Discovery of Social Media Evidence in Legal Proceedings

By Christina M. Jordan

Share this:

Download the PDF of this article

Reprinted with permission from Litigation News, Fall 2019 (45:1), at 2-3. ©2019 by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

The appeal of social media is hard to ignore, as evidenced by the increasing number and variety of social media platforms and the numbers of people using them. Information documented on social media can include photos, videos, location, date, time, communications, and activities, often in real time. As people continue to share their lives and communicate on social media, information that was once considered private is now made public.

Information documented on social media is often spontaneous, relatively permanent, and easily accessible. Such information may be important evidence in legal proceedings. Not surprisingly, social media sites are increasingly becoming the focus of discovery. Accordingly, attorneys should become familiar with legal and ethical issues surrounding discovery of social media evidence.

Different Types of Social Media—Who Is Using Them?

There are more than 200 popular social media sites that can be divided into several categories, including social networks, media sharing, activity tracking, blogs and microblogs, social news, and comments and reviews. For example, Facebook and LinkedIn are social networking sites where users can share in real time personal and professional images, commentary, activities, and news, and also cross-post content from other social media sites. Blogs and microblogs, such as WordPress and Twitter, are also used for personal and business-related purposes, where users can create, share, and consume newsworthy content.

According to a 2019 Pew Research Center survey, the most commonly used social media platforms by adults in the U.S. are YouTube and Facebook, with 73 percent using YouTube and 69 percent using Facebook. Smaller numbers of adults use other social media sites, such as Instagram (37%), Pinterest (28%), LinkedIn (27%), Snapchat (24%), Twitter (22%), WhatsApp (20%), and Reddit (11%). These percentages are generally unchanged from 2016, with the exception of Instagram, which experienced an increase in use from 2016 to 2019.

With respect to the legal community, the 2018 ABA Legal Technology Survey Report confirms that lawyers are using social media sites for both professional and personal purposes. Among lawyers surveyed, 65 percent maintain a LinkedIn profile and 37 percent maintain a Facebook profile for professional purposes. In addition, 34 percent of lawyers surveyed reported that they use LinkedIn for non-professional reasons, whereas 90 percent indicated that they participate on Facebook for personal purposes.

With the prominence of social media and its use, almost everyone will have a significant amount of data on social media sites. How and whether to request this information in legal proceedings should be carefully considered.
Discovery Insights—Limitations on Production

Courts have allowed discovery of social media information when litigants can show its relevance to the case. In New York, for example, a former semiprofessional basketball player filed suit alleging that he became disabled due to an automobile accident. The court held that access to private social media accounts was permitted to obtain information such as photographs and other evidence of physical activity. The court provided limitations on time and subject matter, however, in that access was limited to information related to depicting physical activity posted after the incident. The court noted that private social media information is discoverable to the extent it contradicts a plaintiff’s alleged claims.

In Nevada, a woman slipped and fell at a restaurant and allegedly sustained injuries resulting in future back surgery. Before this incident, she had two previous slip-and-fall accidents and was involved in a car wreck. The defendant restaurant requested data from a fitness activity tracker, arguing that the information from the activity tracker is relevant to the extent it affects the validity of the plaintiff’s alleged claims. The defendant also requested discovery of the plaintiff’s public and private social media information to gather information in support of her emotional or mental state, expressions, and reactions related to the alleged accident. The court agreed and granted access to data from an activity tracker for a period of five years, as well as access to public and private social media information for a period of about three years.

Attorneys seeking social media evidence should be prepared to establish the relevancy and authenticity of the information being sought. Similarly, attorneys seeking to prevent disclosure of social media evidence should be prepared to not only argue inaccuracy or unreliability of the information but also advocate for reasonable limitations on production.

Ethical Considerations—Proceed with Caution

As courts trend toward permitting discovery of public and private social media information, attorneys should use caution not to violate ethical boundaries during social media investigations for legal proceedings. Accessing private social media activity raises ethical considerations and boundaries that attorneys should be mindful of. For example, under ABA Model Rule 4.2, attorneys and attorneys’ agents are prohibited from requesting a connection to a represented party through social media networks. Accordingly, attorneys should avoid communicating with or contacting a represented party to access social media information.

Some social media platforms, such as LinkedIn, send an automatic message to account holders informing them that their profile was viewed and by whom. Certain jurisdictions, such as New York, view such automatic messages as contacting the account holder. If the account holder is represented by counsel, then the communication could be considered a violation of ethical rules. Any request to view a represented party’s private social media information should be made to the party’s attorney.

Further, under ABA Model Rule 8.4, an attorney violates ethical obligations when using deceptive tactics to gain access to a private account. An attorney may request permission to review an unrepresented person’s private social media information, but cannot engage in dishonest or deceptive conduct to do so. Attorneys should know whether their jurisdiction requires disclosure of the purpose of their request for gaining access to a private account, as jurisdictions differ in whether attorneys have an obligation to disclose the purpose of such a request.

Preservation of Social Media Information

Some social media platforms permanently delete information once it has been removed or modified. Under ABA Model Rule 3.4, a “lawyer shall not unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value.” Properly preserved social media evidence retains all available metadata and digital identification for verification and authentication purposes. Certain social media activities, including direct messages sent between account holders, contain a number of unique metadata fields that provide circumstantial evidence sufficient to establish authorship. Social media activity can be authenticated by establishing authorship. Accordingly, attorneys should advise their clients of their duty to ensure relevant data is not destroyed or otherwise compromised.
As social media information can be easily modified or destroyed, attorneys may consider updating a litigation readiness strategy to account for preservation of social media information. In addition, creating a record retention policy that advises clients not to delete social media information may also help attorneys avoid running afoul of ethical obligations.

Resources

Model R. of Prof. Conduct 3.4, 4.2, 8.4.


Andrew Perrin & Monica Anderson, Share of U.S. adults using social media, including Facebook, is mostly unchanged since 2018, (Pew Research Center Apr. 10, 2019).

Michael Hoens, “Discovery Battles About Social Media,” N.Y. L.J. (Feb. 21, 2019).


Authors

Christina M. Jordan

Christina M. Jordan is an associate editor for Litigation News.

Originally published in Litigation News, Volume 45, Number 1, Fall 2019, at 2-3; reprinted in GPSolo eReport, Volume 9, Number 6, January 2020. © 2020 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association. The views expressed in this article are those of the author(s) and do not necessarily reflect the positions or policies of the American Bar Association, the Section of Litigation, or the Solo, Small Firm and General Practice Division.