A Plaintiff’s Perspective: Social Media Best Practices From Preservation through Discovery

by Harrison Cohen

Social media has changed the legal landscape. On one hand, social media evidence is a strong weapon. Imagine you are litigating a devastating auto accident. The defendant driver testifies she paid attention and was not in a hurry. You confront her with her own tweet from the morning of the accident, “I hate it when I fall behind schedule #neverlate #inhurley #getoutofmyway.”

On the other hand, the proverbial “social media smoking gun” can destroy a plaintiff’s case. Consider the look on your client’s face after testifying he is so “severely and permanently” injured he can no longer walk, now having to explain updates from his Nike+ Running mobile application showing he recently ran 10 miles.

Whether they know it or not, almost every person has terabytes of digital information. This “digital trail” is virtually endless and grows each day. Finding this trail and preserving it is a challenge. Digging for digital dirt raises ethical hurdles to consider, and courts are only beginning to address formal discovery of social media.

This article arms plaintiff’s counsel with best practices to preserve, investigate, and recognize social media discovery issues. Section I addresses the duty to preserve plaintiff’s social media and the necessity of a “social media hold.” Sections II and III discuss social media investigation methods and how to avoid ethical pitfalls. Lastly, this article explains issues surrounding formal discovery of social media.

I. The Duty to Preserve Plaintiff’s Social Media and the Necessity of a “Social Media Hold”

The duty to preserve requires a party to identify, locate, and maintain information relevant to litigation. When a party reasonably anticipates litigation, the duty to preserve arises. A plaintiff reasonably anticipates litigation when they meet with a lawyer, if not sooner. As a result, it is important to identify a plaintiff’s social media activity during your intake process. This will help you determine early on what you need to preserve, review, and possibly produce.

Consider adding the following questions to your intake form:

1. Do you have a social media account? For example: Facebook, Twitter, LinkedIn, YouTube, Pinterest, MySpace, Google+, Instagram, Flickr, Tumblr, Foursquare, Tagged, MyFitnessPal, Nike+, Fitness Buddy, MyLiveJournal. If you do, please list ALL of your accounts below and provide the following information:
   (a) User name(s) or e-mail you use for your social media account(s).
   (b) Do you have privacy restrictions on your social media account(s)?
   (c) Who has access to your social media account(s)?
   (d) Do you ever post anything about your emotional state/physical or mental health?
   (e) Have you had any social media activity site since the incident? If yes…
      • Have you posted about your accident/injury, emotional state, or physical/mental health since the incident?
      • Have you posted anything about events/appointments you went to since the incident?

2. Do you have social media accounts that you no longer use? If you do, please list ALL the accounts you no longer use and provide the following information:
   (a) When is the last time you posted on that social media account(s)?
   (b) What name(s) did you use for yourself for those social media account(s)?

3. Have you ever posted comments in any blog? If you have, please list ALL below and provide the following information:
   (a) What type of blog was it? For example: a personal blog, company blog or something else.
   (b) What was the name(s) of the blog(s)?
   (c) What was subject matter?
   (d) What name(s) did you use?
   (e) What would be the best way to find your comments?

This information will develop a foundation for your “social media hold.”
A. The Necessity of a “Social Media Hold”

A “social media hold” is a process plaintiff’s counsel should put in place to comply with plaintiff’s preservation obligations. It starts by informing plaintiffs of their duty to preserve during the intake process. A letter should follow explaining the duty to preserve and warning of the consequences for failing to preserve relevant social media. Your letter should also give advice regarding future social media activity. Consider recommending plaintiffs follow these guidelines:

- **Check privacy settings:** Have your client check their privacy settings. Social networking sites allow you to block certain people from seeing your activity. This makes opposing counsel’s life more difficult, because they will have to resort to formal discovery to obtain access.

- **Google themselves:** Use any search term (name, address, etc.) that the opposing party could use in searching for you.

- **Avoid posting any information about their case:** Advise your client to use extreme caution in their postings. Ask them to assume it will be Exhibit #1 in their lawsuit. If you would not say it to opposing counsel, do not shout it to the world through social media.

- **Remind their social media “friends” not to comment, message, or post a photo or video about them:** Advise your client to monitor online activity of their “friends” closely. If they post photos of you, make comments about your client, check you in to locations, etc., you and your client need to know.

- **Don’t talk to strangers:** Do not accept a “friend” request from anyone you do not know. This “friend” could be an insurance adjuster, investigator, or defense attorney trying to gain access to your Facebook page.

These instructions to your client and a “social media hold” letter alone do not satisfy a plaintiff’s preservation obligations. You must also supervise the collection and preservation process.

