have forensic examinations of computer hardware performed or issue subpoenas directly to social media providers, although the validity of the subpoenas may be challenged under the SCA.

CONCLUSION

Just because social media information is discoverable does not necessarily mean it will be admissible evidence at trial. Suffice it to say, counsel must be prepared to authenticate social media evidence and otherwise establish its admissibility.[78] Social media evidence carries with it unique risks of impersonation and fabrication.[79] It must therefore be authenticated with additional corroboration. Social media information may have other uses during litigation as well, such as providing ammunition to impeach a particular witness and serving as a source of information about prospective jurors during *voir dire*.

As social networking activities continue to produce more and more electronically stored information, the usefulness of this information during litigation will only increase. Uncertainty exists as to how Ohio courts will treat social media issues, but counsel must nevertheless have a game plan for handling such issues. Even though there is a danger any given court will grant unrestricted access to litigants' social media information, counsel should endeavor to maintain control over what information is turned over to the opposition by applying basic discovery principles (rather than permit the opposition to dig through all social media information and make its own relevancy determinations). As recognized by a trial court in Pennsylvania, the responding party is the "party with the greatest familiarity with his own Facebook account."[80] It is, therefore, "appropriate" and "substantially more efficient" for the responding party to conduct an initial review of the information and then, if warranted, object to disclosure of some or all of the potentially responsive information included in his account."[81]

Litigants are in a better position to object to overbroad and otherwise impermissible requests for social media information by taking reasonable steps to preserve social media evidence, by not being obstructionist, and by producing relevant social media communications when requested. If litigants are able to demonstrate they have done so, they will certainly be in a better position to credibly argue that their adversaries have failed to demonstrate a good faith belief that the requested social media information contains discoverable evidence and, therefore, are on a "fishing expedition," which results from ill-defined, imprecise conjecture that there must be more than has already been disclosed. Counsel should also be mindful that failure to think through the issues surrounding social media discovery may subject them (and their clients) to sanctions or ethical charges.

