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## Social Media Evidence in Divorce Proceedings



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### Introduction

**T**he difference between winning and losing in litigation depends largely on corroborating your client's version of events and contradicting that of your opponent. In divorce proceedings, there is often little readily available evidence outside of the testimony of the parties and their friends and family members concerning individual events in their marriage. To discover evidence outside of that testimony, divorce practitioners look to many sources, including e-mails, loan applications, piles of saved love letters and text messages.

Far too often, divorce practitioners do not seek discovery of one of the greatest sources of information available in divorce proceedings: social media. When on social media, that mental filter that usually stops people from disseminating information that they know (or should know) might later hurt them malfunctions, and they post thoughts and reflections that they would

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never thoughtfully share even with their best friends, much less their almost forgotten freshmen-year college neighbor.<sup>1</sup> Social media has awakened a new age of openness where users willingly reveal their secrets, their humanness, their egos, their thought processes and their imperfections.<sup>2</sup> The mental faculty that inhibits the expression of socially sensitive or embarrassing personal information goes on the fritz when presented with a Facebook page and a keyboard, and those expressions often come back to haunt us.

Nearly half of U.S. Internet users have a social networking profile.<sup>3</sup> And, as any divorce practitioner (or other person who has had a friend divorcing his spouse) knows, people cannot help talking about their soon-to-be ex spouse while going through a divorce. In almost any divorce case, the other party's social media accounts can potentially provide relevant and potent evidence, whether the alimony-seeking spouse indicates on his Facebook profile that he is "Engaged" or a spouse supposedly visiting with the children posts pictures of herself over-enjoying the neighborhood bar. The information posted on social media, or social media content (SMC), can be powerful evidence in divorce proceedings that should not be overlooked.

Yet many divorce attorneys are reluctant to seek out social media evidence, which these writers suggest is for one of three reasons: (1) they fear that the opposing attorney will then request their own client's SMC, which may be more uncomplimentary; (2) they have no idea how to request SMC; or (3) they have no idea what standards will govern the judge's ruling if the other side objects, and they do not want to look foolish to their client or the court. This article will examine the standards

<sup>1</sup> Karan Chopra, *The Effects of Social Media on How We Speak and Write*, SocialMediaToday (Sept. 17, 2013), <http://socialmediatoday.com/karenn1617/1745751/effects-social-media-how-we-speak-and-write>.

<sup>2</sup> Soren Gordhamer, *5 Ways Social Media Is Changing Out Daily Lives*, Mashable (Oct. 16, 2009), <http://mashable.com/2009/10/16/social-media-changing-lives/>.

<sup>3</sup> John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 SMU Sci. & Tech. L. Rev. 465 (2011) (citing Tom Webster, *The Infinite Dial 2010: Digital Platforms and the Future of Radio*, Edison Res. & Arbitron, (Apr. 8, 2010), [http://www.edisonresearch.com/the\\_infinite\\_dial\\_2010\\_digital\\_platforms\\_and\\_the\\_future\\_of\\_r/](http://www.edisonresearch.com/the_infinite_dial_2010_digital_platforms_and_the_future_of_r/)).

governing the discovery of SMC, the methodology for discovering SMC and when the use of SMC may be a mistake.

### When Discovery of SMC Is Appropriate

Courts have not developed a consensus regarding when and to what extent SMC is discoverable.<sup>4</sup> With the notable exception of New York, most state courts have not promulgated guidelines for the discovery of SMC.<sup>5</sup> As a result, litigants have inconsistent experiences when SMC is requested in discovery. In Illinois, for example, where the appellate courts have not provided any guiding standards for the discovery of SMC, some judges take the position that the SMC is inarguably discoverable in divorce cases, while other judges have decided the privacy of the social media user outweighs the need for information, even where a prima facie case of what the SMC may include is made.

There is ample, if inconsistent, case law from federal courts dictating the standards for the discovery of SMC. Before allowing discovery of SMC, some federal courts have required only a “minimal showing” that “the adversary subscriber has posted information or photographs that are relevant to the facts of the case at hand,” in addition to the general threshold showing that the evidence is likely to lead to the discovery of admissible evidence.<sup>6</sup> Other courts have erected even higher barriers to the discovery of any SMC.<sup>7</sup> While SMC is not privileged or protected by any right of privacy, courts justify those barriers as limiting “fishing expeditions” when the issue is raised on one of the parties’ objections.

