

# **SOCIAL MEDIA – DISCOVERY AND EVIDENCE**

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## SOCIAL MEDIA – DISCOVERY AND EVIDENCE

### I. COMPETENCY

Let's start with the basics about social media. Then again, let's not. Social media touches just about every practice area, so attorneys should already be generally familiar with the various social networks such as Facebook, Twitter, LinkedIn, etc. ABA Model Rule 1.1 (Competency) includes the following comment: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."<sup>1</sup> Over half of the states have adopted this duty for attorneys to be familiar with technology that affects their practice. Florida has gone one step further by requiring three of thirty continuing education hours to be in the area of technology.

Texas has yet to incorporate technology competence into the rules of professional conduct or continuing education standards, but the writing is on the wall. A recent ethics opinion announced that attorney competency includes being knowledgeable of the existence and potential pitfalls of transmitting metadata in electronic documents.<sup>2</sup>

The days are numbered on a Texas lawyer's ability to utter the phrase "I'm not a Techie." You need not be a computer programmer to be familiar with and/or involved in social networking. Consider the following statistics:

- Over half of online adults use two or more social media sites
- Facebook has over 1.7 billion users (about 22% of the world's total population)
- Five new Facebook profiles are created each second
- 50% of 18-24 year-olds go on Facebook when they wake up
- Twitter has 1.3 billion users (313 million active)
- Over a billion tweets are sent every 48 hours
- 81% of millennials check Twitter at least once per day
- YouTube has over a billion users, and every day people watch hundreds of millions of hours of video
- YouTube reaches more 18-34 year-olds than any cable network

These billions of human beings are creating terabytes of digital information every day! These folks are your

clients, your opposition, your witnesses, and even your judge and jurors. They don't want to hear you talk about how "nobody licks a stamp anymore."

### II. DISCOVERY OR EVIDENCE?

When I was in law school, Evidence was a full semester course, yet we only focused on discovery for about a week. Back then, more cases were tried, and pretrial conferences were little more than a glorified docket call. We had to focus on proving up our trial evidence and precluding that of our opposition. This certainly required advance preparation, but often it meant thinking quickly on your feet when faced with an objection during trial.

Today, fewer cases are tried, and most of those cases start with a detailed pretrial conference during which exhibits are pre-marked and mostly pre-admitted. The days of memorizing the business records predicate seem to be gone.

Also in the past 20 years, discoverable evidence has grown exponentially thanks to technology. What was formerly preserved on a single sheet of paper may now exist in multiple electronic formats, each of which possibly being stored in repositories spanning the globe. The fear of data loss may mean that any number of those stored electronic files will have redundancy in even more storage locations. To top it off, the electronic version of that file or communication will have descriptive properties (metadata) contained within, and possibly "when where" attributes contained separately in a log file.

All of this means that, in my opinion, discovery in the technology age is far more important to a litigator than evidence concerns. (I hope Professor Powell forgives me for that statement). But think about it. You will conduct discovery in almost 100% of your cases, yet statistics show that you will make an actual offer of proof in less than 10% of those cases. Moreover, the better your discovery, the more armed you will be to dispose of the case with a pretrial motion or settlement. Clients often prefer that result!

### III. SOCIAL MEDIA DISCOVERY

*"These are kids, folks. They put stupid things on Facebook. Millions of people are on Facebook. Millions of people put stupid things on Facebook."*<sup>3</sup>

Opinion No. 665 (Dec. 2016).

<sup>3</sup> *Copeland v. State*, 06-13-00044-CR, 2013 WL 6388585, at \*9 (Tex. App.—Texarkana Dec. 5, 2013, no pet.) (citing defense attorney's closing argument).

<sup>1</sup> American Bar Association Model Rules of Professional Conduct 1.1, Comment 8.

<sup>2</sup> Professional Ethics Committee for the State Bar of Texas,

### A. Clear Chat

Before you embark on your investigation of your opponent's social media presence, you would be wise to inquire about your own client's cyber activities. Find out if your client has posted information or photos/video that could be relevant to the litigation. If so, be mindful of the potential for your client to want to delete anything they deem harmful to the case. What is your duty in this situation?

