Best Practices in Use, Authentication, & Admissibility of Social Media Evidence

Social media can yield the most important evidence of your case, but only if you gather and use it properly
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Robert Keeling bio

○ Partner at Sidley Austin, a powerful legal adviser for global businesses with 1,900 lawyers across 20 offices worldwide

○ Experienced litigator whose practice includes a special focus on electronic discovery matters

○ He represents both plaintiffs and defendants in complex civil litigation throughout the nation and conducts internal investigations in the U.S. and throughout the world

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eDiscovery Webinar Series
Best practices in Use, Authentication, & Admissibility of Social Media Evidence
The Use, Authentication, and Admissibility of Social Media Evidence

Robert Keeling
Overview

- The Prevalence of Social Media
- The Use of Social Media
- Using Social Media as Informal Discovery
- Applicable Ethics Rules, Guidelines, and Opinions
- Takeaways, Tips, and Other Considerations
- Authentication and Admissibility Considerations

“One of the best ways for lawyers to investigate and obtain information about a party, witness, or juror, without having to engage in formal discovery, is to review that person’s social media account, profile, or posts.”

-NY State Bar Assoc., Social Media Ethics Guidelines
What is Social Media?

Internet-based applications that allow the creation and exchange of user-generated content.
Prevalence of Social Media

Ninety-one percent of today’s online adults use social media regularly.

- 80% of online American adults use social media regularly.
- 52% of Americans now have at least one social media profile.
- In the US, this is more than a 350% increase in less than a decade.
Prevalence of Social Media

Social media is the top online activity, accounting for more than 15% of all U.S. internet site visits.

- YouTube users upload 48 hours of new video every minute.
- Twitter users send one billion tweets every 2.5 days.
- Instagram users post 70 million photos per day, totaling more than 30 billion photos that have been shared.

- In a single year, U.S. users spent more than 2 billion minutes on Pinterest.
- On Facebook, 510 comments are posted, 293,000 statuses are updated, and 136,000 photos are uploaded every 60 seconds.
Use of Social Media: Litigation

- Social media data is increasingly subject to search warrants and subpoenas, and offers troves of information for the Government.
  - *E.g.*, Facebook can provide a user’s profile, wall posts, location, photos that the user uploaded, photos in which the user is tagged, a list of all their Facebook friends, login information, and IP data.

- Social media is increasingly used as evidence of criminal activity and even to locate criminals.
  - *E.g.*, John McAffee, creator of McAffee Antivirus software, was located in Guatemala using Facebook metadata and deported to Miami in connection with the murder of his neighbor.
Using Social Media as Informal Discovery: Pre-Litigation

Social media is also useful in civil actions and private litigation:

- *E.g.*, investigate an adverse expert witness’s potential biases
- *E.g.*, analyze photographs of a products liability plaintiff for physical activities contrary to their allegations
- *E.g.*, learn about jurors
- *E.g.*, evaluate a former employee’s posts for claims that contradict a wrongful termination claim
- *E.g.*, search for pirated videos on YouTube

Clients, opposing parties, witnesses, potential jurors, and counsel likely all have social media presences.
Gathering social media information informally assists in crafting effective formal discovery requests.

- Examples gathered informally can serve as evidence that there is relevant social media content
- Initial searching can help tailor formal discovery requests so they are not quashed as overbroad or harassing
Limits to Using Social Media Informally: ABA Model Rules of Professional Conduct

The ABA Model Rules of Professional Conduct related to contacting represented and non-represented parties apply to appropriately accessing social media.
Limits to Using Social Media Informally: ABA Model Rule 3.5

“A lawyer shall not . . . communicate ex parte with [a judge, juror, prospective juror or other official] during the proceeding unless authorized to do so by law or court order . . . .”
“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”
Limits to Using Social Media Informally: ABA Model Rule 4.3

“In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer shall make reasonable efforts to correct the misunderstanding.”
"It is professional misconduct for a lawyer to ...(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."
Limits to Using Social Media Informally: State and Local Bar Rules

Many state and local bar associations have issued ethics guidelines or opinions on appropriately accessing social media content.

• These social media rules and opinions typically are based on local rules similar to the relevant ABA Model Rules.