But where can the practitioner obtain the SMC if not in discovery? Practitioners need the SMC information to make that “minimal showing.” In divorce cases especially, the battlements erected by courts to protect social media subscribers, despite the absence of any recognized privilege, prevent the parties from discovering ample relevant information. No state has passed any special rule or statute promulgating special rules for discovery of SMC, and the courts should not be legislating discovery rules that do not exist.

Notwithstanding these somewhat unrealistic standards, there is little reason *not* to request SMC where you can at least make some showing that there is or may be relevant information on the opposing party’s social media account. In divorce cases, where the scope of relevance is rather broad, particularly in equitable distribution states or custody matters, divorce practitioners should seek the opposing party’s SMC in nearly every case. More often than not, the opposing party will object, and your judge may not order him to provide the SMC, but there is simply too much useful information on the average person’s social media account not to try.

To make the threshold prima facie case for discovery of SMC, it is important to have your client save postings

from the opposing party that may be relevant, preferably before the opposing party knows the divorce is coming and any housekeeping of social media websites may be done. It is also worth mentioning that, while you should always advise your client to stop using his social media account until at least his or her case is over, you should not advise your client to delete information on his or her social media account or to close the account altogether, as that may lead to sanctions or even attorney discipline for spoliation of evidence.<sup>8</sup>

### How to Discover Social Media Content

Successful discovery of the opposing party’s unedited and complete SMC requires that the divorce practitioner follow a few steps. First, you should immediately send a discovery-preservation letter to the opposing party or his attorney stating that you consider the opposing party’s SMC to be evidence and requesting that the opposing party not delete or take down any information posted on the account, or the account itself. Next, include in your template divorce discovery request to the opposing party a request for SMC. The request should specify (a) the type of content being requested; (b) the social media providers the request refers to; (c) the format in which the requesting party desires the SMC to be produced; (d) the time period of the request; and (e) the scope of the content being sought.

In designating the type of SMC being requested, the options are typically: (i) pictures posted by the user; (ii) pictures posted by other users in which the user is “tagged”; (iii) private messages between the user and third parties; (iv) public messages, including posts, comments, tweets, likes and status updates; (v) privacy settings; and (vi) other information provided on the user’s home page, e.g., relationship statuses and links to other Web pages. Most discovery requests should include “all social networking and social media websites” while specifying the social media websites in which the requesting party is particularly interested. The request should also specify if it is for printed or electronically stored information (or both).

The time period and content scope of the request are particularly important. To avoid the discovery of irrelevant personal information, most courts that have addressed the discoverability of SMC have required the request for SMC to be rather specific in terms of the time period and content of the information sought.<sup>9</sup> Courts have been particularly reluctant to allow discovery of SMC where the request does not limit the scope to information sought to the subject of the lawsuit (e.g., custody or the divorce).<sup>10</sup> Thus, the request should state the time period for which the SMC is being requested and should limit the request to information plausibly re-

<sup>8</sup> See, e.g., *Gatto v. United Air Lines, Inc.*, No. 2:10-cv-01090, 2013 BL 80118 (D.N.J. Mar. 25, 2013).

<sup>9</sup> *In re Christus Health Se. Texas*, 399 S.W.3d 343, 348 (Tex. App. 2013); *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 389 (E.D. Mich. 2012); *Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 571 (C.D. Cal. 2012); *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 436 (S.D. Ind. 2010). But see *Holter v. Wells Fargo & Co.*, 281 F.R.D. 340, 344 (D. Minn. 2011).

<sup>10</sup> *Smith v. Hillshire Brands*, No. 13-2605-CM, 2014 BL 172313 (D. Kan. June 20, 2014).

<sup>4</sup> See *Del Gallo v. City of New York*, No. 107409/11, 2014 BL 168531 (N.Y. Sup. Ct. 2014) (unpublished opinion).

<sup>5</sup> But see *Root v. Balfour Beatty Const. LLC*, 132 So. 3d 867, 870 (Fla. Dist. Ct. App. 2014).

