

# Ethics and Social Media Discovery

By Brian A. Zemel, *Litigation News* Associate Editor

The COVID-19 pandemic has transformed our profession into a virtual practice reliant on technology. This change affects how we engage in educational programs that enhance our legal expertise. The ABA Section of Litigation's recently held Virtual Section Annual Conference provided a safe platform to learn from leading experts about pressing legal issues regarding trial advocacy and litigation strategy. With technology and social media driving the flow of information, the timely seminar "Trending Now More Than Ever: Social Media Ethics and Litigation" (May 5, 2020) discussed best litigation practices in the context of social media discovery.

The program began by explaining the ethical principle that all lawyers are subject to the fundamental competency requirement expressed in ABA Model Rule 1.1. "Competence" includes an obligation to understand the risks and benefits of technology and to keep abreast of changes to properly advise clients. The level of necessary knowledge corresponds to the needs of your clients. For example, "the regular lawyer doing family law in Hahira, Georgia, may not have kept up with the latest in social media and technology, and yet that lawyer has an obligation to be competent in guiding a client about its use and about how to use it in discovery," explains panelist Paula J. Frederick, Atlanta, GA, chair of the ABA's Standing Committee on Professional Regulation.

Social media giant Facebook is a fertile source of discovery triggering competency-related issues. "Right now, if you look at social media, the monthly active users for Facebook is 2.6 billion, and the worldwide population is 7.8 billion. Roughly a third of us are on social media. With coronavirus, there's been an uptick of workers at home spending more time at their computers with 15 to 20 percent on social media," observes another panelist Julie Lewis, Santa Clara, CA.

With this background, the moderator, Richard C. Douglas, Chicago, IL, presented a Facebook-related discovery dispute hypothetical. The defendant in a wrongful termination suit requested production of the plaintiff's Facebook account login records, which allegedly contained employment-related admissions. The plaintiff refused, claiming lack of relevance and control over the account information under Rule 34 of the Federal Rules of Civil Procedure.

"In terms of relevance, the claims here are based in part on information that the plaintiff says that they saw on Facebook. Some of the core issues in the case really are about Facebook content, so that's probably going to establish a sufficient nexus to create some relevance," opines panelist Lauren E. Schwartzreich, New York, NY, cochair of the ABA's annual National Institute on E-Discovery. There also exists a "possibility that the wage and hour claim raises a potential relevance claim because there may be records within the Facebook account that show when the plaintiff was accessing the account and whether the plaintiff actually engaged in compensable work activity for which she seeks payment through her lawsuit," she adds.

Attorney competence requires a working knowledge of who has possession, custody, or control over social media information. "There is a split among jurisdictions as to what standard is required to establish control. Some jurisdictions say a party must establish that the producing party had a legal right to obtain the information upon request. Other jurisdictions say that it would be sufficient to show that the producing party had the practical ability to obtain the information upon request," expounds Schwartzreich.

To better understand the control analysis, the panel pointed to a decision addressing a web-based account, *Arteria Property Pty Ltd. v. Universal Funding V.T.O., Inc.* There, "the court focused on the user having the power to delete content despite the presence of an intermediary when posting content on the web. Ultimately, the court found that the defendant had the ultimate authority to control the website's content, so control was established because the account holder largely controls the content on the account, including deletion of information," notes Schwartzreich.

It is equally important to understand social media terminology. In the hypothetical, the plaintiff asserted that she deactivated her account. "Lawyers need to be aware when it comes to social media that language really does matter. A deactivation of a Facebook account, for instance, is not the same as deletion of an account," clarifies Schwartzreich. "If a Facebook user decides to delete their account, Facebook starts the deletion process after 30 days. It used to be 14 days, but they wanted to give a little more time, and this gives the user an opportunity to change their mind about the deletion process. It may take up to 90 days for Facebook to fully remove the profile, and it may remain in backups for disaster recovery. This is unlike deactivation, which removes the user's profile temporarily, but they may be able to reactivate it at any time," defines Lewis.

Social media platforms also generate preservation issues. "For litigators, when we learn that social media evidence is potentially relevant in a threatened or actual litigation, it means that it really is incumbent upon us to move quickly to preserve the content and not merely rely on an instruction to a client not to delete the relevant information," counsels Schwartzreich.

The panel concluded by highlighting competency as an ever-evolving education process to understand the technology of our times. To do so, lawyers should attend appropriate seminars presented by leading experts, keep up with changes identified in reliable legal journals, and consult with other attorneys when needed. [LN](#)

## RESOURCES

- ① Marie V. Lim, "Social Media Content: What Is It and How Do I Use It at Trial?," *Commercial & Bus. Litig.* (Sept. 7, 2018).
- ② Matthew J. Hamilton, Donna L. Fisher & Jessica K. Southwick, "From Snaps to Tweets: The Craft of Social Media Discovery," *Trial Evid.* (Oct. 5, 2018).
- ③ *Arteria Prop. Pty Ltd. v. Universal Funding V.T.O., Inc.*, No. 05-4896 (PGS), 2008 U.S. Dist. Lexis 77199 (D.N.J. 2008).