

Social Media and the Lawsuit

#howtogetit

#howtouseit

#caselawupdate

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What is Social Media?

- Facebook
 - 2004, 1.2 billion monthly active users
- Myspace
 - 2003, 125 million users
- Twitter
 - 2007, 500 million Tweets daily
- LinkedIn
 - 2003, 277 million members

More and More Every Day

- Google Plus
- Instagram
- Pinterest
- Vine
- YouTube
- Tumblr
- Flickr
- Meetup
- FourSquare
- We♥it
- LiveJournal
- Stumbleupon
- Badoo
- Tagged
- okCupid
- Friendster
- Reddit
- Squidoo



Hashtag Mania

- Used to be the # sign on the phone
- Then used to flag trending topics on Twitter
- Now:
 - #everywhereyoulook
 - #partoftheconversation
 - #sayanything

So Many Issues, So Little Time

- Social Media websites can lead to:
 - Location disclosure
 - Investigation without a warrant
 - Social profiling for advertisers
 - Third party information disclosure
 - Cyberstalking
 - Cyberbullying

Privacy? What's That?

- Check out Spokeo.com – a “people” website that aggregates your data
- Website privacy controls – use them!
- But, realize restricting access to “friends” is not protecting your privacy
- Courts appear uniform in holding that your “sharing” with friends means you do not have reasonable expectation of privacy in social media



Blunder

- Confidentiality agreement
 - Prep school headmaster filed age discrimination claim, settled with school
 - Daughter posted on Facebook:
 - “Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT.”
 - School found out, claimed breach of confidentiality, revoked settlement



Blunders

- Admissions, Evidence
 - Paris Hilton – arrested for cocaine possession, found in her Chanel bag. Hilton vehemently denied the bag was hers.
 - But earlier in the day she tweeted: “Love my new Chanel purse I got today!”
 - Anthony Weiner. That is all.



Blunder

- Actual case – murder case involving gang-related drive-by shooting
- State had evidence from defendant's Myspace accounts:
 - Photos showing his gang-related tattoos and him making gang signs
 - Referring to victim and music played at victim's funeral
 - Bragging about killing, shooting, being angry about the "snitch"

Discoverability of Social Media

How do I get social media
information to make my case?

Discovery – Is the Information Relevant???

- Primary inquiry of any discovery request
 - Tex. R. Civ. P. 192.3(a); Tex. R. Evid. 401; Fed. R. Evid. 401
 - Social media is no different
- Social media websites often flooded with irrelevant information. We all know people who post the minutiae of their lives on Facebook.

Discovery – Is the Information Relevant???

“You want to know the best thing
about *Zombieland*? . . .

. . . no Facebook status updates. You
know, ‘*Rob Curtis is gearing up for
Friday.*’ Who cares?”

Discovery – Is the Information Relevant???

- Generally, social media content that is relevant to litigation is discoverable.

- E.g. *Bass v. Miss Porter's School*, 2009 WL 3724968 (D.Conn. Oct. 27, 2009) (ordering the production of “more than 750 pages of wall postings, messages, and pictures” from plaintiff’s Facebook account);
- *Ledbetter v. Wal-Mart Stores, Inc.*, 2009 WL 1067018 (D. Colo. Apr. 21, 2009) (denying plaintiffs’ motion for protective order regarding their Facebook, Myspace, and Meetup.com content)

Discovery – Is the Information Relevant???

In re Christus Health Se. Texas, 399 S.W.3d 343, 348 (Tex. App.—Beaumont 2013, no pet.).

- Because the family was seeking mental anguish damages, the statements plaintiffs may have made about decedent's death on social media sites **were relevant** and within general scope of discovery.
- Plaintiffs had not shown an expectation of privacy in their social media posts.
- But, because the discovery request was not limited in time, it was overly broad on its face.

Discovery – Possession, Custody, & Control

- Only required to produce documents/content within party's possession, custody, or control; Tex. R. Civ. P. 192.3; Fed. R. Civ. P. 34(a).
 - If I post something on my Facebook page, who owns and controls that post?
 - What if I post something on someone else's Facebook wall?
- A user typically has "control" of his or her own social media content – to the extent he or she can still access it – because the user typically has the "legal right, authority, or practical ability to obtain the materials sought on demand."