<sup>6</sup> *Fawcett v. Altieri*, 38 Misc. 3d 1022, 1027-28 (N.Y. Sup. Ct. 2013).

<sup>7</sup> Agnieszka A. McPeak, *The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery of Social Media Data*, 48 Wake Forest L. Rev. 887, 888 (2013).

lated to the divorce. For example, a request might ask for “all photographs posted on Facebook.com depicting the parties or their children are for the period of January 1, 2011 through the date of production.”

If the response to your request appears incomplete, there are a couple of options for enforcing compliance. First, some social media providers, namely Facebook, allow users to download all information into a zip file with the touch of a few buttons, and you can request that the opposing party be ordered to do so. Second, you may ask the court to order the opposing party to sign an authorization for you to subpoena the requested SMC or ask for the party’s username and password. It is often difficult to show exactly what is missing and, even if you can, the opposing party may simply provide only the specific information targeted, omitting other useful evidence. The appeal of obtaining the username and password is obvious, but most courts have been reluctant to grant the opposing party the right to rummage through his spouse’s social media account absent some evidence of incomplete production or spoliation. Thus, authorizations for subpoenaing SMC are usually the best available option.

The authorization is necessary to discover SMC from the social media provider via subpoena since most providers will not otherwise produce SMC, having previously succeeded in quashing subpoenas unaccompanied by authorizations.<sup>11</sup> The federal Stored Communication Act prohibits the disclosure of most SMC that litigants would ordinarily wish to discover without the consent of the user absent an authorization.<sup>12</sup> So, unless the opposing party agrees to sign an authorization under the Stored Communication Act, you will need to ask the court for a discovery order compelling him or her to do so.

In sum, discovering SMC in divorce cases is difficult since you have to be extremely precise in your request and extremely vigilant in pursuing compliance. Do not wait to seek the SMC, as obtaining it is often a long pro-

cess. Opposing parties rarely produce SMC in discovery prior to the court ordering them to do so; courts are often unduly skeptical of your right to discover SMC; and parties to divorce cases are not terribly forthcoming when producing often-sensitive SMC. The very reason the SMC is so alluring is the same reason enforcing compliance is often so difficult: The evidence is embarrassing, revealing and, every once in a while, it is the proverbial smoking gun.

## Presentation of Social Media Evidence

While outside the scope of this article, it is worth mentioning that the courts have been rather inconsistent in the standards they have developed for authentication of social media evidence.<sup>13</sup> Some states go so far as to require that the proponent of the SMC show that the social media provider supplied sufficient security procedures to ensure that the SMC could not have been fabricated.<sup>14</sup> So, it is important to ensure that you have what you need to authenticate SMC at trial based on the standards required in your state and that you not take it for granted that the same foundation that would work for an e-mail will work for a social media home page.

Even after discovering SMC that is relevant and authenticable, divorce practitioners should next consider whether to use the SMC. Sometimes, using SMC is a no-brainer, where, for example, it includes a Facebook message from the opposing party stating the allegations she has made about your client abusing her were made up to bolster her claim for child custody. But, in other cases where the evidence is cumulative or somewhat sympathetic to the other party, caution is warranted. Some judges seem to feel that what people post on Facebook should be private and look at evidence obtained through SMC discovery somewhat negatively. As is true in all cases, use your own good sense when deciding how to use the lack of judgment of the opposing party. You do not want the court to be sympathetic to your opponent’s sorry, if turbulent, indiscretions.

<sup>11</sup> See *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 981 (C.D. Cal. 2010); see also Facebook, *Information on Civil Subpoenas*, <https://www.facebook.com/help/473784375984502>.

<sup>12</sup> 18 U.S.C. § 2701; *Crispin*, *supra* note 11; *McPeak*, *supra* note 7, at 913.

<sup>13</sup> See Honorable Paul W. Grimm et. al., *Authentication of Social Media Evidence*, 36 Am. J. Trial Advoc. 433 (2013); Nicholas O. McCann, *Tips for Authenticating Social Media Evidence*, 100 Ill. B.J. 482, 483 (2012)

<sup>14</sup> *McCann*, *supra* note 13, at 483.



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