• The nuances vary by jurisdiction, so it is critical to research the local rules.
Foundational Ethics Opinions: Represented v. Unrepresented Parties

  - One of the first rulings on informal social media discovery; based on Oregon Rule of Professional Conduct 4.2, which follows the ABA Model Rule.
  - Written communications via the internet are the same as traditional forms of communication.
  - Lawyer cannot contact a represented person via the internet but can contact a non-represented person.

- In a 2013 ruling, Formal Op. 2013-189, Oregon’s Ethics Committee ruled that a lawyer can access publicly available information on social media; this is not considered a communication under Rule 4.2.
  - A lawyer can request access to the non-public portions, so long as the lawyer does not have actual knowledge that the person is represented.
  - A lawyer may not use deception to gain access to non-public content.
  - If the person being contacted asks for additional identifying information about the lawyer, or if the lawyer has other reason to believe the person misunderstands the lawyer’s role, the lawyer must provide additional information or withdraw the request.
Foundational Ethics Opinions: Duty to Disclose Lawyer’s Interest

• New Hampshire requires that a request to view non-public content of an unrepresented party must:
  – disclose the lawyer’s full name;
  – inform the individual of the lawyer’s involvement in the litigation; and
  – identify the lawyer’s client in the litigation.

• The Philadelphia Bar prohibits a lawyer from asking a third party to request access to non-public information unless the third party discloses the purpose of the request (i.e., that it is in connection with the litigation).

• San Diego likewise requires the lawyer to disclose her affiliation and the purpose of the request.

• The NYC Bar Association has said it is sufficient for the lawyer to disclose her full name.
  – So long as the lawyer also uses her real social media profile.
  – The lawyer is not required to disclose the reason for making the request.
Limits to Using Social Media Informally: New York State Bar Rules

The Commercial and Federal Litigation Section of the New York State Bar Association issued Social Media Ethics Guidelines in 2014 (which were updated in June 2015).

• A lawyer can view the public portions of a represented person’s profiles.

• A lawyer may request permission to view the private portions of an unrepresented person’s profile, so long as the lawyer does not misrepresent herself.

• A lawyer cannot request permission to view the restricted portions of a represented person’s profile.

• A lawyer cannot “friend” a juror, or “subscribe” to a juror’s feeds, or otherwise contact a juror.
  – Auto-generated messages are “communication”

• A lawyer can join a social media network to obtain information.
The Takeaways

1. Social media activity is considered “communication.”
   - “Communication” may be automatic, such as on LinkedIn.

2. There is a distinction in the law between “public” and “private” social media content.

3. There is also a focus on whether the lawyer’s behavior is dishonest, fraudulent, or deceptive.
   - Failure to proactively disclose information could be considered deceitful.

4. Ethical implications of social media discovery extend beyond the parties or witnesses in a litigation— jurors are different.
The Takeaways: Complicating Factors

• Distinguishing between public and private content can be difficult.
  • Layers of information sharing is possible via social media.
    • Some information may be viewable only to a select group of individuals even if it does not require permission from, or notification to, the target of the research.
  • The number and diversity of social media applications and websites makes it hard to know the distinction from one platform to the next.
The Takeaways: Complicating Factors

Constant innovations in social media mean that information may be public today but private tomorrow, or vice-versa.

- Transferability of information between social media users
  - Information may be private on the individual’s site but publicly viewable through a friend’s account.

- Social media sites generally are not considered private.
Tips for Using Social Media

• Stay up-to-date on current sites, applications, etc. and their functionalities. Technology evolves rapidly, and social media falls out of fashion.
  – There are hundreds of different platforms; some popular ones today include:
    • Facebook
    • Google+
    • LinkedIn
    • Instagram
    • Tumblr
    • Twitter
    • Vine and Periscope
    • Snapchat
    • Youtube
    • Pinterest

• As a result, ethics rules and opinions can also become outdated quickly. It is important to stay abreast of the current guidelines.
Tips for Using Social Media

• Be aware of automatic, unintentional communications that could be sent by sites or applications.

• Properly secure and preserve information gathered through informal discovery.
  – Print or electronically store the obtained information.
  – Obtain date stamps or screenshots if possible.
Other Considerations

If a hold notice is in place, it could cover social media, such as status updates, comments, Tweets, photographs, videos, etc.