This is mostly common sense. First off, be clear with your client that deleting any post or media that could have relevance to the litigation could lead to spoliation penalties or even monetary sanctions. Refrain from directing or even suggesting that your client publish false or misleading information on a social network that is relevant to the claim.

It is ethically permissible to do the following:

- Advise your client on social media privacy settings. Explain how the various settings allow different types of files and information to be accessed by certain groups of people or friends. Suggest that your client should use the strongest privacy settings if he/she wants fewer people to have access to posts, photos, videos friend lists, and other information.
- Screen media files and advise your client as to the potential ramifications if such media is posted on social media. In this situation, the client should be advised not to delete the media from its current storage even though it may never be posted on a social network.
- You may approve your client posting truthful information that could be relevant to the claim.

A Virginia plaintiff and his attorney learned a very expensive lesson about removing social media during litigation. Isaiah Lester brought a wrongful death claim after his wife was killed in an auto accident with a cement truck.<sup>4</sup> After reviewing posts on Lester's Facebook page, which included a photo of Lester holding a beer can while wearing a T-shirt emblazoned with "I ♥ hot moms," Lester's attorney instructed his paralegal to tell Lester to "clean up" his Facebook page because "[w]e don't want any blow-ups of this stuff at trial."<sup>5</sup> Lester deleted 16 photos from his page, and later lied to the opposition about deleting his Facebook account.<sup>6</sup> At the conclusion of the trial, the judge ordered sanctions totaling \$722,000 (\$542,000 against the attorney and \$180,000 against the plaintiff).<sup>7</sup>

When in doubt, leave it alone.

### B. Identify the Networks

The first step in social media discovery is to identify the social networks being used by your subject. If your subject is a party to the case, an easy way to accomplish this would be to send a specific interrogatory. More on that later. Often, however, your subject is not a party, or maybe you want to be more clandestine in your investigation. You can get a head start by utilizing traditional search engines. The more information (e.g., spouse, hometown, employer, school) you can plug into the search, the better chance you have to find pertinent information and social media subscriptions. Also, since most social network users register the same e-mail address with social media accounts, plugging an e-mail address into a search engine may bring up social media accounts, but also postings on message boards, blogs, product reviews, and maybe even a personal webpage. Running an image search on Google or Bing could also get you a hit on your subject's profile photo, which could lead you to one of their social networks.

Don't get sucked in by the dozens of "free" services touting the ability to find people on social media. Most will give you partial search results hoping to entice you to subscribe to a paid service for the full results. Others are just vehicles to fill your screen with advertisements. The only free people search site I trust is Pipl.com, which has helped me find an out-of-state subject multiple times.

After you exhaust the search engines, head over to Facebook. Chances are your subject is one of the 1.7 billion individuals who have joined Zuckerberg's worldwide community. After that, I suggest you search these networks, in the following order:

- Twitter
- Instagram
- YouTube
- LinkedIn
- Google+
- Tumblr
- MySpace
- Tagged
- Bebo
- Flickr

Obviously, there are many more out there, but if your subject uses social media, the above list will tell you what you need to know.

<sup>4</sup> *Allied Concrete Co. v. Lester*, 285 Va. 295, 300, 736 S.E.2d 699, 701 (2013).

<sup>5</sup> *Id.* at 302, 702.

<sup>6</sup> *Id.* at 303, 703.

<sup>7</sup> *Id.*

### C. Facebook Privacy

Facebook privacy has evolved over the years. Your “friends” have always possessed almost unlimited access to your Facebook presence. Early on, those within your “network” (at that time, the same .edu internet domain), could see posts, photos, and your friend list, even if you had not “friended” them. As Facebook expanded beyond colleges, the “network” category was replaced with “Friends of Friends.” This began a relaxing of the default privacy settings to the point where much of your Facebook presence was visible to the entire internet, even those without a Facebook account. In 2014, Facebook responded to pressure from its users and provided tools to allow users to dynamically control access to the information and files scattered about the Facebook landscape. While this may be reassuring to you as a Facebook user, it can also be frustrating to someone trying to investigate the social media presence of a party or witness. Essentially, more social media information is now located behind the “privacy wall” than ever before.

Still, Facebook’s search tools allow you to at least locate your subject more often than not. At that point, there is a decent chance your subject has not taken advantage of the privacy tools and is displaying just about everything. This allows you to read posts and comments, view photos, and discover biographical information, interests, friend lists, family members, and even location tags.

