SOCIAL MEDIA IN LITIGATION

AUTHORED BY
ALFA INTERNATIONAL
ATTORNEYS:

Lance G. Eberhart
HALL & EVANS, LLC
Denver, CO
eberhartl@hallevans.com

Jeaneen Johnson
SEMMES, BOWEN & SEMMES
Baltimore, MD
jejohnson@semmes.com
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ACCESSING SOCIAL MEDIA AS EVIDENCE

In the modern age, anything from business transactions to personal relationships can take place online. As a result, there has been a shift in how Americans document and share their lives. Photos, personal thoughts, personal information, and conversations are all readily available through social media platforms like Facebook, Twitter, LinkedIn, Instagram, and more. With this onslaught of information available from a new source, attorneys are facing unchartered territory when it comes to discovery. What kind of social media information can we access? What can we submit to the court? What should we advise our clients to do with their social media when facing a lawsuit? Many of these questions are answered by traditional notions of the ethical considerations and rules of evidence.

ETHICAL CONCERNS

For a discussion of ethics, the Rules of Professional Conduct are key. Except where stated, the Model Rules of Professional Conduct reflect the content of the discussed rules throughout the 50 states and the District of Columbia.

When speaking about social media evidence, discerning between a public portion and a private portion of someone’s account is key. The public portion is any information posted by an individual through social media that is available to and viewable by anyone with access to the internet or anyone who is a part of that social media network. The Colorado Bar Association Ethics Committee, Use of Social Media for Investigative Purposes, Ethics Handbook 127 (2015). Conversely, a private portion is information posted to an individual’s social media account which is only accessible through a friend request, network connection, or other means of granting access by the account owner. Id. Without permission, this information would be hidden from the person requesting it.

An attorney can generally view the public portion of a person’s social media accounts without violating any Rules of Professional Conduct. This information is readily available for any and all to see and does not require any communication to access. Therefore, the rules which restrict communication between an attorney and adversarial, unrepresented parties, jurors, and judges do not apply. Model Rules of Prof’l Conduct r. 4.2, 4.3, 3.5 (Am. Bar Ass’n 2019).

It is in trying to access the private portion of someone’s social media account when an attorney must use caution. The most important thing to remember is that a lawyer cannot gain access to a private portion of a social media account through deceit. Rules 4.1 and 8.4 of the Model Rules of Professional Conduct codify this notion. They say that a lawyer cannot knowingly make a false statement of material fact nor can they engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, respectively. Model Rules of Prof’l Conduct r. 4.1, 8.4 (Am. Bar Ass’n 2019). While this seems straightforward, the practice of law can present difficult situations where these rules do not seem so black and white.
In Re Pautler involves a district attorney ("DA") who deceived a murder suspect in order to stop him from harming more. In Re Pautler, 47 P.3d 1175, 1175 (Colo. 2002). While the murder suspect was on the phone with the DA, he requested to speak with a public defender before turning himself over. Id. The DA pretended to be a public defender on the phone. Id. The court was unconvinced by the DA’s proffered good intentions. Id. at 1180. “Even a noble motive does not warrant departure from the Rules of Professional Conduct … when presented with choices, at least one of which conforms to the Rules, an attorney must not select an option that involves deceit or misrepresentation.” Id. The DA was found guilty of violating CRCP Rules 8.4 and 4.3 and was subjected to a suspension. Id. at 1184.

The aforementioned Rule 4.3 is applicable to attorneys when dealing with a party who is unrepresented. Model Rules of Prof’l Conduct r. 4.3 (Am. Bar Ass’n 2019). It holds that when doing so, an attorney should not state or imply that they are “disinterested.” Id. Essentially, this means the attorney should do their due diligence to make sure the unrepresented party understands the lawyer’s role in the matter if they have reason to believe there is a misunderstanding. Id. Wisconsin is the only state that sets a higher bar, requiring an attorney to inform the unrepresented party of their role in the matter, no matter if the unrepresented party does or does not understand. Wis. RPC 4.3 (2019). The DA in In Re Pautler did just the opposite of this by pretending to have the interests that were exactly inverse to his actual interests. In Re Pautler, 47 P.3d at 1175.

The best way to deal with communicating with an unrepresented party, whether it be through social media or other means, is full disclosure. An attorney should disclose the following before any communication: 1) their full name, 2) the fact that they are representing a client, and name of said client, 3) the general nature of the matter in connection with which the lawyer is seeking information, and 4) if applicable, explain how the unrepresented party’s interest may be opposed to that of the attorney’s interest. The Colorado Bar Association Ethics Committee, Use of Social Media for Investigative Purposes, Ethics Handbook 127 (2015). Disclosing the above when trying to access an unrepresented party’s private social media account should keep an attorney out of an ethics trial.

Accessing the private portion of a person represented by counsel involves less complete disclosure. It does, however, require permission from the attorney representing the party. Model Rules of Prof’l Conduct r. 4.2 (Am. Bar Ass’n 2019).

ADMISSIBILITY

Once an attorney has gotten access to a social media profile through the proper and ethical means, the questions still stands: what can be submitted as evidence? “While the medium of social media is relatively new, the principals of discovery remain the same.” Gofdon v. T.G.R. Logistics, Inc., 321 F.R.D. 401, 404 (D. Wyo. 2017). As with all evidence, social media evidence must be both relevant to the claim at issue and authentic.