Discovery – Possession, Custody & Control

- E.g. Facebook: **“You own all of the content and information you post** on Facebook, and you can control how it is shared through your privacy and application settings.” Facebook – Statement of Rights and Responsibilities, <http://www.facebook.com/legal/terms>
- Twitter: **“You are responsible** for your use of the Services, **for any Content you post to the Services,** and for any consequences thereof.” **“[W]hat’s yours is yours – you own your Content** (and your photos are part of that Content).” Twitter – Terms of Service, <https://twitter.com/tos?PHPSESSID=57a411f70b1964a2bc78b82638ba1843>

Discovery – Statutory Roadblocks

- How do you get the information off a social media site?
 - Do you send subpoenas to Facebook/Twitter/etc.?
 - Trying to subpoena data directly from Facebook, Twitter, or other social media providers can violate the Stored Communications Act (“SCA”) 18 U.S.C. §§ 2701-2712.

Discovery – Stored Communications Act

- The SCA prohibits:
 - “a person or entity providing an electronic communication service to the public” from “knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service. ...” 18 U.S.C. § 2702(a)(1)
 - Provides no exception for civil subpoenas

Discovery – Stored Communications Act

- *Crispin v. Christian Audigier, Inc.*, 717 F.Supp.2d at 987 (C. D. Cal. 2010)
 - Defendants served subpoenas on Facebook and Myspace, seeking subscriber information, all communications between plaintiff and third party, and other all communications.
 - Court: Facebook and Myspace are both “electronic communication services” and “remote computing services” with respect to wall posts and comments, and the SCA will apply to prohibit the services from divulging the contents of such wall posts and comments.

Discovery – Stored Communications Act

- *Crispin v. Christian Audigier, Inc.*, 717 F.Supp.2d at 987 (C. D. Cal. 2010)
 - Subpoena quashed with respect to Facebook and Myspace private messaging
 - But court remanded to magistrate to determine whether Facebook wall postings and Myspace comments were available to the general public or a smaller subset of people. Court suggested that if postings were available to general public, the SCA would not bar disclosure.

Discovery – Steering Clear of the Stored Communications Act

- Request or subpoena the communications directly from the user
- Should not implicate the SCA because user likely is not an “electronic communication service” under the SCA
- Ask for user’s consent to have service provider release the information
- Notify service provider of intent to request information and ask them to preserve during interim period

Discovery – Getting Social Media Information from the User

- Compelling discovery:
- Think your Facebook posts and messages are “private”? Think again!
 - *EEOC v. Simply Storage Management, LLC*, 270 F.R.D. 430 (S.D. Ind. 2010)
 - Court found that **“a person’s expectation and intent that her communications [on a social media site] be maintained as private is not a legitimate basis for shielding those communications from discovery.”**

Discovery – Getting Social Media Information from the User

- Most courts have held that social media posts are not “private,” “confidential,” or shielded from discovery:
 - *McMillan v. Hummingbird Speedway, Inc.*, No. 113 - 2010 CD, 2010 WL 4403285 (Pa. Ct. Com. Pl. Sept. 9, 2010)
 - “[N]o person choosing MySpace or Facebook as a communications forum could reasonably expect that his communications would remain confidential, as both sites clearly express the possibility of disclosure.”
 - Court compelled disclosure of Facebook and Myspace **usernames** and **passwords**, prohibited plaintiff from deleting or altering existing information

