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Social Media Evidence: Strategies for Discovery, Use at Trial and Settlement Negotiations

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Social Media Evidence: Tactics for Discovery, Use at Trial and Settlement Negotiations

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October 20, 2020

Agenda

- **What is so special about social media?**
 - Why is it so compelling?
 - A (dangerously) candid digital record
 - Rapidly evolving technology
 - Not just for teenagers
- **What could go wrong?**
- **Discovery of social media evidence**
 - Applicable rules
 - Judicial limitations
 - Best practices
- **Authenticating social media evidence**
 - Applicable rule of evidence
 - Evolution of the law
 - Best practices
- **Social media evidence in settlement**

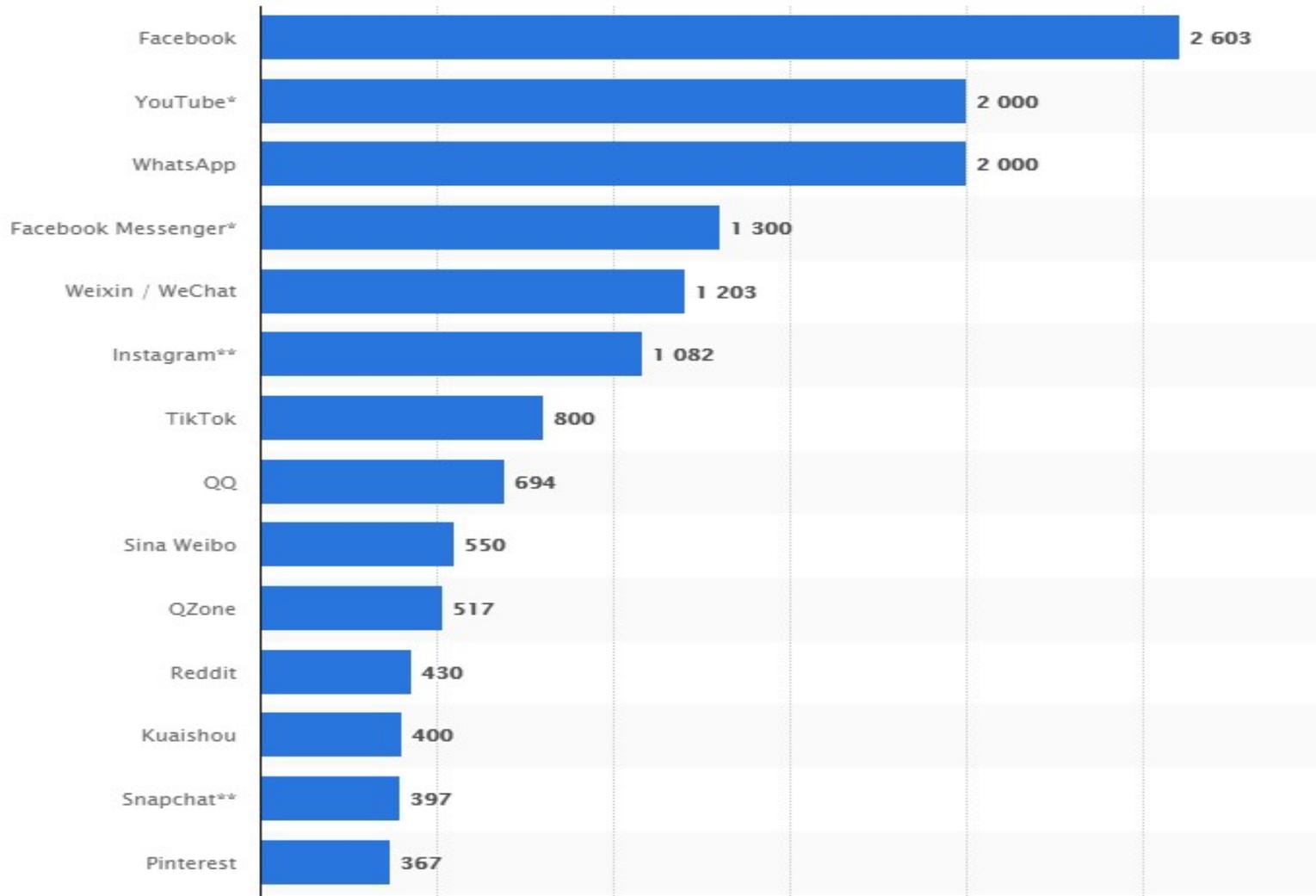


What Is So Special About Social Media?

