FALL 2017 E-NEWSLETTER

At Digital Mountain we assist our clients with their computer forensics, e-discovery, and cybersecurity needs. For this E-Newsletter, we discuss social media discovery and important strategic legal insights and spooky innovative technologies.

Digital Mountain's Guest Contributor

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Legal Strategy Considerations for Social Media Discovery

The ever-increasing prevalence of social media in society, politics, news, and our everyday lives, creates vast amounts of valuable, discoverable and often admissible information. Consequently, it should come as no surprise that the discovery of social media evidence has become an integral aspect of trial preparation. According to Facebook's own reporting, as of October 2017, Facebook has 1.32 billion daily active users, and 2.01 billion monthly active users. For context, that is over six times the U.S. population. Individuals and organizations use of Facebook has increased significantly over the past several years, and the same trend is being reported across the social media spectrum. People now use social networking sites not only to connect with friends, but also for sharing developments and milestones in their lives, memories, political views, news reports or articles (including fake news), shopping experiences, photos of themselves in various locations (often showing or describing the activity that the photo is depicting), and their current location or mood. Data often essential in discovery includes events attended or being planned to attend, activities enjoyed, videos appeared in and even connections to others. Savvy litigators understand that the skillful use of social media evidence both in and out of the courtroom can provide valuable tactical advantages.

Social media evidence, if properly obtained and utilized, can be a powerful tool in contradicting an opposing party's claims, such as: the degree of disability allegedly sustained, if any; their inability to do certain things; or their alleged loss of enjoyment/diminished quality of life. For example, in 2014, The New York Times reported that social media evidence led to the arrest of over 100 retired New York City municipal workers for alleged Social Security fraud based on allegedly fabricated claims that they were completely incapacitated by serious mental/psychiatric disabilities, (William K. Rashbaum and James C. McKinley Jr., "Charges for 106 in Huge Fraud Over Disability," *The New York Times*, January 7, 2014). One of those workers, who claimed he was too disabled to leave his home, had a Facebook page that contained photos of him holding a large swordfish while deep-sea fishing. Other photos showed a retired worker riding a jet ski, and others working in jobs such as helicopter pilot and martial arts instructor. Likewise, it is not unlikely that plaintiffs in personal injury matters will post photos of themselves engaging in activities that they claim they can no longer perform.

At the outset of discovery, it is important to search for any online content that may have been posted by the opposing party. This includes blogs, threads, Facebook, Myspace, Twitter, YouTube, Instagram, and anything else that may have been posted. You should also search for the social media accounts of any known friends or relatives of the opposing party in your action as those accounts may contain posts about your adversary or photos of your adversary that may not have been visible on your adversary's account or profile.

It should be noted, however, that it is important to avoid any conduct that may be considered unethical, such as "friending" a litigant who is represented by counsel. If litigators are not careful, they can inadvertently make unethical contact with a litigant who is represented by counsel. For example, LinkedIn notifies users when someone views their profile and often identifies the viewer by their name and/or the company they work for, and this could be viewed as an improper communication with a represented party. *See* New York State Bar Association, "Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association," at Guideline No. 4.C, (updated 2017).

If you come across any relevant or useful internet posts during your initial search, it is imperative that you print, screen shot, or otherwise save them. While this material may be difficult to authenticate and may receive a high degree of judicial scrutiny, it will be useful in support of motions to compel in the event that those posts are removed, changes are made to privacy settings, and/or production is refused. The material you obtain during your initial search can potentially be used to demonstrate relevancy and a basis for compelling discovery. Unless something useful turns up during the initial search, holding off on propounding social media discovery demands on your adversary until after taking their deposition may be advisable. And even if something useful is found, in most instances, it is still best to wait until the deposition to disclose what was found as a more candid response may be elicited if the deponent does not have an opportunity to prepare for your questions. At the deposition the deponent should be asked questions regarding their social media activity, such as whether or not they have: profiles on any social networking sites; ever posted or published anything related to the subject incident; ever discussed the subject litigation or their incident with anyone via Facebook messenger or on any other social networking site; a resume with their current work history posted anywhere on the Internet; and/or, posted any photos showing them conducting activities they are now claiming they cannot engage in, photos of them on vacation, or any photos at all since the time of the subject incident. The answers to these questions along with any materials found during the initial search will provide the grounds to overcome your adversary's subsequent objections to discovery demands.

After the deposition, discovery demands should be made for the public and non-public portions of their social networking accounts The demand may ask for the identification of all websites, blogs, social network accounts, or other electronic/social media platforms used since the time of the subject incident, along with the user names and passwords used to access those accounts and the names of any other individuals who have access to those accounts. Demand may also include all documents comprising or referencing the content that has been posted by or at direction of the respondent to any of the above named social networking sites or other media platforms, since the time of the subject incident. However, as discussed in more detail below, it would be prudent to narrowly tailor these discovery requests to only seek materials that relate to the subject incident or claims arising from same.

