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Social media evidence: A new accountability

- » Courts are seeing an explosion of evidence from social media sites.
- » Case law regarding social media evidence is still developing.
- » Attorneys and investigators should stay abreast of new rulings as they happen.
- » Ethics and common sense rule when it comes to gaining access to personal social media information.
- » Rules of preservation apply to social media, just as they do elsewhere.

When 19-year-old Rodney Bradford updated his status on Facebook on October 18, 2009, he had no idea that his message about craving pancakes would become the crucial piece of evidence that would clear him of first-degree robbery charges. The Harlem teenager spent two weeks in jail before his father noticed



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the status update, which had been posted one minute before the robbery occurred, from a location 12 miles away from the crime. The district attorney subpoenaed Facebook for documentation to prove Bradford had updated his status from his father's home in Harlem, providing Bradford with a rock-solid alibi and a ticket to freedom.

With more than 800 million users on Facebook, 200 million registered Twitter users, about 135 million on LinkedIn, and more than 60 million already on Google+, it's clear that social media has become part of everyday life for a huge percentage of the world's population with access to the Internet. It makes people's activities, even thoughts and feelings, trackable and discoverable.

And while Bradford's Facebook evidence worked in his favor, that's often not the case for those whose social media activity is brought under scrutiny in the courts, which are seeing

an explosion of this type of evidence. The implications are huge for companies whose employees use social media both at work and at home. In fact, half of all companies will need to produce material from social media sites for e-discovery by the end of 2013, according to a 2011 Gartner report,¹ entitled *Social Media Governance: An Ounce of Prevention*.

A world of evidence

"We are entering an entirely new world of communication, unprecedented in human history," says attorney Benjamin Wright, an author, e-discovery expert, and instructor at SANS Institute. "Social media makes e-mail look like stone tablets, in terms of the flexibility of communication, the volume of communication and the multiplication of copies of communication. I believe that our legal system is only beginning to scratch the surface of the questions related to how we gather evidence, how we respect privacy and how we authenticate the evidence in the courtroom," he says.

Because it's a relatively new field, new challenges are coming to light each month as more and more social media evidence is being used. It can be a valuable source of information for both sides in any case, so understanding how to collect it ethically and leverage it legally will ensure it's admissible.

“In e-discovery, there is no difference between social media and electronic or even paper artifacts. The phrase to remember is ‘if it exists, it is discoverable,’” said Debra Logan, Vice President and distinguished analyst at Gartner, in a company press release.² “Unique aspects of social media present additional challenges, but as with an overall information governance strategy, the key to avoiding or mitigating potential legal issues in the use of social media for business purposes is to have a governance framework, policy, and user education,” she said.

Ethical evidence-gathering

Social media can certainly be a useful tool for e-discovery when used responsibly, and it can sometimes be incredibly easy to access evidence on these sites. If parties in a dispute leave their personal sites open for public scrutiny, the evidence is generally accessible to anyone, although there can be limitations on copyright and use of pictures. But, when a party in an investigation has a social media profile with tight privacy settings, getting access to the information can be more difficult.

A court may order that passwords be disclosed or might request a user to provide the evidence from his/her own social media pages to lawyers for the other side. But, without a formal request for disclosure, investigators and attorneys may be left with some difficult dilemmas.

To make matters even more complicated, how you can access information and what information you can use as evidence—each has its own set of developing rules. So far there are relatively few standardized, widely accepted methods for gathering evidence from social media sites. One approach is for the lawyer or investigator to print the social media page and show it to the judge or administrator. Capturing images using a screen grab, time-stamping, and using a web cam to record yourself recording

the evidence can be helpful to establish time and place. But this assumes that the material you need to access is readily available.