### D. Ethical Social Networking

Upon being confronted with this wealth of information provided to you gratis by your subject, you might ask yourself whether simply being there violates any ethical rules. Various cases and state bar opinions agree that simply viewing the public-facing social media page of an adverse party or witness does not violate ethics rules or constitute invasion of privacy, provided that no “friending” takes place.<sup>8</sup>

Further action on your part, however, could get you in trouble. First, sending a friend request to an opposing party (who is represented by counsel) would constitute a communication and would violate Texas Disciplinary Rule of Professional Conduct 4.02. Using a third party or investigator to send the friend request won’t keep you

out of trouble, either. In a 2012 Ohio case, an insurance defense firm hired an investigator to gain access to the privacy-restricted Facebook page of a twelve-year-old plaintiff in a dog bite lawsuit by posing as one of the girl’s Facebook friends. The investigator obtained the username and password of one of the girl’s Facebook friends, which allowed the investigator to see over a thousand posts and more than 200 photos of the girl. The girl’s father sued the investigator, the law firm and the insurance company for violating the Stored Communications Act.<sup>9</sup>

In another “fake friend” case, a New Jersey defense attorney directed his paralegal to search the Internet to obtain information about the plaintiff.<sup>10</sup> Using her true identity, but not disclosing her employment with the defense firm, the paralegal “friended” the plaintiff.<sup>11</sup> The paralegal obtained information from the plaintiff’s private Facebook page that could be used to impeach him.<sup>12</sup> Plaintiff’s counsel discovered the conduct and filed a complaint with the New Jersey Office of Attorney Ethics.<sup>13</sup>

Even though Twitter uses “followers” rather than “friends,” a request to become a follower of a Twitter user involves a notification to the subject, which constitutes a communication that could violate Rule 4.02 if the subject is represented.

Friending a witness or other unrepresented party would not violate Rule 4.02, but it could get you in hot water if the purpose of your connection involves deception or dishonesty. The Philadelphia Bar Association has opined that an attorney who has a third party “friend” a witness (without revealing the association with the attorney) solely for the purpose of discovering potential impeachment evidence on a Facebook page would violate ethical rules 8.4 (Misconduct), 4.1 (Truthfulness in Statements to Others) and possibly 4.3 (Dealing with Unrepresented Person).<sup>14</sup> The New York City Bar issued an opinion similar to the Philadelphia Bar (citing rules 8.4 and 4.1), but tapped the brakes a bit and opined that using a true identity to friend a subject would not violate the aforementioned rules, even if the requestor did not disclose the reason for the friend request.<sup>15</sup> Still, a good

<sup>8</sup> See, e.g., New York State Bar Association, Committee on Professional Ethics, Opinion No. 843 (2010); Oregon State Bar Legal Ethics Comm., Opinion 2005-164 (2005); *Moreno v. Hanford Sentinel, Inc.*, 172 Cal. App. 4th 1125, 91 Cal. Rptr. 3d 858 (2009), as modified (Apr. 30, 2009) (the plaintiff’s affirmative act of publishing an article on MySpace and making it available to any person with a computer opened it to the public eye).

<sup>9</sup> *Cope v. Prince*, No. CV 12-781824 (Ohio Ct. Com. Pl. May 2, 2012).

<sup>10</sup> *Robertelli v. New Jersey Office of Atty. Ethics*, 224 N.J. 470, 473, 134 A.3d 963, 965 (2016)

<sup>11</sup> *Id.* at 965, 474.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at

<sup>14</sup> The Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02 (Mar. 2009).

<sup>15</sup> New York City Bar Ethics, Opinion 2010-2 (Oct. 19, 2010).

rule of thumb is to refrain from extending the click of friendship if potential deception would result.<sup>16</sup>

What if your subject is a party and has restricted access to most information on their Facebook pages, but you just so happen to have a mutual friend with the subject? Can you contact your friend for the purpose of viewing your subject's unrestricted Facebook page? In this author's opinion, no ethical rules are implicated because no "friending" takes place, and no deception or dishonesty occurs, assuming you are upfront with the mutual friend about the reason for your request.