Almost too many to count and growing fast



Users as of July 2020 (millions)



Why Is It So Compelling?



What Could Go Wrong?

A (Dangerously) Candid Digital Record



- **What can go wrong?**
 - Misunderstanding of Privacy Controls
 - Public vs Private posting
 - Personal vs Professional
 - Unintended audiences
 - Devastating consequences
 - Loss of jobs
 - Criminal prosecution
 - Immigration implications
 - Fake Accounts
 - Anyone can pretend to be anyone else online
- **Implications for Litigation go much further**
 - Personal injury plaintiffs
 - Corporate witnesses
 - Criminal defendants



"On the Internet, nobody knows you're a dog."

Facebook is the New Town Square

***Commonwealth of Pa. v. Shallenberger*, 2020 Pa. Super. Unpub. LEXIS 2730 (Pa. Super., Aug. 26, 2020)**

On a public Facebook page dedicated to an ongoing teachers' strike, Defendant responded to another user's pro-teacher message calling that user an idiot, and then made his own posts, including:

“Easiest job in the world but they need more money. Shoot them and start over.”

On his personal Facebook page Defendant posted additional graphic statements about teachers, including:

“Happiness is a warm gun,” and “Guns don't kill people, I kill people.”

The court instructed the Jury that only the public post was being presented as evidence of the crime, with the private posts admitted only for purposes of showing his tendency towards violence

The Pennsylvania Superior Court upheld the admission of his Facebook posts, finding them sufficient to satisfy the elements of the charge

Medical Malpractice Claim Undone by Facebook

Nicolau v. Martin, 170 A.2d 990 (Pa. 2017)

The Pennsylvania Supreme Court granted allocatur to determine whether plaintiff's medical malpractice claim was time-barred

A split superior court below determined that multiple pieces of evidence, including her Facebook posts, indicated she had Lyme disease more than two years before the applicable statute of limitations expired

Plaintiff argued that while she may have suspected she had Lyme, she was only able to confirm it after a test

The court, however, cited two Facebook posts that undercut that argument:

“I had been telling everyone for years I thought it was Lyme . . . ,” to which her friend responded

“You DID say you have Lyme so many times!”

Be Careful when Venting Online

Carr v. Commonwealth of Penna., 2020 Pa. LEXIS 2766, 230 A.3d 1075 (May 19, 2020)

While off-duty and at home, Carr, a PennDOT employee, posted a self-described “rant” through her personal Facebook account to a closed Facebook group, complaining about the local school bus drivers:

“don’t give a flying s*** about those babies and [] will gladly smash into a school bus”

Although Carr posted on her personal Facebook page, she identified herself as a PennDOT employee on her public profile

Members of the Facebook group forwarded complaints to PennDOT’s Facebook page

Pennsylvania Supreme Court ruled that PennDOT did not violate an ex-employee’s free speech rights in terminating her employment



Discovery of Social Media Evidence

Social Media is Evidence

- **Social Media comes in many forms**
 - Some social media is exposed to the public and available to anyone who cares to look
 - Other types are restricted in who can see them
 - Be wary that privacy controls may not stop “friends,” those who may see a private post, from sharing it more widely
- **Users often believe that their “private” social media will remain secret and not subject to discovery**
 - Those users are mistaken
- **Courts have repeatedly held that private social media can be relevant to the claims or defenses in a case and so subject to discovery**
 - There is no generalized right to privacy that governs social media
 - “For starters, the court is persuaded that Plaintiff lacks a right to privacy with the regards to the content of his social media profile(s).” *Rodriguez-Ruiz v. Microsoft Operations P.R., LLC*, 2020 U.S. Dist. LEXIS 39681 (P.R. Mar. 5, 2020)
- If social media is relevant to the matter at hand, it is subject to discovery

