

Know Your Way Around Social Media Evidence

Law360, New York (April 19, 2013, 12:52 PM ET) -- The use of so-called “social media” continues to expand both in terms of options and outlets and the number of people using it. In addition to chat rooms, countless discussion forums and blogs, plaintiffs may be active on social websites including Facebook, Twitter, LinkedIn, Pinterest, Instagram, Four Square, Flickr, YouTube, MySpace, Google Plus, LiveJournal and myLife.

Many lawyers and judges are also active social media contributors, but many more are not, and some remain utterly unfamiliar with this social phenomenon. From pictures of a lung-cancer plaintiff smoking a cigarette to a profile of a wrongful death widow on a dating website, social media can supply virtually endless evidence for impeachment or mitigating damages in personal injury and product liability cases.

The law continues to evolve in this area as defense lawyers more aggressively seek, and plaintiffs more steadfastly resist, disclosure of such activities.

Discovery

Social media has become so prevalent that content is being sought in many standard discovery requests. The threshold for discovery in this area should be relatively low. The information is likely never protected by any privilege and need only be potentially relevant and reasonably calculated to lead to admissible evidence.

Relevance is relatively easy to establish on any point the plaintiff places at issue in a case. Content from social media websites may be used to counter a plaintiff’s claim of damages, to impeach claims made or in support of defenses like assumption of risk or pre-existing condition.

As with all evidence, it is important to establish the date or time frame of the material, i.e., when a picture was taken or when a comment was posted, in order to assert its relevance. As long as social media discovery requests are not a fishing expedition, but rather reasonably tailored to seek information on point with particular claims in the case, most courts will allow the requests.

The default settings of most social websites automatically make content public and searchable, but disclosure of password-protected or “private” content on social websites may even be compelled. The content would only rarely be protected from disclosure by a traditionally recognized privilege.

Moreover, the social media sites themselves generally disclose that any posted information, even password-protected posts, may become publicly available. For such reasons, courts generally continue to hold that there is no reasonable expectation of privacy associated with such information.

For example, in *Equal Employment Opportunity Commission v. Simply Storage Mgt. LLC*, 270 F.R.D. 430 (S.D. Ind. 2010), the court compelled production of relevant, private social networking site communications, finding that social networking information is “not shielded from discovery simply because it is ‘locked’ or ‘private’.”

Similarly, the New York Supreme Court in *Romano v. Steelcase Inc.*, 907 N.Y.S. 2d 650 (N.Y. Sup. Ct. 2010) also compelled discovery of private portions of a plaintiff’s social networking profiles, where information on her publicly available profiles was relevant and indicated a reasonable likelihood that similar content might be found on the private portions.

But, it is important to remember that such information is not per se discoverable because its relevance must still be established, and the scope of information requested must be reasonably tailored. The Florida Circuit Court in *Levine v. Culligan of Florida Inc.* (Fla. Cir. Ct. Jan. 29, 2013) sustained plaintiff’s objections to the social networking discovery not because the information was “private” but because defendant failed to establish the relevance of information sought.

In its analysis, the Levine court pointed to cases in other jurisdictions, including *Simply Storage* and *Romano*, supporting the idea that social networking information, by its very definition, defies any expectation of privacy.

The potential use of social media postings is not limited to plaintiffs. Social media websites offer more than social networking — they can be tools for commercial marketing as well. Expert witnesses and even corporate co-defendants may use social media to promote their services and make representations about their products or expertise.

Accordingly, social media evidence may have relevance to a product liability case beyond the plaintiff — pictures or comments posted on websites may be relevant to any witness’ bias and truthfulness and may be useful for cross-examination.

The pervasiveness of social media content and its potential negative impact is not lost on plaintiffs’ counsel. Some appear to be instructing their clients to remove potentially harmful content or to completely “unplug” during the pendency of litigation. But at what point does removing content from the Internet — if such a thing can ever really be done — constitute destruction of evidence?

It is generally advisable that a party removing content from the Internet preserve it by printing the page with the web address and date or by taking a screen capture of the content. This way, the content can be reviewed in camera and produced to opposing counsel if need be. Likewise, the party propounding the social media discovery should search publicly viewable content or profiles in anticipated support of a motion to compel or motion for spoliation sanctions.

Courts have imposed spoliation sanctions for removal of social media information — with and without fraudulent motives. In a recent personal injury case in the U.S. District Court of New Jersey, counsel for the defendant airline, which was accused of knocking a staircase into a ground operations supervisor of another airline, requested access to the plaintiff’s Facebook account in search of evidence inconsistent with his alleged injuries. See *Gatto v. United Airlines Inc.* (D.N.J. Mar. 25, 2013).

The plaintiff provided his password, and the defense counsel attempted to access the plaintiff’s Facebook page. Facebook, seeing activity on the plaintiff’s account from an unfamiliar IP address, sent a security warning, which caused the plaintiff to deactivate his account.

On motion for spoliation sanctions, it was unclear whether the plaintiff affirmatively deleted the Facebook account or merely failed to reactivate it after he deactivated it pursuant to the security measure. Accordingly, the court declined to award monetary sanctions but issued an adverse inference instruction to the jury.

Earlier this year, the Virginia Supreme Court held that a trial court did not abuse its discretion in refusing to grant a retrial where it issued an adverse inference instruction and imposed sanctions on both a plaintiff and his attorney for willful destruction of social media evidence. *Allied Concrete Co. v. Lester* (Va. Supreme Ct. Jan. 10, 2013).