Practice Tip: Facebook User History

The screenshot shows a web browser window displaying a Facebook profile page. The browser's address bar shows the URL <https://www.facebook.com/dyi?x=AdkFhb9v8SjppDn#/>. The browser's menu bar includes File, Edit, View, Favorites, Tools, and Help. The browser's toolbar shows search, back, forward, and refresh buttons, along with several open tabs: 'sherman, tx - Google S...', 'TAMES SEARCH - Four...', 'WestlawNext Signon', and 'Facebook'. The Facebook page header includes a search bar with the text 'Search for people, places and things' and navigation links for Home, Find Friends, and a user profile for Kyle. A dropdown menu is open over the user profile, listing options: Create Page, Advertising, Activity Log (with a notification badge '1'), Settings, Log Out, Help, and Report a Problem. The main content area of the page features several posts: 'Affordable healthcare', 'Insatiable DO You Love The Movie Goodfellas!' (with 9,135 likes), 'PrideStaff Want A Better Job?' (with 44,649 likes), and 'Did You Buy Pocket Hose?' (with a link to hosesettlement.com). The footer of the page includes 'Facebook © 2014' and links for English (US), Privacy, Terms, Cookies, and More. The Windows taskbar at the bottom shows the system tray with the date and time '3:27 PM 3/24/2014' and a search bar.

Practice Tip: Facebook User History

Browser address bar: <https://www.facebook.com/dyi?x=AdkFhzb9v8SjppDn#/settings>

Search bar: Search for people, places and things

General Account Settings

Name	Kyle Burke	Edit
Username	[REDACTED]	Edit
Email	[REDACTED]	Edit
Password	Password last changed over a year ago.	Edit
Networks	No networks.	Edit
Language	English (US)	Edit

[Download a copy of your Facebook data.](#)

Footer: Facebook © 2014 · English (US)

Taskbar: 3:28 PM, 3/24/2014

Practice Tip: Facebook User History

The screenshot shows a web browser window displaying the Facebook 'Download Your Information' page. The browser's address bar shows the URL: <https://www.facebook.com/#!/dyl?x=AdkFhb9v8SjipDn>. The browser's menu bar includes 'File', 'Edit', 'View', 'Favorites', 'Tools', and 'Help'. The browser's toolbar shows several open tabs: 'sherman, tx - Google S...', 'TAMES SEARCH - Four...', 'WestlawNext Signon', and 'Download Your Info...'. The Facebook page header features a search bar with the text 'Search for people, places and things' and navigation links for 'Home', 'Find Friends', and 'Kyle'. The main content area is titled 'Download Your Information' and includes the subtext 'Get a copy of what you've shared on Facebook.' Below this is a prominent green button labeled 'Start My Archive'. To the right of the button is an illustration of a document, a padlock, and a large green arrow pointing downwards. Underneath the button, a section titled 'What's included?' lists the following items:

- Posts, photos and videos you've shared
- Your messages and chat conversations
- Info from the About section of your profile
- And more

At the bottom of the page, there is a footer with links for 'About', 'Create Ad', 'Create Page', 'Developers', 'Careers', 'Privacy', 'Cookies', 'Terms', and 'Help'. Below these links, it says 'Facebook © 2014 · English (US)'. The browser's status bar at the bottom shows the system tray with icons for network, volume, and power, along with the time '3:13 PM' and date '3/24/2014'. The browser's zoom level is set to 125%.

Discovery – Other Ways to Pull Social Media Information

- *In camera* review:
 - *Offenback v. Bowman*, No. 1:10-cv-1789, 2011 U.S. Dist. LEXIS 66432 (M.D. Pa. June 22, 2011), (magistrate judge conducted an in camera review of the plaintiff's Facebook account and ordered the production of a "small segment" of the account as relevant to the plaintiff's physical condition)
- Navigating to website, printouts with affidavit
- Video demo of navigation through website
- Third-party data miners
 - *E.g.*, CloudPreservation and X1 Social Discovery are two examples of commercially available tools that are specifically designed for archiving and collecting social media content.