Endnotes

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11. *EEOC v. Simple Storage Management, LLC*, 270 F.R.D. 430, 434 (S.D. Ind. 2010).
12. *Dexter v. Dexter*, 11th Dist. No. 2006-P-0051, 2007 WL 1532084, ¶ 33, fn 4 (May 25, 2007).
13. *Beye v. Horizon Blue Cross Blue Shield of New Jersey*, 568 F.Supp.2d 556, *2, fn 3 (D.N.J. 2008).
14. *See, e.g., Largent v. Reed*, Pa. C.P. Franklin County No. 2009-1823 (Nov. 8, 2011); *McMillen v. Hummingbird Speedway, Inc.*, Pa. C.P. Jefferson County No. 113-2010 CD (Sept. 9, 2010).
15. *Moreno v. Hanford Sentinel, Inc.*, 172 Cal. App.4th 1125, 1130 91 Cal.Rptr.3d 858 (Ca. App. 2009).
16. *Romano v. Steelcase Inc.*, 30 Misc.3d 426, 427, 429, 907 N.Y.S.2d 650, (N.Y. C.P 2010).
17. *Id*. at 434.
18. *McMillen*, *supra*, at p. 3.
19. *Id*. at p. 5.
20. *Zimmerman v. Weis Markets, Inc.*, Pa. C.P. Northumberland County No. CV-09-1535, p.6 (May 19, 2011).
21. *See Crispin v. Christian Audiger, Inc.*, 717 F. Supp. 2d 965, 980 (C.D. Cal. 2010).
22. *EEOC*, *supra*, at 434.
23. *Patterson v. Turner Construction Company*, 88 A.D.3d 617, 618, 931 N.Y.S.2d 311, 2011 N.Y. Slip Op. 07572 (N.Y.App. 2011).
24. *See, e.g., Moreno*, *supra*; *Romano*, *supra*; *Patterson*, *supra*; *EEOC*, *supra*; *Largent*, *supra*; *McMillen*, *supra*; *Zimmerman*, *supra*; *Arcq*, *supra*.
25. *EEOC*, *supra*, at 434.
26. Fed.R.Civ.P. 34 Advisory Committee's Note on 2006 Amendments.
27. *Id*.
28. Civ.R. 26(b)(1).
29. *See Barnes v. CUS Nashville, LLC*, D.Tenn. No. 3:09-cv-00764, 2010 WL 2265668 (June 3, 2010).
30. *See, e.g.*, *Patterson*, *supra*, at 618 (recognizing social media information that "contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims" is relevant).
31. *B.M. v. D.M.*, 31 Misc.3d 1211(A), 927 N.Y.S.2d 814, 2011 N.Y. Slip Op 50570(U), *4 (N.Y. C.P. 2011)
32. *EEOC*, *supra*, at 435.
33. *Id*. at 436.
34. *Id*.
35. *Id*.
36. *Zimmerman*, *supra*, at p. 6.
37. *Mackelprang v. Fidelity Nat. Title Agency of Nevada*, D. Nevada No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149, *7 (Jan. 9, 2007).
38. *Muniz v. United Parcel Service, Inc.*, N.D. Cal. No. C-09-01987-CW (DMR), 2011 WL 311374, *7-*9 (Jan. 28, 2011).
39. *Patterson*, *supra*, at 617-18.
40. *McCann v. Harleysville Ins. Co. of N.Y.*, 78 A.D.3d 1524, 1524-25, 910 N.Y.S.2d 614, 2010 N.Y. Slip Op. 08181 (N.Y.App. 2010). *See also*, however, *Bass v. Porter's School*, D. Conn. No. 3:08cv1807 (JBA), 2009 WL 3724968, *2 (October 27, 2009) ("[R]elevance of the content of Plaintiff's Facebook usage as to both liability and damages in this case is more in the eye of the beholder than subject to strict legal demarcations, and production should not be limited to Plaintiff's own determination of what may be 'reasonably calculated to lead to the discovery of admissible evidence.'")
41. *Romano*, *supra*, at 435.
42. *McMillen*, *supra*; *Zimmerman*, *supra*.
43. *Largent*, *supra*, at p. 13, fn. 13.
44. *Arcq*, *supra*, at p. 2-3.
45. *Davids v. Novartis Pharmaceuticals Corp.*, D.N.Y. No. CV06-0431(ADS(WDW) (Feb. 24, 2012).
46. *Id.*
47. *Id.*
48. *Mackelprang*, *supra*, at *2 (emphasis added).
49. *Id*.
50. *Id*. at *6.
51. *See EEOC*, *supra*, at 434 (recognizing "privacy concerns may be germane to the question of whether the requested discovery is burdensome or oppressive and whether it has been sought for a proper purpose in the litigation . . ."). *Mackelprang*, *supra*, at *6 (holding the probative value of the alleged social media communications concerning the plaintiff's private sexual conduct was substantially outweighed by the prejudicial effect of admitting such communications as evidence in her sexual harassment lawsuit).
52. *Ledbetter v. Wal-Mart Stores, Inc.*, D. Colo. No. 06-cv-01958-WYD-MJW, 2009 WL 1067018, *1 (Apr. 21, 2009).