B. Guidance for Collecting and Preserving Plaintiff’s Social Media

The best strategy for collecting and preserving social media is to communicate with opposing counsel and agree on reasonable steps. However, this is impractical when a plaintiff’s duty to preserve is triggered. Therefore, you need to consider strategies for collecting and preserving plaintiff’s social media to avoid a spoliation claim. Regardless of the method you choose, always document your process with dates, times, and who captured the information, so you can defend against spoliation claims. In addition, send a plaintiff’s perspective continued on page 18
a formal written request to plaintiff’s social networking sites requesting they preserve your client’s social media.33 This will help protect against spoliation claims.34 Here are some collection procedures to consider:

• Consider Third-Party Providers or Software: Preserving social media in native format with all metadata intact is a difficult task, because each social media site’s metadata is unique.35 Third-party providers have developed solutions that capture social media metadata and preserve its content in native format.36 X1 Social Media allows you to search, collect, and produce social media in native format while preserving metadata.37

• Use Built-In Social Media Collection Tools: Some social media sites allow users to download their data.38 For instance, Facebook allows users to download their information through their website.39 Although this collects everything a person has ever posted on Facebook, it does not capture deleted material.40

• Create Static Images or Print Social Media Content: Some courts permit the use and introduction of evidence from static images.41 However, creating a static image or simply printing social media content will lead to the loss of metadata and other information.42 For example, some information, such as video content, cannot be collected.43 When preserving social media evidence with static images or printing social media content always use a date stamp.44

Collecting and preserving social media poses significant technical challenges, and raises evidentiary issues that courts are only beginning to address.45 However, failing to preserve social media will subject plaintiffs to spoliation sanctions.46 Instructing your client to delete social media activity can cost you your law license.47 In Lester v. Allied Concrete, the defendant sought discovery of plaintiff’s Facebook page.48 Plaintiff’s attorney, through his paralegal, promptly instructed his client to “clean up” his Facebook page because “[w]e don’t want blow ups of other pics at trial.”49 Plaintiff then deleted a number of photos from his page.50 Although plaintiff ultimately prevailed at trial, the court reduced the jury award by over $4 million, because plaintiff “deliberately delete[d] Facebook photos that were responsive to a pending discovery request” at counsel’s direction.51 The court ordered sanctions in the amount of $180,000 for plaintiff and $542,000 for his attorney.52 Plaintiff’s counsel accepted a five-year suspension of his law license.53

You had better know your client’s social media trail and preserve it. Insurance adjusters and defense attorneys are lowering settlement offers, bolstering motions to dismiss and summary judgment, and impeaching witnesses with plaintiff’s social media.44 On the other hand, if you are not investigating opposing parties and witness’s social media, you are not doing your job.55

II. Informal Discovery of Social Media: Methods for Investigation

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should complete a social media search of all parties, potential witnesses, and opposing counsel. Person’s Facebook “friends,” for example, can lead to other potential witnesses or establish a witness’s possible bias. A social media search can identify former and current names, aliases and addresses, former and current spouses, children and grandchildren, any affiliated businesses, and properties owned. All of this information is useful in determining who to sue and where to serve your complaint. Searching for relevant social media evidence should be as routine and systematic as your document discovery, depositions, and witness interviews.

Most lawyers start their search for social media evidence by using Google, Bing, or the search engines of social networking sites directly. While these are valuable places to search, there are more nuanced ways to investigate social media.

Try an aggregate social media search engine, also known as, a “people-search” engine. One is Spokeo.com, which searches over 70 social media sites by name, e-mail, phone number, username, and address. Whos Talkin and Social Mention offer similar social media search tools. Using these sources gives you one concise summary of the most comprehensive data about a defendant, witness, or other non-party to date.

**III. Informal Discovery of Social Media: Effective But Ethically Problematic**

Although aggregate social media search engines are a useful investigative tool, there are ethical implications to consider in investigating social media. Two primary ethical problems arise when a person restricts access to part or all of their social networking profile. This means only their “Facebook friends” may view the content of their social media page. The first issue is the use of deceptive investigatory tactics, a practice known as “pretexting.” The other issue is engagement in prohibited communications.

No court has addressed the ethics of informal discovery of social media sites, but several city and state ethics committees provide guidance for plaintiff’s counsel.

In 2009 and 2010, two ethics opinions addressed whether an attorney or someone working for the attorney can try to become a witness’s “friend” in order to gain access to their private social media content. In March 2009, the Philadelphia Bar Association’s Professional Guidance Committee explained it is professional misconduct for an attorney to ask a third party to “friend” a witness in order to gain access to their Facebook and MySpace pages. Having someone else deliberately conceal the purpose of their “friend request” would suggest that the lawyer was inducing an adverse party to provide information. Using a non-lawyer assistant, such as a paralegal, does not relieve an attorney of responsibility for the conduct of such assistants under Rule 8.4 of the Rules of Professional Conduct. Failing to disclose the third party’s affiliation with the lawyer “omits

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a highly material fact.”

