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Technology Corner

Obtaining and Using Social Media in Litigation: Tips for the Employment Practitioner

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Now that you know how to [use and obtain social media in pre-litigation investigations](#), here are some tips for obtaining social media during litigation, and ensuring that you will be able to use it to your client's advantage.

Ask for Specific and Relevant Social Media in a Discovery Request: If you have a reasonable belief that social media created by an opposing party is relevant to the claims, defenses, or alleged damages in your case (e.g., a supervisor's harassing or discriminatory comments posted on Twitter or Facebook, photos of a plaintiff alleging severe emotional distress partying with friends, etc.), do ask for it in discovery. Courts have ordered parties to produce social media during litigation - even if it is designated as "private" - if the requesting party can demonstrate that the information is relevant to the case. See, e.g., *Zimmerman v. Weis Markets, Inc.*, No. CV-09-1535, 2011 WL 2065410 (Pa. Com. Pl. May 19, 2011) (granting a motion to compel discovery of private content from a Facebook page after publicly available content displayed evidence that would undermine claims); *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, (S.D. Ind. 2010) (granting a motion to compel discovery of private Facebook and MySpace information to rebut specific claims). You are more likely to get the information you want if your request is narrowly tailored, so make sure your request is limited in time and scope and describes what you seek with specificity.

Practice Pointer: Don't accept the opposing party's assertion that posts or photos have been deleted. Social media platforms may be able to retrieve "deleted" items, although each platform has its own protocol for storage and production of user data. For example, while Facebook is notoriously difficult to obtain information from via third-party subpoena, it allows a user to download her entire archived profile, including photos, videos, wall posts, messages and friend lists onto one zip file that can easily be produced in discovery. To obtain this

information, the user can click on "Account Settings," then "Download a copy of your Facebook data."

Practice Pointer: Do not authenticate all social media or other internet-based information obtained through discovery. Courts have concluded that stand alone pages from a website or a Facebook page, even with a profile picture attached, are not self-authenticating - no matter how incriminating or relevant. Without sworn testimony or an affidavit from a witness with personal knowledge of the authenticity of the content, your "smoking gun" may be rejected as hearsay. See, e.g., *Williamson v. Prince George's County, et al.*, slip copy, DKC 10-1100, 2011 WL 280961 (D. Md. Jan. 26, 2011) (rejecting printouts of unauthenticated internet webpages as hearsay when submitted as evidence in support of a motion for summary judgment); *Griffin v. Maryland*, 419 Md. 343 (2011) (reversing a conviction that had been based on unauthenticated social media evidence); *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534, 538 (2007) (emphasizing the need to properly authenticate electronic evidence). If you request social media in discovery, also propound interrogatories or requests for admission that will provide the authentication needed to support use in motion practice or at trial. Or get the authentication you need during deposition of the social media owner.

Get Creative: If a discovery dispute over social media emerges, the court will need to review a host of electronic media (digital images, videos, messages, applications, metadata, etc.) that are not easily viewed in traditional printed form. Courts have taken various approaches to this problem; for example, Magistrate Judge Joe Brown of the Middle District of Tennessee offered to temporarily create his own third-party Facebook account in order to conduct an in camera review of private Facebook content. *Barnes v. CUS Nashville, LLC*, No. 3:09-cv-00764, 2010 WL 2265668 (M.D. Tenn. June 3, 2010). For such an approach to work, the custodian of the private information would "friend" the Judge, who would review the items in question, determine their relevance and the scope of permitted discovery, and delete the temporary account immediately after review.

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