Discovery Is Not Unlimited but Tempered by Relevance

- **Like any other type of information, social media may be subject to discovery if it is relevant and proportional to the needs of the case**
 - Fed.R.Civ.P 26(b)(1)
 - State equivalents
 - Proportionality requirement is often incorporated, even if not explicit
- **Courts will not permit litigants to rummage at will through information that the author had taken steps to withhold from public view**
 - Some courts analogize social media to a filing cabinet
 - While some items in that cabinet may be relevant and thus discoverable, that doesn't give the other side the right to rifle through the rest
 - This is particularly so given the often personal nature of social media

Social Media Relating to Mental and Physical Status is Relevant

Rodriguez-Ruiz v. Microsoft Operations P.R., 2020 U.S. Dist. LEXIS 39681 (P.R. Mar. 5, 2020)

Plaintiff sought damages for wrongful termination, seeking reinstatement, and damages for pain and suffering.

Defendant requested plaintiff to identify all social media profiles he managed and a complete copy of the profiles, including all messages, posts, status updates, comments, causes etc. published or posted between January 2010 and present.

Court rejected plaintiff's privacy claim, holding social media postings may be relevant, especially with claims for emotional distress.

Court order Plaintiff to identify all social media platforms in which he had an account or profile and ordered plaintiff's attorney to review all contents of those profiles and produce any referencing plaintiff's emotions, feelings, mental status or mood status, including any photographs accompanying such posts.

Filing Cabinet or Diary?

Locke v. Swift Trans. Co. , 2019 U.S. Dist. LEXIS 17412 (W.D. Ky. Feb. 4, 2019)

Defendant sought a record of plaintiff's social media activities, including a download of her Facebook account, for the date of the accident and the six month period afterwards relating to "plaintiff's activities or mental status."

Despite the limit in time contained in requests, court held defendant was entitled to discovery of social media information relating to plaintiff's claims, but was not entitled to unfettered access to all of her social media information and communications.

Social media sites profiles more akin to a filing cabinet, where certain files are relevant, rather than a diary, which defendant would be entitled to inspect

Court granted motion in part, denied in part. Ordered defendant to identify the specific items or information to be produced from the social media accounts and ordered plaintiff to review her social media accounts and produce information responsive to those specific items

Social Media Can Provide Evidence of Prior Injuries



Hinostroza v. Denny's Inc., 2019 U.S. Dist. LEXIS 7508 (D. Nev. 2019)

Plaintiff sued Denny's for injuries suffered during an alleged slip and fall

In a request for production Denny's sought any social media accounts used from five years prior to the accident through the present

Plaintiff objected on the basis that the request was overly burdensome and a violation of privacy

The court confirmed that there is no right to privacy in social media, but collecting authorities, explained that requests must be narrowed by website, platform, time period and content related to the case

The court held that social media is relevant to claims for emotional distress to the extent it is reflective of a person's contemporaneous emotions and mental state

Granted the request but narrowed the time period to take into account a prior car accident

Social Media Continues to Evolve

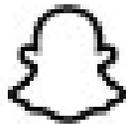
- No longer just pictures of (my) cat



Ephemeral Messaging Apps

- **The hottest trend in social media**

- A new wave of platforms that enable secure communications that are automatically deleted after viewing or a preset period of time
 - Increased privacy protection
 - No record of the messaging ever being sent
- So popular that older social media platforms like Instagram have added the features
- Not just for teenagers up to no good, business use is booming as users seek to protect sensitive trade secret or other valuable information