Most social networking sites are reluctant to release user account data and will even reject an authorization for release signed by the account owner; social media site operators are also likely to move to quash any subpoena served for this information. That is not to say efforts will never be successful in processing an authorization or overcoming a motion to quash a subpoena for records from a social networking site. In *People v. Harris* (36 Misc. 3d 613, 945 N.Y.S.2d 505, N.Y. City Crim. Ct. 2012), the ADA issued a subpoena to Twitter for access to the account of a defendant arrested during an Occupy Wall Street demonstration. In upholding the subpoena, the Court held that "you post a tweet, just like if you scream it out the window, there is no reasonable expectation of privacy. There is no proprietary interest in your tweets, which you have now gifted to the world." *Id*. Although processing an authorization or upholding a subpoena is possible, there are easier and more cost-effective ways to obtain social networking data. For example, Facebook created an option that is invaluable to litigators in light of Facebook's policy regarding subpoenas. The "Download Your Facebook Data" tool allows users to download a "data file" containing all of their account history in a single document, including all account activity, such as posts, photos, communications, and even things they have deleted. *See "Accessing Your Facebook Data,"* at facebook.com (last visited October, 2017). To download their Facebook data, all that users need to do is click on "Settings" at the top of any Facebook page, then click "Download a copy of your Facebook data" at the bottom of general account settings, and then click "Start My Archive." *Id*.

Increases in the privacy settings available to social media users and the effect those privacy settings may have on the ability to compel the production of certain data can frustrate the discovery process. However, relevant social media posts are not shielded from discovery merely because a party utilized privacy settings to restrict access. For example, in New York it is well established that the production of private social media discovery can be compelled when the legal and factual predicate for the production of same is demonstrated through inconsistencies in deposition testimony and/or the public portions of a social networking account. In *Romano v. Steelcase Inc.* (30 Misc. 3d 426, 907 N.Y.S.2d 650, N.Y. Sup. Ct. 2010), the defense sought the discovery of the non-public portions of a personal injury plaintiff's social media accounts on the grounds that they would contradict plaintiff's claim that she suffered injuries that lessoned her enjoyment of life and limited her participation in certain physical activities, such as horseback riding and running. In rejecting plaintiff's privacy arguments, the Court stated that to allow a plaintiff who is claiming severe physical and emotional injury to hide behind self-set privacy controls on a site, "the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial." *Id.*

However, demands for social media discovery should be as narrowly tailored as possible to avoid the implication that counsel is engaging in a "fishing expedition" for relevant material, and ensure the greatest likelihood of success on a motion to compel production.

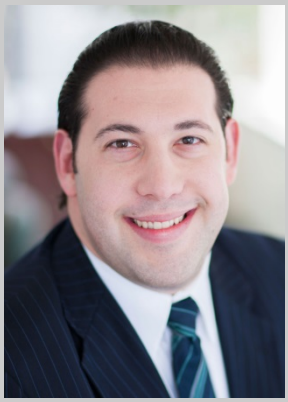
Essentially, the party seeking social media discovery must demonstrate a good faith basis for its request, rather than rely on the mere hope of finding relevant evidence on social media accounts. *See Fawcett v. Altieri* (38 Misc. 3d 1022, 1027, 960 N.Y.S.2d 592, N.Y. Sup. Ct. 2013). This is where the results of the initial search, and deposition testimony, will be most useful, as they will assist in establishing a good faith basis for the demand, and a threshold showing that the material sought is likely to be relevant to the case. The party seeking disclosure will need to argue that the publicly available materials contradict their adversary's claims or testimony, and

therefore, it is more than likely that there are relevant materials on the private portion of their social media accounts. For example, in reaching its decision in *Romano, supra*, the Court found that "[i]n light of the fact that the public portions of plaintiff's social networking sites contain material that is contrary to her claims and deposition testimony, there is a reasonable likelihood that the private portions of her sites may contain further evidence such as information with regard to her activities and enjoyment of life, all of which are material and relevant to the defense of this action." Whether a threshold showing is required or not, to maximize the likelihood of success on a motion to compel, attempts should be made to narrow discovery requests to specific time frames and subject matters. If the requests are limited to relevant time frames and/or subject matter, the likelihood that a court will find your request to be an unwarranted "fishing expedition" decreases significantly.

The most persuasive support for a motion to compel social media discovery is material from public posts that contradict respondent's claims. Thus, another option to consider at the outset of discovery is retaining the assistance of a company that provides electronic discovery services with experts that specialize in the collection and preservation of social media postings. While cost considerations are important, these experts can conduct broad and in-depth searches for any internet posts made by your adversary, including the metadata associated with those posts.

In sum, the discovery of social media evidence merely requires the application of traditional discovery principles in a somewhat novel context. Relevancy is the focus of whether social media evidence is discoverable. As such, litigators must act quickly to obtain any and all publicly available posts that may contradict the claims being asserted in order to make a *prima facie* showing that the private portions of respondent's social media accounts are likely to contain relevant materials. To that end, it is vital that litigators be thoroughly versed in the use, availability and discoverability of social media evidence and keep apprised of developments.

Paul J. Zola is a Member of Cozen O'Connor's General and Commercial litigation department. Practicing out of Cozen's downtown New York office, he defends various complex claims, including high-profile multimillion dollar cases. He concentrates his practice in construction and labor law, products liability, premises liability, personal injury, sports liability, and toxic and environmental tort matters. His work in these areas has gained him substantial courtroom experience, as well as proficiency in handling cases involving an array of critical legal and professional disciplines. Paul draws from his diverse experience to provide clients with both preventative counsel and representation in all phases of litigation.



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Relativity Fest
Chicago, IL: October 22-25, 2017

National eDiscovery Leadership Institute
Kansas City, MO: October 30, 2017

"The Exchange" Data Privacy and Cybersecurity Forum
Washington, DC: November 1, 2017

39th Global eDiscovery Confex
San Francisco, CA: November 1, 2017

The Sedona Conference Working Group 1 Annual Meeting 2017
Phoenix, AZ: November 2-3, 2017

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