The plaintiff, the surviving husband of a car accident victim, deleted Facebook pictures on his attorney's advice that they would place him in an unfavorable light with the jury. The trial court came down hard on such spoliation of social media evidence, imposing over \$700,000 in sanctions. Most of the pictures from the plaintiff's Facebook page were recovered prior to trial, and at least one was admitted into evidence — a picture of the widower-plaintiff in an "I heart hot moms" t-shirt.

Admissibility

To be admissible at trial, social media evidence must still satisfy the rules of evidence regarding relevance, hearsay, authenticity and prejudice. Relevance, at least for purposes of impeachment, and hearsay should not typically be significant impediments to the use of social media evidence at trial.

Authenticity could potentially be the biggest obstacle to admissibility, while unfair prejudice remains a wild card to a certain extent. On the issue of relevance, courts are trending toward limiting the admission of evidence from social media websites to be used for impeachment purposes only and not as substantive evidence. See, e.g., *Quagliarello v. Dewees* 802 F.Supp.2d 620 (E.D. Pa. 2011).

Thus, pictures of a plaintiff riding a bike or hiking a mountain are relevant only to impeach his claims that an accident has left him disabled or severely injured. Similarly, comments or "status updates" by the plaintiff that he is engaging in physical activities or events can only be construed to counter his claims for damages and injuries limiting these activities. Even the mere fact that a plaintiff has a website or is active on a social media page can be indicative of his ability to perform tasks associated with low-impact vocational work in opposition to a disability or lost wages claims.

Hearsay is typically not a significant issue. Most content posted by a plaintiff would be excluded from the hearsay rule as a party-opponent admission. See FED. R. EVID. 801(d)(2). Even "likes" on Facebook or "retweets" on Twitter could arguably fall under the exclusion as admissions. For nonparty witnesses, tweets may be admissible as then-existing mental, emotional or physical condition, present sense impression or excited utterance exceptions to hearsay. See FED. R. EVID. 803(1), (2) and (3).

In fact, the instantaneous nature of some social media sites, coupled with geolocation software on many smartphones and mobile devices, can be useful in product liability cases as well. Services are available to track all of the posts or messages uploaded from a particular area, during a certain period in time.

This information could produce a message from an eyewitness in a motor vehicle accident or a co-worker's reactionary post to a worksite malfunction. Again, as with the privacy settings, geolocation is typically activated by default.

Authentication is arguably the most difficult obstacle to overcome in establishing the admissibility of social media evidence. The very reason why so much information is readily shared on the Internet works against establishing its authenticity. The anonymity of posting from behind a screen name grants users the freedom of unfiltered expression. But what if, even when confronted with the evidence, a witness claims not to have been the author of the content.

It is commonplace enough for people to pose as other users in posting content to social media websites that the term “catfish” has worked its way into today’s vernacular. Arguably though, the identity of the author of a comment or post could go to its weight and not admissibility, assuming it was already established that the witness was the owner of the social media account, website or screen name.

A screen capture showing that content came from a particular website, printed with the web address and date the content was pulled, could be sufficient support for its authenticity. See *Tienda v. Texas*, 358 S.W.3d 633 (Tex. Crim. App. 2012) (finding that the collective content of a defendant’s MySpace page was sufficient circumstantial evidence to authenticate it was created and maintained by him). Without a plaintiff’s cooperation, however, more information is needed to match a user with a screen name or profile.

Some courts will allow authentication through witness testimony or circumstantial evidence that the personal account details indicate the content was created and posted by the plaintiff. See, e.g., *Campbell v. State*, 382 S.W.3d 545 (Tex. App. 2012). Given the ease with which evidence from social media can be manipulated or altered, courts tend to require a greater degree of authentication than for written material from print publications. So, proponents of social media evidence obtained outside of party discovery may have to get creative with authenticating evidence or work it into a cross-examination.

When a plaintiff has refused or failed to provide content from his social media accounts, some defendants have subpoenaed the social media providers directly. The Stored Communications Act (SCA) prohibits a social network provider’s disclosure of its users’ information and electronic communications without consent. Courts have quashed subpoenas to third-party social network providers under the SCA. See, e.g., *Crispin v. Christian Audigier Inc.*, 717 F. Supp. 2d 965 (C.D. Cal. 2010) (quashing a subpoena for private messages from social networking sites).

In addition, some of the social media providers are taking action to head off discovery of their users’ personal information. Twitter, for example, recently filed a motion to quash a New York County District Attorney’s Office’s subpoena for “basic user information,” which was denied. See *State v. Harris*, 949 N.Y.S.2d 590 (N.Y. Crim. Ct. 2012) (appeal pending). According to their websites, both Facebook and Twitter have a policy against providing the contents of a user’s account to a nongovernmental entity without a warrant.

Investigations into a plaintiff’s social media activity should be incorporated into product liability cases, and social media evidence should be sought in discovery as it may prove useful to refuting a plaintiff’s injury regardless of admissibility at trial.

As social media continues to pervade everyday life, its use in the context of litigation will undoubtedly expand, forcing courts to provide instruction on the discovery and admissibility of the content on a case-by-case basis.

--By Joseph W. Hovermill and Katherine A. Lawler, Miles & Stockbridge PC

Joseph Hovermill is a principal with Miles & Stockbridge in the firm’s Baltimore office. He is the firm’s products liability practice group leader. Katherine Lawler is associate counsel with the firm in the Baltimore office.

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