If your Facebook subject has locked down some or all of their page, you still may find information leading you to other discoverable data. A profile name will always be displayed, and it may include a maiden name or nickname about which you were previously unaware. These names may assist you in searching for that same user on other social networks. Also, only the most tightly locked page will restrict access to all photos and friend lists. A user's list of friends is sometimes very revealing about their interests, hobbies and associations, which may lead you to a specific Facebook Group or Fan Page. If these pages are open to public viewing, you may find a comment or photo posted by your subject. And since the very nature of social media is sharing information, you will often find that your subject's friends will have tagged the subject in a photo or made a curious comment involving your subject. One thing I have found over the years is that even a privacy-conscious subject will have posted a revealing comment on a friend, family member or co-worker's Facebook page whose privacy settings are less restrictive or non-existent.

In *Sumien v. CareFlite*, Sumien brought an intrusion upon seclusion claim against his former employer after his comment on the Facebook page of a coworker (Roberts) was seen and reported by another co-worker who was Facebook friends with Roberts.<sup>17</sup> Sumien unsuccessfully argued against dismissal of his cause of action despite admitting that he misunderstood Roberts' Facebook settings and thus did not know who had access to Roberts' wall.<sup>18</sup> Moral of the story: spend some time perusing the pages of your subject's "friends."

## E. Location Tagging

If an issue in your case involves whether a party was in a particular place at a particular time, a few social media sites might give you the information you want. Facebook, Twitter and Instagram allow users to include their location in posts, tweets and photos. Swarm (formerly the location-tagging feature of Foursquare) is an app dedicated to location-based social networking. Uber may not be much of a social media app, but a person's Uber ride history might reveal their location at the time in question. Similarly, mapmyrun.com and mapmyride.com could literally give you a map of your subject's bike rides or jogging routes. Finally, phones and wearables potentially have apps tracking a user by GPS at any given time. Your subject's use of these apps is something to explore at their deposition.

## F. Data Preservation

Depending on your situation, it might be prudent to send your opponent a data preservation letter, advising that you deem social media information to be potentially relevant to the claims or defenses in the case. To ensure compliance with the request, ask that the party create a digital backup of the accounts. Facebook makes this easy. A user can download a complete copy of their Facebook data by navigating to their Facebook profile page, clicking Settings, and then clicking "Download a copy of your Facebook data." In Twitter, a user can go to Settings, and then select "Request your archive." Twitter will compile the archive and send the user instructions on downloading it. With other networks, search the FAQs and Privacy Policies to obtain instructions on how a user can preserve media and posts. At a minimum, you could request that your subject download pertinent social media pages to .html files or convert them to PDF.

One additional note on photos and videos. They may be "posted" on one social network even though the media itself is uploaded elsewhere. For example, a user may upload a video to YouTube and then post a link to it on Facebook. Twitter users often rely on Vine or Periscope for videos. Keep this in mind, if you are wanting to ensure your subject preserves all media for later production.

Yet another note on photos and videos. When a photo or video is uploaded to social media, a new photo is created within the app. That photo probably will not

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<sup>16</sup> Friending a judge, while not the subject of this paper, has also been the subject of numerous state bar opinions. Most states that have opined on the topic do not disapprove of a judge being Facebook friends with an attorney, but many caution that judges should be mindful of whether the "friendship" could give the appearance of impropriety. A few states (Florida, Oklahoma, Massachusetts) prohibit attorney/judge friending, removing the possibility of any improper influence or bias. As of the date this paper is being

written, the State Bar of Texas has not opined on the issue. Keep in mind that this is an active topic among state bar associations, so you should always check the status of your state's opinion on the topic.

<sup>17</sup> *Sumien v. CareFlite*, 02-12-00039-CV, 2012 WL 2579525 (Tex. App.—Fort Worth July 5, 2012, no pet.).

<sup>18</sup> *Id.* at \*3.

contain the “exif” data (properties, such as the date the photo was taken, the camera used, and the geotagging data) as the original photo. If you want or need this data with the image file, you need to ask the subject to produce the photo from original storage, e.g. phone, flash media, camera internal storage.