53. *Lenz v. Universal Music Corp.*, N.D. Cal. No. 5:07-cv-03783 JF (PVT), 2010 WL 4789099, *3-*5 (Nov. 17, 2010).
54. *Crispin v. Christian Audiger, Inc.*, 717 F. Supp. 2d 965, 972 (C.D. Cal. 2010).
55. 18 U.S.C. § 2510(15) (emphasis added).
56. 18 U.S.C. §§ 2702(a)(1), (b) (emphasis added).
57. 18 U.S.C. § 2711(2).
58. 18 U.S.C. § 2702(a)(2).
59. *Crispin*, *supra*, at 969.
60. *Id*. at 969.
61. *Id*. at 987-88, 990.
62. *Id*. at 976-991. *See also O'Grady v. Superior Court*, 139 Cal.App.4th 1423, 44 Cal.Rptr.3d 72, 79 U.S.P.Q.2d 1398, 34 Media L. Rep. 2089 (Ca.App. 2006).
63. *Largent*, *supra*, at p. 11-12.
64. *Barnes*, *supra*, at *1.
65. Facebook, Download Your information, at https://www.facebook.com/help/?page=18830 (last accessed March 11, 2012).
66. Next Generation E-Discovery Law & Tech Blog, "Discovery Procedures to Obtain Social Media Evidence – 3 Different Approaches," at http://blog.x1discovery.com/2011/11/04/discovery-procedures-to-obtain-social-media-evidence-%E2%80%93-3-different-approaches/ (last accessed March 11, 2012).
67. Fed.R.Civ.P. 26(b)(2)(B).
68. Civ.R. 26(C).
69. *Lester v. Allied Concrete Company*, Va.Cir.Ct. Nos. CL08-150, CL09-223, at ¶¶ 33-35, 48, 100 (September 1, 2011).
70. *Lester v. Allied Concrete Company*, Va.Cir.Ct. Nos. CL08-150, CL09-223 (October 21, 2011).
71. *Lester v. Allied Concrete Company*, Va.Cir.Ct. Nos. CL08-150, CL09-223 (December 6, 2010)
72. Ohio courts have discretion under Civ. R. 37 and their inherent authority to fashion sanctions for spoliation. Ohio courts are not uniform on the culpable mental state necessary for spoliation sanctions. A common formulation used by Ohio courts is "a strong showing of malfeasance – or at least gross neglect." *RFC Capital Corp. v. EarthLink, Inc.*, 10th Dist. No. 03AP-735, 2004 Ohio 7046, ¶ 88 (Dec. 23, 2004); *Brokamp v. Mercy Hosp. Anderson*, 132 Ohio App. 3d 850, 870 (1999); *Vernardakis v. Thriftway, Inc.*, 1st Dist. No. C-960173, 1997 WL 224905, *1 (May 7, 1997); *Cherovsky v. St. Luke's Hosp.*, 8th Dist. No. 68326, 1995 WL 739608, *16 (Dec. 14, 1995). *See also Penix v. Avon Laundry & Dry Cleaners*, 8th Dist. No. 91355, 2009 Ohio 1362, 2009 WL 792348, ¶ 52 (Mar. 26, 2009) (observing, in *dicta*, that "[e]ven if the court finds the evidence was not deliberately destroyed, negligent or inadvertent destruction of evidence is sufficient to trigger sanctions where the opposing party is disadvantaged by the loss.").
73. *Pension Comm. Of Univ. of Montreal Pension Plan v. Bank of Am. Secs., LLC*, 685 F. Supp.2d 456, 496, 2010 WL 184312 (S.D. N.Y. 2010).
74. *Id*.
75. See *Wolfe v. Fayetteville*, 600 F.Supp.2d 1011, 1017-1018, 243 Ed. Law Rep. 72 (W.D. Arkansas 2009).
76. Akin, *How to Discover and Use Social Media-Related Evidence*, 37 Litigation 32 (Winter, 2011).
77. *See* San Diego County Bar Ass'n Ethics Comm. Op. 2011-2; The Ass'n of the Bar of the City of New York Comm. On Prof'l Ethics Formal Opinion 2010-2; N.Y. State Bar Ass'n Comm. On Prof'l Ethics Opinion 843 (2010); and Philadelphia Bar Association Professional Guidance Committee – Ethics Opinion No. 2009-02.
78. *See*, *e.g.*, *State v. Bell*, 12th Dist. No. CA2008-05-0444, 2009 WL 1395857, at ¶¶ 29-31 (May 18, 2009) (holding Myspace communications are not "business records" and may be authenticated by witnesses with knowledge).
79. *See*, *e.g.*, *State v. Bell*, 145 Ohio Misc.2d 55, 882 N.E.2d 502, 2008-Ohio-592, ¶¶ 32-34 (C.P. Clermont County 2008) (recognizing a risk that social media communication may be fabricated or the source of the communications could be a third party but holding these concerns go to the weight – not admissibility – of otherwise properly authenticated social media evidence).
80. *Offenback v. L.M. Bowman, Inc.*, M.D. Pa. No. 1:10-CV-1789, 2011 WL 2491371, *3 (June 22, 2011).
81. *Id*.