Social Media and the Trial

Use of Social Media,
Spoliation, and
Admissibility Issues

Everyone's Doing It

- Lawyers Investigating Potential and Seated Jurors
- Jurors Investigating Lawyers, Parties, Witnesses, Subject of Case
- Judges Investigating Lawyers, Parties, and Jurors
- Criminal & Civil Backgrounds, Subject Matter of Case, Prior Rulings in Case

Jurors – Before Trial

- Social Media “Consultants” Used in High-Profile Cases
 - Casey Anthony Trial
- Cases “Tried in the Media” – Social Media – Unprecedented
- Voir Dire Questioning Must Include Social Media and Other Internet Habits

Jurors – Voir Dire

- Texas case – lawyer used info about juror's extensive use of social media to strike her from panel in crim. case where D met assault victim through Myspace page
- Survived *Batson* challenge – strike was related to facts of case
- Pretrial searches of potential jurors' social media sites currently permissible

Jurors – Voir Dire

- Texas Supreme Court Instructions for Jurors: Tex. R. Civ. P. 226a
 - Do not discuss this case with anyone, even your spouse or a friend, either in person or by any other means, [including by phone, text message, email message, chat room, blog, or social networking sites such as Facebook, Twitter, or Myspace].

Jurors – Voir Dire

- State Bar of Texas – No Formal Rule Specific to Use of Social Media to Investigate Jurors
 - Texas Disciplinary Rule of Professional Conduct 3.06 (prohibiting a lawyer from “conduct[ing] ... a vexatious or harassing investigation of a venireman or juror”).

Jurors – During Trial

- Jurors Seek Outside Sources of Information
 - Relevant Information Withheld
 - Evidence Highly Screened
 - Jurors Not Permitted To Ask Qs
- Jurors Communicating with Outsiders
- Jurors Communicating with Each Other Before Deliberations

Jurors – During Trial

- 2010 Reuters Legal Survey
 - Twitter Search “Jury Duty”
 - Tweet Once Every 3 Minutes!
- Jurors Seeking Opinions From Friends and Relatives About Trial
- Increasing Mistrials, Contempt Sanctions Based on Internet Research & Use of Social Media
 - Fort Worth Juror & Community Service

Jurors – During Trial

- Texas Supreme Court Rules Committee
 - Best Way to Address Threat to Jury Verdicts Through Jurors' Use of Internet for Outside Research and Social Media is Specific Instructions
- Texas Rules of Civil Procedure 281, 284, 226a

Jurors – During Trial

- TRCP 284 – Judge Caution to the Jury:
 - Immediately after jurors are selected for a case, the court must instruct them to turn off their phones and other electronic devices and not to communicate with anyone through any electronic device while they are in the courtroom or while they are deliberating. The court must also instruct them that, while serving as jurors, they must not post any information about the case on the Internet or search for any information outside of the courtroom, including on the Internet to try to learn more about the case.

Jurors – During Trial

- TRCP 284 – Judge Caution to the Jury:
 - If jurors are permitted to separate before they are released from jury duty, either during the trial or after the case is submitted to them, the court must instruct them that it is their duty not to communicate with, or permit themselves to be addressed by, any other person about any subject relating to the case.

Jurors – During Trial

- TRCP 226a – Trial court caution to jury:
 - Turn off all phones and other electronic devices. While you are in the courtroom, do not communicate with anyone through any electronic device. [For example, do not communicate by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace.]

Jurors – During Trial

- TRCP 226a – Trial court instruction for during deliberations:
 - Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. . . . Do not use your phone or any other electronic device during your deliberations for any reason.

- Texas Rule 226a: Explain to Jurors Reason for Restrictions on Social Media and Internet Research
 - All the information [considered by the jury] must be presented in open court so the parties and their lawyers can test it and object to it. Information from other sources, like the Internet, will not go through this important process in the courtroom. In addition, information from other sources could be completely unreliable. As result, if you investigate this case on yor own, you could compromise the fairness to all parties in this case and jeopardize the results of this trial.

- Despite these precautions, numerous cases show how jurors can taint the proceeding through social media use
- Death row inmate in Arkansas got a new trial because of juror's tweeting during liability and sentencing phases (even after judge's reprimand)
- Juror in West Virginia lied during voir dire about knowing criminal defendant, even though she had "friended" him a week before trial.
 - Juror's dishonesty = new trial.