### G. Written Discovery Requests

Written discovery can either precede or follow your manual social media search. If you start with traditional discovery, your subject will likely cease posting things that could adversely affect their case. The subject might even quickly delete older troublesome posts, knowing that the chance of you discovering their conduct is probably low. The better practice is to see what you can find before tipping off your subject that you find their social media presence to be relevant. When it comes time to send discovery, you certainly want to include a few interrogatories. I would suggest one or more of the following:

- Identify all social networks (e.g., Facebook, Twitter, LinkedIn, Instagram, YouTube, Google+, Tumblr, MySpace, Tagged, Bebo, Flickr, etc.) for which you have registered during the last *x* years, including terminated or inactive accounts.
- Your screen names for all of the identified networks in your answer to the preceding interrogatory.
- Your e-mail addresses for the past *x* years, including work e-mail addresses.
- Identify, by manufacturer and device, all technology devices, including wearable devices, you have used during the past *x* years.
- Identify all cloud storage providers with whom you have stored photos or video at any time during the past *x* years.

You may draw objections based on the length of time you select for the interrogatories, but a court should allow you at least a few years of information.

Requests for production are a little trickier. There are two limiting factors in play. First, a request for production must describe the documents sought with “reasonable particularity.”<sup>19</sup> Overly broad requests, such as “a printout of all social media pages sponsored

or maintained by [the responding party]” will almost certainly draw an objection that, under long standing Supreme Court precedent,<sup>20</sup> will be sustained. Second, in order to request social media information that sits behind a privacy wall, you need to locate evidence on the public-facing page(s) that would suggest the existence of relevant evidence behind the privacy wall.

The *Romano*<sup>21</sup> case out of New York was one of the first significant decisions allowing an attorney to pierce the Social Media privacy wall. In *Romano*, the plaintiff claimed she “sustained permanent injuries as a result of the incident and that she can no longer participate in certain activities or that these injuries have affected her enjoyment of life.”<sup>22</sup> The public facing portions of her social media pages, however, revealed that she had an active lifestyle and traveled to multiple states during the time period she claimed an inability to travel because of her injuries.<sup>23</sup> This suggested that other posts – those behind the privacy wall – may contain similar, relevant evidence. The Court granted the defendant’s request for signed authorizations allowing the defendant to obtain “current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information.”<sup>24</sup> The Court’s decision contains a very thoughtful analysis of the plaintiff’s privacy concerns weighed against the defendant’s need for the discovery.

A 2010 case out of Pennsylvania involved an injured plaintiff who commented on his public-facing pages about his fishing trips and attendance at the Daytona 500.<sup>25</sup> The judge granted the defendant’s motion to compel information from behind the privacy wall. The shocking part of the judge’s ruling was that he required the plaintiff to turn over to defense counsel his user names, log-in names, and passwords for Facebook and MySpace. I seriously doubt such a ruling would occur in 2017.

A few Texas cases provide some guidance on how to draft an appropriate request for production of Facebook data:

In a 2014 case out of Beaumont, the defendant in a personal injury case requested that the plaintiff produce “[a] color copy of any and all photographs and/or videos of you (whether alone or accompanied by others) posted on your Facebook page(s)/account(s) since the date of the accident ....”<sup>26</sup> When the plaintiff refused to

<sup>19</sup> TEX. R. CIV. P. 196.1(a).

<sup>20</sup> See, e.g., *K Mart Corp. v. Sanderson*, 937 S.W.2d 429, 430 (Tex. 1996); *Dillard Department Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (Tex. 1995); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995); *Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989), *disapproved of by Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992).

<sup>21</sup> *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650 (Sup. Ct.

2010).

<sup>22</sup> *Id.* at 653.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 657.

<sup>25</sup> *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 WL 4403285 (Pa.Com.Pl. Sep. 9, 2010).

<sup>26</sup> *In re Indeco Sales, Inc.*, 09-14-00405-CV, 2014 WL

produce the materials, the defendant filed a motion to compel, which the trial court denied.<sup>27</sup> The appellate court held that the trial judge did not err in sustaining the objection, noting that the request, on its face, could include photos taken *before* the incident but posted *after* it.<sup>28</sup> The easy lesson learned with respect to Facebook photos is to define the time period by the date photos are taken rather than when they are posted.