In September 2010, the New York City Bar Association’s Committee on Professional Ethics (“NYCBA”) issued an advisory opinion on “whether a lawyer, acting alone or through an agent… may resort to trickery…to gain access to an otherwise secure social networking page and the potentially helpful information it holds.” Like Philadelphia, the NYCBA pointed to Rule 4.1’s prohibition against knowingly making a false statement of fact to a third person, as well as to Rule 8.4’s ban on conduct involving dishonesty, deception, fraud, or misrepresentation. The NYCBA held, “a lawyer may not use deception to access information from a social networking webpage.” However, an attorney or their agent “may use [their] real name and profile to send a “friend request” to obtain information from an unrepresented person’s social networking website without also disclosing reasons for making the request.”

These ethic’s opinions suggest trial lawyers cannot use deceptive practices when investigating opposing parties and witness’s social media. However, you may investigate another party’s social media as long as the profile is publicly available. In order to obtain evidence on private social media profiles you should utilize formal discovery.

IV. Formal Discovery of Social Media

According to the Next Generation eDiscovery Law & Tech Blog, there were 689 published state and federal court decisions involving social media in 2010 and 2011. In January 2014, social media evidence played a key role in 74 cases. The volume of social media cases has almost doubled each year. This section examines how courts handle social media discovery cases. The existing cases raise four questions: (A) Is social media content generally discoverable? (B) Is “private” content off-limits from discovery? (C) To whom should the discovery request be directed? And (D) What is the correct process for reviewing and producing social-media content?

A. Is Social Media Content Generally Discoverable?

Courts have struggled to define the contours of the relevance inquiry for social media, especially in cases where the requesting party has sought production of all of the data in a user’s social media account, rather than specific items. No case has suggested social media content is discoverable “just because.” Instead, there has to be some finding of relevance. If a requesting party can show reason to believe that there is relevant social media content on a profile, courts are more likely to enforce a request. This means that it is important to have some factual predicate for the discovery of social media content. Typically, this will involve publicly-viewable statements or photographs that contradict or call into question one or more of the other side’s claims or defenses.

B. Is “Private” Content Off-Limits From Discovery?

There is no discovery rule that...
excludes information from discovery based on the fact that the recipient of the discovery request has kept the information a secret, wishes to keep it a secret, or has restricted access to the information to a select group.94 Discovery often inquires into matters that are “private” or “secret,” in the sense that the information has not been shared with the public.95 Indeed, one of the primary purposes of court-supervised discovery is to compel persons to provide information they do not want to share and would not willingly provide.96 Discovery is a powerful and often intrusive litigation tool precisely because of its power to invade privacy and demand the telling of secrets.97 Accordingly, a person’s privacy restricted social media account is not shielded from discovery.98

C. To Whom Should the Discovery Request Be Directed?

Many lawyers assume that issuing a subpoena to a social networking site is the best way to obtain social media evidence.99 However, seeking to compel social media sites to produce social media content has been largely unsuccessful.100 Sending subpoenas to social media sites raises Stored Communications Act (SCA) issues.101 For example, the SCA prohibits Facebook from disclosing the contents of a user’s Facebook account to any non-governmental entity, even pursuant to a valid subpoena or court order.102 The most Facebook will provide is the basic subscriber information for a particular account.103 As a result, requests for account information are better obtained through discovery requests to opposing party.104

A social media discovery request should be specific, not broad such as “all Facebook content.”105 Discovery requests must be narrowly tailored, incorporating date restrictions and references to specific events, claims, or defenses.106 Experts on e-discovery suggest this sample interrogatory: “Identify the user name and e-mail address from any social media account used by you from [_____] to the present date.”107 A sample request is: “All online profiles, postings, messages (including, but not limited to, tweets, replies, re-tweets, direct messages, status updates, wall comments, groups joined, activity streams, and blog entries), photographs, videos, and online communication relating to particular claims or defenses from [_____] to the present date.”108

It is clear the contents of social media, regardless of the privacy settings selected, are discoverable if they are relevant and not privileged.109 Even so, who reviews social media content to determine if any of it is responsive to a discovery request?110

D. What is the Correct Process for Reviewing and Producing Social Media Content?

After a request is made, the general rule is the person to whom the request is sent reviews their own records, determines which items are responsive (and screens for privilege), and then arranges for them to be made available for inspection.111 A handful of state-
court cases, however, have ordered the account holder provide their account number and login information so that the requesting party could access the account directly.112