Implications for Discovery and Beyond



- **Ephemeral Messaging apps are a new and evolving threat to discovery**
 - If there is no record of a communication, it can't be collected for use in a dispute
 - There are many legitimate reasons for such communications, but also many ways that they can be abused
- **The legal implications of the use of Ephemeral Messaging apps are starting to take shape**
 - United States Department of Justice Position
 - In 2017 the DOJ issued guidance that, in order to receive full credit for self-reporting violations of the FCPA, companies must prohibit the use of ephemeral messaging apps
 - In 2019 the DOJ clarified that companies may use the apps, but that they must ensure the retention of business records through the use of appropriate guidance and controls on their use

Courts View use of Ephemeral Messaging with Skepticism

- ***WeRide Corp. v. Kun Huang*, 2020 U.S. Dist. LEXIS 72738 (N.D. Ca.).**
 - The court found the defendant’s use of ephemeral messaging app DingTalk to be evidence of its intentional spoliation of relevant information

- ***Hertzig v. Ark. Found. for Med. Care, Inc.*, 2019 U.S. Dist. LEXIS 111296 (W.D. Ark. 2019).**
 - The court inferred that plaintiff’s failure to disclose his use of ephemeral messaging app Signal, until discovery was almost complete to be indicative of an intention to deprive the other side of that information

What about the Format?

Why Does Format Matter?

- Native format
 - Format in which the data is kept on its native system
 - Different in kind from a printout or PDF copy
- Social media data is electronically stored information (ESI), carries with it a great deal of metadata, only some of which is obvious to the user
 - Photos posted, for example, can carry tremendous amounts of metadata
 - Device that captured the image
 - When the photo was taken
 - GPS location where the photo was taken
 - Social media posts can also carry information about everyone else who interacted with them
- With just those few metadata fields, someone can assemble a detailed timeline
 - Who an individual has interacted with
 - Subject of their interactions
 - Who their social circle includes
 - Precise GPS locations of where they have been

If You Don't Ask For It . . .

***Faulkner v. Aero Fulfillment Servs.*, 2020 U.S. Dist. LEXIS 99878 (S.D. Oh. Jun. 8, 2020)**

Defendant requested all content on any social networking or internet sites that plaintiff had used since 2010, but did not specify the desired format for production

Plaintiff's counsel obtained a download of her LinkedIn account data, which contained an archive in Excel format. After receipt of the data, defendant requested that plaintiff produce the data to all sites in screenshot format. By the time defendant made that request, however, plaintiff had deleted her account

Defendant requested sanctions pursuant to Federal Rule of Civil Procedure 37(b) for failure to comply with discovery order by not producing the format requested by defendant.

Court denied defendant's motion, holding that:

- Defendant's original requests did not specify any particular format, although they could have done so
- Defendant was not legally entitled to a second production of the LinkedIn account data in a different format because Rule 34(b)*2)(E)(iii) clearly states that once produced, a party "need not produce the same electronically stored information in more than one form."

Demands for Metadata Must be Justified



In re Cook Med., Inc., 2017 U.S. Dist. LEXIS 149915 (S.D. Ind., Sept. 15, 2017)

Plaintiffs alleged injury from an implanted IVC filter

Defendants sought Facebook account in native format as provided to plaintiffs' expert rather than PDF format provided

The court, however, reasoned that that native format provided "considerably more information" in metadata, the who, what, when, where and how of a post, and so denied defendants' request as not having made sufficient showing

Any specific request for native format must be justified

In re Cook Med., Inc. (con't)

The court made a number of instructive rulings:

- Plaintiff has no expectation of privacy in public-facing social media
- Plaintiff need not produce what defendants can find themselves
- Private social media posts, however, require a more involved analysis
 - The requesting party must show that the information is both relevant and proportional to the needs of the case
 - The request must be tailored to the needs of the case
- Based upon those principles, the court:
 - Granted requests for posts showing travel and activities post surgery as relevant to damages
 - Denied request for screenshots of “all” social media posts after surgery as not limited by subject matter

Best Practices for Discovery of Social Media



- While the case law continues to develop, certain principles are clear
 - Requests must be tailored to meet the requirements of Federal Rules 26(b)(1) and 34(b) or their state equivalents
 - To be relevant, requests must be closely tied to the subject matter of the case
 - Requests must also be strictly limited by relevant time scope
 - Requesting parties must formulate their requests carefully as courts may not be willing to reframe them
 - Requests for metadata or native format production must be substantially justified by the needs of the case, or upon evidence of spoliation



