



## 7 Things About Social Media as Evidence

### Public or Private?

When a “Facebook” account is created, the user agrees that their personal information would be shared with others. Once the information is made public it can be copied, tagged, and distributed. When a person creates a social media account for themselves they are, in a sense, a *self-created celebrity*. So, is it “reasonable” to expect complete privacy of the account?

### 2. Let’s Subpoena – Not!

Can Facebook, Instagram, Snapchat, or Twitter be subpoenaed for the user account data? How would you domesticate and overcome another “little” obstacle called – “End User Stored Communication Act?”

Sending a subpoena to Facebook, in a civil matter, could prove to be a waste of time. I would much rather focus resources on trying to obtain the actual device used to post to the social media account, than try to get

Facebook to comply.

### 3. **Preserve, Please Preserve.**

I know! Digital forensic and social media analysts, myself included, are on a perpetual repeat play cycle: **preserve**, rewind, play, **preserve**, rewind, play, **PRESERVE!** I cannot over emphasize the advantages of preserving and storing digital data and devices early in a case. Way too often we are called up last minute to pull a rabbit out of a hat. The way people and businesses use technology and its byproduct digital DATA preservation of such should not be an afterthought or a last-minute trick pulled a day before the discovery deadlines.

A narrowly well-tailored proactive preservation order for the social media account should include language encompassing: username data, last user log session, and all users with access to the account. Similarly, when requesting to preserve digital devices we should ask for the various platforms of data storage, searched data, and identify the specifics, such as, file type, file extension, date, and time parameters.

I urge you to stop and think for a second of your current case load. How many of your cases, right now, involve digital data: text messages, deleted data, altered data, and contents of email. If you are nodding, you should be preserving.

#### **4. Ring the Compel Bell**

Making best efforts to compel opposing to turn over the device(s) used to access the social media account(s) early on and being granted the motion is like all the church bells ringing at the same time. We can forensically preserve, extract, and analyze the social media data right from the device itself. So, we get the private data with the users' consent to temporarily turn it over to a third party, such as a licensed forensic lab.

#### **5. Is the Data Really Relevant?**

*What? Yes!*

Social media can contain evidence; person to person communication, informal comments, postings, images, locations, videos, date and time stamps and every friend or follower is a potential witness. The question is; if what we collect can likely help prove or disprove a fact in the case. If the answer is yes, then – do you think it's relevant? A good example of cases where social media collection can be useful are: Personal Injury, Child Custody, Insurance Defense, Interference, Tort, etc.

#### **6. Not all attorneys are "Friends"**

I recently attended a Social Media Analysis training seminar where I learned that the San Diego County Bar Association Legal Ethics Committee states that: "A lawyer may not serve a friend request on a represented party as it would be designed to obtain information for a lawsuit and would, therefore, likely constitute a



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communication about the subject of the representation.” On a case-by-case basis you should weigh the advantages of having a licensed third-party service collect and monitor public data from social media to ensure that the data is collected in a defensible manner.

## 7. Considerations

Authenticating social media is important, fake accounts are easy to create, once social media is collected, it is important to authenticate it by identifying a witness who can establish that a post, a comment, or a picture is authentic. If you choose to use your paralegals to screen shot or capture social media, your firm can become a witness. If the data is not collected in its entirety, you could miss important metadata.

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