Courts have, however, generally been reluctant to get directly involved in assessing the sufficiency of a production, and for good reason.113 The last thing courts want is to undertake their own search or review whenever the requesting party suspects the response might not be complete.114 Accordingly, courts will usually accept a responding party’s representation that their response is correct and complete, absent some evidence to the contrary.115

V. Conclusion

A person posting status updates, wall postings, tweets, photos and YouTube videos may very well become tomorrow’s plaintiff. “Sharing” on social media can come at the price of destroying a plaintiff’s case. While social media has quickly changed the way in which we communicate, the law surrounding social media has been slow to develop. As the law matures, plaintiff’s counsel should use the best practices discussed here to recognize social media discovery issues, and preserve and investigate this fertile source of potential evidence.

Endnotes

1 iTunes Preview: Nike+ Running, itunes, https://itunes.apple.com/us/app/nike+-running/id387771637 (last visited January 14, 2014) (Nike+ Running is a mobile device application that tracks and records its users’ runs and allows users to share their progress with other users online).


3 Id.

4 Id.


6 Zubulake v. Warburg, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (Zubulake IV) (a party “is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is subject of a pending discovery request”).


9 Id.

10 Id.

11 Id.

12 Frazer, supra, note 2, at 552.

13 Id.

14 Lee, supra, note 8, at 46; Fed. R. Civ. P. 37(b)(2) (failing to preserve evidence can lead to dismissal or default, preclusion of evidence, an adverse inference based on spoliation, and monetary sanctions).


20 Hancock, supra, note 15.

21 Id.

22 Id.

23 Id.

24 Id.

25 Id.

26 Id.


28 Id.

29 Sedona Conference Social Media Primer, supra, note 5, at 38 (the best strategy for preserving and collecting social media is to confer with opposing counsel and agree on reasonable steps); see “The Sedona Conference Cooperation Proclamation” (2008); In re Facebook PPC Advertising Litig., 2011 WL 1324516 (N.D.Cal. Apr. 6, 2011) (ordering parties to meet and confer in order to devise ESI protocols including for Facebook data).

30 Sedona Conference Social Media Primer, supra, note 5, at 38.

31 Id.


33 Witte, supra, note 17, at 901.

34 Id.

35 Frazer, supra, note 2, at 563.

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37 X1 Social Discovery, http://www.x1.com/download/X1_Social_Discovery_Product_Brief.pdf (the industry’s first investigative solution specifically designed to address social media content, website collection, webmail, and YouTube video capture, in one single interface. However, it costs $945 for a copy annually or $2,000 for a license plus annual support of 20%).


A user can download and print their Facebook data by logging onto their Facebook account, selecting “Account Settings” under the “Account” tab on your homepage, clicking on the “learn more” link beside the “Download Your Information” tab, and following the directions on the “Download Your Information” page.


Sedona Conference Social Media Primer, supra note 5, at 38.

40 Browning, supra, note 38, at 538.

41 Browning, supra, note 38, at 538.


43 Sedona Conference Social Media Primer, supra note 5, at 37.


47 Christopher J. Akin, “How to Discover and Use Social Media-Related Evidence,” 37 Litig., Winter 2011, at 34.

48 Browning, supra, note 57, at 471.


51 Frazier, supra, note 2, at 541.

52 de Cespedes Wenke, supra, note 54.


54 Id.
88 Id., at 14.
89 Id.
90 Id.
92 Browning, supra, note 38, at 537.
93 Id.
94 Gensler, supra, note 87, at 20.
95 Id.
96 Id., at 20-21.
97 Id., at 21.
98 Largent v. Reed, No. 2009-1823, slip op. at 9-10 (Pa. D. & C. Nov. 8, 2011) (no general privacy or social media privilege protects Facebook profile information, even when designated as “private,” including photographs, applications, posts, and status updates, from production).
99 Browning, supra, note 57, at 472.
101 18 U.S.C. §§ 2701-2712
103 Browning, supra, note 57, at 472.
104 Id. at 473.
105 Browning, supra, note 38, at 537.
106 Id.
108 Id.
109 Gensler, supra, note 87, at 22-23.
110 Id., at 23.
111 Id.
113 Gensler, supra, note 87, at 26; See Barnes v. CUS Nashville, LLC, No. 3:09-cv-00764, 2010 WL 2265668, at *1 (M.D. Tenn. June 3, 2010) (asked a third-party account holder to send him a friend request so the judge could review the contents of the account).
114 Id.
115 Id.

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