Authentication of Social Media Evidence

Don't Forget that Evidence Must be Authenticated



- You may find some compelling evidence in your opponent's social media, but you can't use it unless it is first authenticated
- Authentication does not present a high threshold, but its nonetheless one that can trip you up if you fail to address it properly
- While the law governing authentication of social media evidence showed some early signs of division among jurisdictions, with some insisting upon a more demanding threshold than for other evidence, the standards have since harmonized

Applicable Rules of Evidence



Federal Rule of Evidence 901 – Authenticating or Identifying Evidence

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce sufficient evidence to support a finding that the item is what the proponent claims it is

(b) Examples

- (1) Testimony of a witness with knowledge
- (4) Distinctive characteristics and the like

State equivalents

e.g. Pa. R. Evid. 901

There is No Longer a Heightened Standard for Social Media

***Griffin v. State*, 19 A.3d 415 (Md. 2010)**

Early days for social media discovery, the Maryland Supreme Court held that the risk of falsification was greater with social media than with other evidence and so held that the standard for its authentication should be higher and suggested three non-exclusive ways it could be done

- Ask the purported creator if he or she created the profile
- Search the computer or device used to create the profile because browsers and other histories can provide an evidentiary trail; or
- Obtain information directly from the social network itself

***Sublet v. State*, 442 Md. 632 (2015)**

A few years later, however, the court held in, held that the same standard applied by other federal and state courts should apply

It's a Low Threshold, But a Threshold Nonetheless

State of Vermont v. Allcock, 2020 VT 60, No. 2019-015 (Jul. 10, 2020)

Defendant appealed her conviction for aggravated assault on a police officer on the basis that the court erroneously admitted Facebook messages that the state failed to authenticate

“I didn’t hit the cop either . . . I did take a lighter to his ha[n]d after he assaulted me . . . But it was fine because he tried pulling me around by my hair after.”

The police executed a search warrant on Facebook for the page registered in defendant’s name – the record listed the account holder’s name, email address, phone numbers and IP addresses, but the state presented no testimony about whether all those items belonged to defendant

Defendant argued the inherent danger that someone can claim to be someone else online

The court held that social media evidence must be authenticated subject to the same standard as other types of evidence

State of Vermont v. Allcock (con't.)

While applying the same standard as for other types of evidence, the court was careful to caution that courts should not apply a more lenient standard either

A statement that a person owns a Facebook page is no more self-authenticating than a flyer posted in the public square that states the same

Citing the reported number of fake Facebook accounts, and the ease with which they can be created

While the Facebook Business Record contained information from which law enforcement could have readily connected the account to defendant, the state offered no testimony tying the IP address to defendant

The conclusions drawn by the police that the account was in fact hers were not sufficient to authenticate it

Best Practices for Authentication



- Establish that the account or phone number is registered in the purported author's name, including address
- Confirm that there are no other accounts bearing the same name
- Establish the purported author's exclusive access to the account or phone
- Demonstrate that the circumstances and content of the messages or postings correlate closely to relevant events to which the other party has testified or admitted
- Present testimony sufficient to establish these points



Use of Social Media Evidence in Settlement

Social Media Evidence in Settlement



Just like any other type of evidence, but potentially more impactful, particularly at the claim or pre-complaint stage

Incriminating posts, updates, live videos and social media conversations can give insurance companies solid grounds for denying the claimant's claims outright or to force the claimant into accepting a lower settlement

Such evidence may also dissuade a claimant from filing suit in the first place

Social Media Evidence in Settlement



Should a claimant file suit in the face of social media evidence that undercuts their claim of liability or their asserted damages, settlement discussions can focus on those facts

Any evidence that goes against the claimant's claims can be used to not only chip away at the individual's chances of winning at trial, but also to reduce his or her likelihood of walking away from mediation or settlement negotiations with a substantial award

Questions & Answers

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