- Typically a lawyer can advise her client to change her privacy settings, so long as content is not deleted.
- The Florida Bar recently has opined in an advisory opinion that an attorney “may advise the client regarding removal of relevant information from the client’s social media pages. . . provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence ... as long as an appropriate record of the social media information or data is [sic] preserved.”
  - The Florida Bar Committee noted that what information is relevant to reasonably foreseeable litigation is a question of fact that must be determined on a case-by-case basis. Prof. Ethics of FL Bar, Proposed Ad. Op. 14-1 (Jan. 23, 2015).
Other Considerations

The rules are different in criminal investigations.

• Government agents can pierce the privacy veil.

• They are allowed to create fake online identities or use a cooperating witness to gain access to private portions of a person’s social media account.

• In a case in the S.D.N.Y., the government relied on one of the defendant’s “friends” to view his Facebook profile.

  – The court held that the defendant’s, “legitimate expectation of privacy ended when he disseminated posts to his ‘friends’ because those ‘friends’ were free to use the information however they wanted including sharing it with the Government.”

Admissibility Issues

Admissibility Requirements

• Social media evidence must still satisfy the rules of evidence regarding:
  – Relevance
  – Hearsay
  – Authentication
  – Prejudice

• Key Considerations: Relevance, Hearsay, Authentication
Admissibility Issues: Relevance

Parties may offer social media evidence for purpose of impeachment or as substantive evidence.

- Example of Impeachment: photos on a social media site of plaintiff waterskiing could be used to impeach her testimony about disabling shoulder injury

- Example of Substantive Evidence: photo printout of social media communication in attempt to show that one party sent a threatening message to the other
  - See Griffin v. State, 19 A.3d 415 (Md. 2011)(court denying admission of MySpace printouts)
Admissibility Issues: Hearsay

- Certain hearsay exceptions are well suited to social media context.
  - Offer social media against a party under the adopted admission exception: “[a] statement is not hearsay if . . . [t]he statement is offered against a party and is the party’s own statement, in either an individual or representative capacity” See FED. R. EVID. 801(d)(2)
  - Social media messages and updates may also be admissible under the state-of-mind, emotional or physical condition, present sense impression or excited utterance exceptions to hearsay. See FED. R. EVID. 803(1), (2) and (3)
Admissibility Issues: Authentication

Captured social media normally must be authenticated in order to use in litigation if challenged

- Parties have successfully challenged introduction of social media posts due to lack of authentication.
- Proponent must present *prima facia* case that the evidence is what the party says it is
- Potentially may establish through testimony, but better practice to establish through contemporaneous declarations or through the use of metadata
Authentication Issues Continued

Courts struggle to apply uniform authentication tests for social media.

• High bar for meeting authentication
  – A witness’s testimony that she has received a message from a person claiming to be ‘A’ without information about site security is insufficient evidence to admit the message as a conversation with ‘A.’ Commonwealth v. Williams, 926 N.E.2d 1162, 1172 (Mass. 2010)

• Lower bar for meeting authentication
  – Authenticity requirement is satisfied if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification.” United States v. Vayner, 769 F.3d 125 (2nd Cir. 2014)
Thank You

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Facebook profiles are exported as HTML files.

The Lexbe platform creates paginated, easy to read, searchable PDFs at import.
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Summary
Senior-level energy trading executive with demonstrated expertise creating and growing energy trading desks and exchanges. Expertly traded markets on Gulf Coast, Californian, Canadian and Latin American crude oils resulting in $3.2 billion in revenue. Initiated the company’s use of advanced trading algorithms to minimize price and volatility risk. Orchestrated the development of Enron Online, the company’s internet market.

13-year track record driving billion-dollar growth for energy trading ventures.


Experience
Executive Director, Americas Energy Trading at enron
Lexbe professionals have extensive eDiscovery knowledge, expertise and experience to assist law firms and corporate legal departments to manage electronic stored information (ESI) and all phases of eDiscovery including the collection of Social Media evidence.
Lexbe Chain of Custody Report

- The Lexbe chain of custody report is available with all ESI Collection+ services including
  - Email Collection+
  - Social Media Collection+
  - Directed Collection+

- Protects your staff from subpoena, having to defend their collection methods.
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