The *Indeco* defendant also requested “[a] color copy of all Facebook posts, Facebook messages and/or Facebook chat conversations, other than those protected by the attorney-client privilege, authored, sent or received, and/or otherwise entered into by you since [the date of incident].”<sup>29</sup> Affirming the trial judge’s decision to not allow the discovery, the appellate court noted that “there is no limit on the scope of the request or the subject matter of the post.”<sup>30</sup> In theory, a request of this nature (posts, chats, messages) should be tailored to the plaintiff’s allegations, which could include the facts of the incident and the plaintiff’s medical treatment, physical activities, hobbies, educational pursuits, ability to work, and/or enjoyment of life. Even the foregoing limitations could easily draw objections under Rule 196, so a good practice is to separate the categories into individual requests and be as specific as possible.

A common mistake in requesting social media discovery is failing to place an appropriate time period on the request. A request for postings “pertaining to [the decedent] or his death on Facebook or any other social media site” was deemed improper by the Beaumont Court of Appeals because the request sought postings during the decedent’s life *and* death, which was essentially unlimited in time.<sup>31</sup> Also keep in mind that, unlike an overly broad non-compete, the trial court is not going to redraft your overly broad discovery for you.<sup>32</sup>

Let’s talk for a minute about the format in which you would like to receive the responding party’s social media. If you want anything other than paper printouts, you must “specifically request production of electronic ... data and specify the form” in which you want it produced.<sup>33</sup> So what format should you request? If you have requested that the responding party download their social media, they will be in possession of electronic folders containing certain categorized subfolders. Within these subfolders are the files you should request.

5490943, at \*1 (Tex. App.—Beaumont Oct. 30, 2014, no pet.).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at \*2.

<sup>29</sup> *Id.* at \*1.

<sup>30</sup> *Id.* at \*2.

## H. Subpoenas and Authorizations

You may be asking, can I just serve the social network with a subpoena?

Facebook privacy policy reads:

*We may access, preserve and share your information in response to a legal request (like a search warrant, court order or subpoena) if we have a good faith belief that the law requires us to do so.*

This policy, however, only truly applies to criminal subpoenas. Facebook’s policy on civil subpoenas reads:

*Federal law does not allow private parties to obtain account contents (ex: messages, Timeline posts, photos) using subpoenas. See the Stored Communications Act, 18 U.S.C. § 2701 et seq.*

Twitter’s policy reads:

***Law and Harm:** Notwithstanding anything to the contrary in this Privacy Policy, we may preserve or disclose your information if we believe that it is reasonably necessary to comply with a law, regulation, legal process, or governmental request; to protect the safety of any person; to address fraud, security or technical issues; or to protect our or our users’ rights or property. However, nothing in this Privacy Policy is intended to limit any legal defenses or objections that you may have to a third party’s, including a government’s, request to disclose your information*

My experience is that serving a subpoena on a social network has little chance of success.

What about obtaining a signed authorization and forwarding that to the social network? Again, my experience is mostly negative. A typical response will direct you to have the opposing party download their information manually and share it with you.

## IV. EVIDENCE

So now it is time to go to trial, and you are armed with files and information from your opposition’s social media activities. Whether you request admission of

<sup>31</sup> *In re Christus Health Se. Tex.*, 399 S.W.3d 343, 347-48 (Tex. App.—Beaumont 2013, no pet.).

<sup>32</sup> *In re TIG Ins. Co.*, 172 S.W.3d 160, 168 (Tex. App.—Beaumont 2005, no pet.).

<sup>33</sup> TEX. R. CIV. P. 196.4.

social media in pretrial or in front of the jury, be prepared to address the typical evidence issues.

“Courts and legal commentators have reached a virtual consensus that, although rapidly developing electronic communications technology often presents new and protean issues with respect to the admissibility of electronically generated, transmitted and/or stored information, including information found on social networking web sites, the rules of evidence already in place for determining authenticity are at least generally ‘adequate to the task.’”<sup>34</sup> The case of *Lorraine v. Markel American Insurance Co.* has an excellent discussion about the admissibility of electronically stored information under the Federal Rules of Evidence, which substantially mirror the Texas rules.<sup>35</sup>

#### A. Relevant, but not Unfairly Prejudicial.

Relevancy shouldn’t be a difficult question. Evidence either bears on a consequential fact or it does not.<sup>36</sup> And if it does, its probative value cannot be substantially outweighed by a danger of unfair prejudice, confusion, delay, etc.<sup>37</sup> These rules, however, often come into play with social media because a popular use of social media evidence is to cross examine an opponent with an inconsistent statement or activity. For example, offering a Facebook post of a terminated employee may draw a 403 objection if the post is laden with obscenities about the employer. What about offering a social media photo of an injured plaintiff to show he is more active than he leads on, yet the shirt he wears in the photo has a satirical endorsement of an illegal drug? The lack of inhibitions on social media setup these potentially unfairly prejudicial scenarios.