- In Texas, Potential Juror Misbehavior Regarding Social Media and Internet: Cases Generally Demonstrate Obtaining Post-Verdict Relief is Difficult
 - Limits on Available Grounds
 - Limits on Admissible Evidence

- Better Way: Prevention Through Jury Instructions

Lawyers

- Some courts consider it a matter of professional competence for lawyers to investigate social media issues as to their clients and as to potential jurors, based on ethical rules requiring “zealous representation”
- But, must balance research and questioning against jurors’ reasonable expectation of privacy
 - Remember DR 3.06 (no harassment)

Judges

- Most articles about judges' use of social media approve of it as long as the judge complies with the rules governing judicial conduct
- Some judges use it to monitor jurors' compliance with their rules; others use it to monitor criminal defendants' conduct

- Texas judge caught texting prosecutor in gallery during criminal case, that acting prosecutor not asking right questions and should try these instead; defendant acquitted
- Dallas case – Ct. App. held judge having someone as “friend” on FB does not show degree or intensity of relationship, and record did not otherwise establish bias of judge

Spoliation

- If litigant deletes social media page or photos or posts, it can be considered spoliation of evidence (leading to presumptions against spoliator, other sanctions)
- Most courts hold account owner has duty to preserve social media when litigation is imminent or lawsuit gets filed

- Virginia: lawyer told paralegal to make sure client “cleaned up” his Facebook page
 - Punishment: judge halved jury’s verdict and sanctioned lawyer and client \$722,000
- New Jersey: defendant changed FB profile picture; while technically spoliation, it was unintentional. Plaintiff had not sent litigation hold.

Admissibility Issues

- Biggest issues: authentication and relevance
- Authentication is proving that the item is authentic, what the proponent claims it to be
 - Did the account owner actually do the posting or tweeting? (My page was hacked!)
 - Did someone else write on the owner's wall? Was the owner merely "tagged" in another person's post?

Authentication Issues

- Social media pages can be created by anyone under any name – no way to know if page is legitimate
- Courts look for evidence linking post/message/photo to the author
 - Names on accounts, IP addresses
 - Unique internal characteristics
 - Timing
 - Verification by third party

- Authentication usually requires personal knowledge
 - Someone to say, this is a picture of X that I saw on X's Facebook page, or this is a message I received from X
 - Facebook says owner of account can authenticate account content – FB will not supply records custodian testimony
- Other ways to authenticate:
 - Use requests for admission
 - Get stipulation to authenticity

- Self-authentication – such as official documents whose authenticity is not in dispute (e.g., public record) – most courts not there yet with social media
 - But, Facebook says its records are considered self-authenticating in Calif. and under federal law
- Expert testimony – some courts approve use of internet expert to authenticate social media evidence

- 5th Cir. – held error to admit photos from Facebook and Myspace because state did not provide sufficient proof to establish def. possessed money, guns, and cocaine seen in photos on def's pages.
- Evidence also unfairly prejudicial
- But, error was harmless because "over-whelming" evidence of guilt came in from other sources

Relevance

- Relevance – evidence having a tendency to make fact at issue more probable or less probable than without the evidence
- Most courts applying traditional relevance analysis
- 11th Cir. – upheld admission of Myspace page showing def. holding same kind of gun used in shooting

- Personal injury cases – social media can help prove or disprove physical injury, mental anguish, other “soft” damages
- May be relevant in:
 - Family law cases (esp. custody)
 - Employment cases (esp. harassment)
 - Intellectual property cases (esp. trademark infringement, copyright)

- In one Texas case, court considered defendant's Twitter feed (offering cheap cargo rates when it had space)
- Found out-of-state defendant's solicitation of new business through Twitter was some evidence to establish minimum contacts with Texas
- Trial court had personal jurisdiction over defendant

- Potential exclusion of social media:
 - Improper character evidence – TRE 404(b)
 - Cannot admit evidence of being bad person in the past to show person was being bad on occasion in question
 - Hearsay – TRE 802 – out-of-court statement offered to prove truth of matter asserted
 - All social media evidence is likely hearsay
 - Still likely to be admitted as:
 - Admission of party opponent (not hearsay)
 - Present sense impression (exception)
 - Excited utterance (exception)
 - Then-existing mental, emotional, physical condition₉

The End!

**Thank you
for your attention!**