Relevant evidence is any evidence that has the tendency to make the existence of a fact more or less probable than it would be without the evidence. Fed. R. Evid. 402. Courts have found guarded social media content relevant for different reasons. In these cases, the courts ordered that the private portions of the party’s social media profile be admitted into evidence for their likely relevance to the case.
In *Forman v. Henkin*, a plaintiff alleged traumatic brain injuries as a result of falling from a horse. *Forman v. Henkin*, 30 N.Y.3d 656, 659 (2018). Two specific injuries they alleged were difficulties with written and oral communication as well as social isolation. *Id.* In support of their claims, the Plaintiff offered up her Facebook account as evidence for the lifestyle she lived prior to the accident. *Id.* Subsequently, the Defendant sought unlimited access to the Plaintiff’s Facebook account. *Id.* In assessing whether this was appropriate, the court laid out the standard that the party seeking the access must be able to demonstrate that the information sought is likely to result in the disclosure of relevant information. *Id.* at 663. The court found the Defendant successfully demonstrated the likely relevance. *Id.* at 668.

The Defendant in *Forman* was successful for three reasons: 1) the Plaintiff raised social media as evidence in their complaint, 2) the complaint also brought up the length of time it took her to craft messages, and 3) the Plaintiff had relevant information available on their public portion of their Facebook. *Id.* at 663, 666. The Plaintiff’s private social media was also relevant because she raised it as an issue. *Id.* at 666. The Defendant was able to get the Plaintiff’s chat logs with time stamps as they proved relevant to how long it took her to craft messages. *Id.* at 660. However, relevant information on someone’s public portion of their social media has proven to be the most helpful in gaining access to a private portion in many cases.

Another New York case found a woman’s private Facebook account relevant because her claim stated that she was confined to her bed due to an injury suffered as a result of actions by the Defendant. *Romano v. Steelcase Inc.*, 30 Misc. 3d 426, 430 (2010). A review of the woman’s public Facebook account found photos of her smiling and outside her home after the alleged incident. *Id.* Finding this relevant evidence readily available on her public page, the court ordered that her private page be made available for further evidence. *Id.* at 435.

Once a piece of social media evidence is found to be relevant, there still must be a showing that the evidence is authentic. A piece of evidence is authenticated when it is shown that the matter in question is what the proponent claims it to be. Colo. R. Evid. 901. The Federal Rules of Evidence offers a non-exhaustive list of how this is done. *Id.* Authentication can be: testimony of a witness with knowledge of the evidence, comparison to an authenticated version of the evidence by an expert, or noting of distinctive characteristics. *Id.* However, social media evidence offers up a whole lot of questions when it comes to authentication.

With anonymity being a norm on social media, attorneys are often left hoping the party self-verifies their own social media account. Lawyers have turned to Federal Rules of Evidence Rule 902 as a way to authenticate social media evidence. Fed. R. Evid. 902. Rule 902 provides examples of evidence that is self-authenticating. *Id.* This is evidence that does not require any other extrinsic evidence in order to be admitted. *Id.* Some jurisdictions have had trouble adopting the idea that a social media page is self-authenticating.

In *United States v. Vayner*, the government introduced a printout of the Defendant’s VK.com profile (Russian equivalent of Facebook) to connect him to an email address that was used to send a forged birth certificate. After considering the items listed in 902 (“*inter alia*, certain public records, periodicals, or business records”), the court concluded that none of the categories laid out in the rule applied to a print-out of a social media page. *U.S. v. Vayner*, 769 F.3d 125, 129 (2nd Cir. 2014). The attorney in *United States v. Browne* argued that Facebook chat logs fell under 902 (11) because they were “records of regularly conducted activity” that fell within the hearsay exception under Fed. R. Evid. 803(6). *United States v. Browne*, 834 F.3d 403, 410 (3rd Cir. 2016). The court was unconvinced by this argument, stating “Facebook does not purport to verify or rely on the substantive contents of the communications in the course of its business.” *Id.*
SPOLIATION


Parties must refrain from “deleting, altering, or moving any social media posts.” Thurmond v. Bowman, 2016 U.S. Dist.LEXIS 45296 (2016) (A woman brought a discrimination suit for being denied housing, claiming the denial caused her homelessness. The Defendant’s counsel moved for sanctions when they observed Facebook posts, from around the time of the incident, disappearing. After an evidentiary hearing found the woman was simply changing her privacy settings, not deleting content, the court denied the motion). Failure to comply with this could leave an attorney open to sanctions and fines. The attorney in Lester v. Allied Concrete Co. found this out the hard way. Lester v. Allied Concrete Co., 736 S.E.2d 699, 702 (Va. 2013). Ahead of the case, the attorney told their client to “clean up” their Facebook account. Id. The client complied and deleted 16 photos from his Facebook account. Id. When this came to light, the court charged the attorney with $542,000 in fines and sanctions. Id.

This is not to say that an attorney cannot advise clients to tighten up the privacy controls on their social media profiles. This is not considered spoliation as all the information is still preserved. Thurmond, 2016 U.S. Dist. LEXIS 45296 at 27.

CONCLUSION

While social media can seem like unchartered territory, a lot of the same notions of ethics and rules of evidence apply. When contacting a party on social media, make sure you follow your state’s Rules of Professional Conduct. Just as it is unethical to deceive a person in a face-to-face conversation, it is unethical to do so over social media. Do not present yourself as “disinterested” to any unrepresented party and get consent from a person’s counsel if they are represented.

Admissibility of social media evidence generally relies on the relevance. This can be shown through relevant information visible on a person’s public page or social media being raised in the complaint itself. Finally, your clients have a duty to preserve their social media pages during litigation. While tightening up privacy controls is fine, spoliation and destruction of social media content could result in sanctions for both you and your client. An attorney navigating social media needs to remember one thing: treat it with the same care and respect they would anything else.