#### B. Authentic.

Based solely on the number of cases around the country addressing the various social media evidence issues, authentication is the primary battleground. You likely won’t draw an authentication objection if your evidence contains your subject’s full name and a clear photo. Many folks, however, will use a pseudonym or variant of their real name on their profile page, bringing

into question whether the page is actually that of your subject.<sup>38</sup>

Authentication requires you to produce “evidence sufficient to support a finding that the item is what [you] claim it is.”<sup>39</sup> You could establish authentication through testimony from a witness, including the subject himself, who can personally identify the social media post.<sup>40</sup> More likely, though, you will need to show that the “appearance, contents, substance, internal patterns, or other distinctive characteristics” of the page/post, taken together with all the circumstances, establish that the page/post is that of your subject.<sup>41</sup> Luckily, social media pages provide a number of opportunities for a subject to provide distinctive characteristics, such as hometown, birthday, schools, employment, family members, relationships, interests and friend lists. Matching a couple of these characteristics with your subject should do the trick.

In *Tienda v. State*, the Texas Court of Criminal Appeals analyzed whether a series of MySpace pages were that of the defendant. Utilizing Rule 901(b)(4), the court found that similar nicknames, e-mail addresses and hometowns, taken together with photos of the defendant and statements about the crime, provided “sufficient circumstantial evidence to support a finding that the exhibits were what they purported to be.”<sup>42</sup> In another case, the Beaumont Court of Appeals found that photographs, comments and a friend list were sufficient characteristics to authenticate certain Facebook messages.<sup>43</sup> The Austin Court of Appeals found authenticity in certain Facebook messages after noting, in addition to other characteristics, that the speech pattern (the defendant was a native of Jamaica) in the messages was consistent with the defendant’s speech pattern at trial.<sup>44</sup>

If the element of surprise is not your angle, two procedural rules can help you authenticate the social media published by your opponent. First, assuming you have asked for and received the social media evidence in response to a request for production, Rule 193.7 allows you to self-authenticate those materials by notifying the producing party of your intent to use the materials at trial or a hearing. Absent a timely, specific authentication objection in response to your notice, the

<sup>34</sup> *Tienda v. State*, 358 S.W.3d 633, 638-39 (Tex. Crim. App. 2012).

<sup>35</sup> *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534 (D.Md.2007)

<sup>36</sup> TEX. R. EVID. 401; 402.

<sup>37</sup> TEX. R. EVID. 403.

<sup>38</sup> See, e.g., *State v. Gibson*, 2015-Ohio-1679, ¶51 (describing police detectives’ efforts to authenticate the Facebook pages of “Oozie Montana YungSavage Mayor” and “Kifty Youngmoney Boss”).

<sup>39</sup> TEX. R. EVID. 901(a).

<sup>40</sup> TEX. R. EVID. 901(b)(1).

<sup>41</sup> TEX. R. EVID. 901(b)(4).

<sup>42</sup> *Tienda*, 358 S.W.3d at 647.

<sup>43</sup> *Coe v. State*, No. 09-13-00409-CR, 2015 WL 3898001, at \*10 (Tex. App.—Beaumont June 24, 2015), *pet. for discretionary review ref’d* (May 25, 2016).

<sup>44</sup> *Campbell v. State*, 382 S.W.3d 545, 552 (Tex. App.—Austin 2012, no *pet.*)

evidence is authenticated.<sup>45</sup> Second, you can send a request for admission asking the party to authenticate the specific social media evidence.

### C. Not Hearsay.

Before the internet age, a standard communication was verbal, involved few participants, and was not typically preserved. Electronic mail introduced the ability to communicate with dozens of recipients in a single message that was automatically preserved. Now with social media, a communication can instantly reach hundreds, sometimes thousands of recipients, any number of which may further publish the communication to hundreds more, and so on, and so on. And unlike e-mail, social media is often preserved in the public domain. The number of preserved communications is astounding, and it will continue to rise. Now more than ever, a litigator should be well-versed on the hearsay rule and its exceptions.

Do not fall into the trap of assuming that any out of court statement is hearsay. Utilize Rule 801 and ask yourself the following questions: (1) does the evidence constitute a “statement,” as defined by Rule 801(a); (2) was the statement made by a “declarant,” as defined by Rule 801(b); (3) are you offering the statement to prove the truth of the “matter asserted,” as described in Rules 801(c) and (d); and (4) is the statement *not* excluded from the definition of hearsay by rule 801(e) (which includes statements of a party opponent). If you answered yes to all four of these questions, then your statement is hearsay and will require an exception to be admitted into evidence.

Social media fits somewhat well into a few of the hearsay exceptions found in Rule 803.

#### 1. Excited Utterance.

An excited utterance is “[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.”<sup>46</sup> In determining whether a statement falls within the excited utterance exception, a court must assess whether (1) the statement was the product of a startling event that produced a state of nervous excitement; (2) the declarant was dominated by the excitement of the event; and (3) the statement related to the circumstances of the startling event.<sup>47</sup> Any smartphone with a social media app allows a person to comment about an event in real

time. In recent days, we have seen this play out during a mass shooting or a significant weather event. People feel compelled to tweet or post about an event even at the expense of their personal safety. So long as the statement about the startling event or condition is made before the declarant's excitement has abated, the excited utterance exception should apply.<sup>48</sup>

#### 2. Present Sense Impression.

Similar to an Excited Utterance, a Present Sense Impression involves a declarant making a statement in conjunction with an event, although in this case, it need not be a “startling” event. Three principal requirements must be met before hearsay evidence may be admitted as a present sense impression: (1) the declarant must have personally perceived the event described; (2) the declaration must be an explanation or description of the event rather than a narration; and (3) the declaration must be contemporaneous with the event.<sup>49</sup> Twitter asks its users to comment (in 140 characters or less) about “What’s happening,” and millions of users happily comply by describing or explaining a particular event. Since social media posts and tweets will often involve this type of event description, you should keep the exception for a Present Sense Impression on your short list when responding to a hearsay objection.

#### 3. State of Mind.

The top of your Facebook News Feed asks “What’s on your mind?” Presumably, then, a response to that query would implicate Rule 803(3), which dictates that “[a] statement of the declarant's then-existing state of mind, (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health),...” is not excluded by the hearsay rule.<sup>50</sup> The post or tweet must be of the author’s then existing state of mind as opposed to being a statement of memory or belief to prove the fact remembered or believed.<sup>51</sup>

## V. POST MORTEM

Monitoring a party’s social network activity occasionally does not end when a case is resolved. Just as a criminal enjoys boasting about a crime, parties to a civil action have been known to wreck a settlement by violating a confidentiality clause through social media. In a 2014 case out of Florida, the headmaster of a private

<sup>45</sup> TEX. R. CIV. P. 193.7.

<sup>46</sup> TEX. R. EVID. 803(2).

<sup>47</sup> *Salinas v. State*, 426 S.W.3d 318, 324 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2014), *rev'd*, 464 S.W.3d 363 (Tex. Crim. App. 2015).

<sup>48</sup> *Sandoval v. State*, 409 S.W.3d 259, 284 (Tex. App.—

Austin 2013, no pet).

<sup>49</sup> *Russo v. State*, 228 S.W.3d 779 (Tex. App.—Austin 2007), *pet. for discretionary review ref'd* (December 5, 2007).

<sup>50</sup> TEX. R. EVID. 803(2).

<sup>51</sup> *Linney v. State*, 401 S.W.3d 764, 779 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2013), *pet. for discretionary review ref'd* (November 27, 2013).

school sued his employer alleging age discrimination. Before the ink on the settlement agreement was dry, the plaintiff's daughter posted the following comment on her Facebook page, available for viewing by her 1200 friends:

*Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT.*

The plaintiff forfeited \$80,000 thanks to his daughter's youthful indiscretion.<sup>52</sup>

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<sup>52</sup> *Gulliver Sch., Inc. v. Snay*, 137 So. 3d 1045 (Fla. Dist. Ct.

App. 2014).