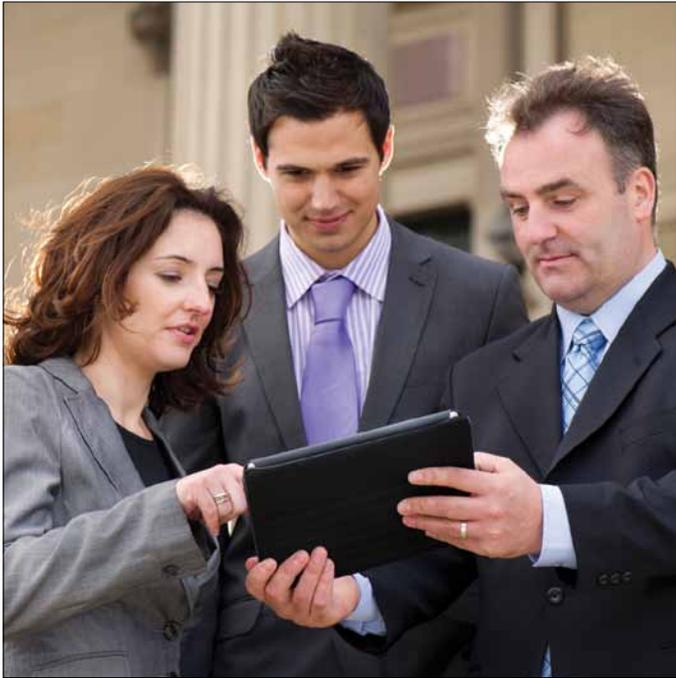
Do not deceive

Attorneys and investigators have to be careful about how they access information posted on a social media profile. They cannot misrepresent who they are in order to join their opposition’s private social media network. For example, you cannot create an account under an alias, “friend” the person under investigation, and then expect to use that information to support your case. The evidence won’t be admissible. It also violates the terms of service on some social media sites.

“Lawyers and private investigators have ethical requirements,” says Wright. “Interpretation of those ethical requirements is that these professionals will not engage in deceit. Professionals need to think very carefully before they use some kind of deceit in order to be ‘friended’ by someone else,” he says, adding that in the right circumstances, police officers working undercover may be justified in assuming an identity to gather evidence, based on the acceptable rules and procedures of a legitimate undercover investigation.

Duty to preserve

Another ethical issue surrounds evidence preservation. If social media profiles belong to the people who create them, creators should have the right to delete whatever they want, right? Not necessarily. “Lawyers are starting to realize that information contained on social media sites may be related to litigation and are having to navigate the intersection of technology and the law,” says Rebecca Shwayri, an attorney and e-discovery expert at Carlton Fields. “Because many social networking sites are owned and controlled by third parties, the preservation issues can be more difficult to manage,” she says.



However, “There can be very serious penalties for the destruction of evidence at a time that you know that the social media evidence will be relevant for some kind of a lawsuit or investigation,” says Wright. A Virginia lawyer and his client found this out the hard way.

Isaiah Lester was suing Allied Concrete for the alleged wrongful death of his wife, Jessica, who died when an Allied Concrete truck rolled onto her car. His lawyer, Matthew Murray, instructed Lester to “clean up” his social media profiles, which contained material that cast doubt on Lester’s level of grief. Lester deleted 16 photos from his Facebook profile, including images of him partying, holding a beer, and wearing a t-shirt that read “I [heart] hot moms.” The deletion came to light in the course of the trial, and of the 16 photos deleted, 15 were retrieved and presented in court. There were serious

consequences. The court found that the deletion of the photos constituted misconduct by Lester and Murray, and awarded a total of \$722,000 to Allied Concrete for attorney fees—\$180,000 to be paid by Lester and \$542,000 from Murray, who has since resigned.

Company social media sites are more straightforward. “If a company is maintaining its own social media page related to its products and resources, information on the social media page should be preserved when there is a reasonable threat of litigation, assuming such information is related to the litigation,” says Shwayri. When it comes to personal social media pages, however, evidence preservation can be more complicated. “Given the millions of users of social media, it is not reasonable to expect social media sites to archive all information related to users just in case of a lawsuit,” says Shwayri. “Most users probably don’t archive their own material because the material is held by third-party sites.”

While the case law is still developing surrounding social media evidence, its potential effect on an investigation, and even our behavior, is becoming clear. “At a very philosophical level... [social media] creates a greater accountability to one another and to society,” says Wright, “because, in fact, we’re all able to watch one another and we all know that anything I say or do tonight can come back to haunt me tomorrow.” *

1. Gartner: Social Media Governance: An Ounce of Prevention. December 17, 2010. The report can be ordered at www.gartner.com/DisplayDocument?ref=clientFriendlyUrl&id=1498916
2. Gartner press release: “Gartner says by year-end 2013, half of all companies will have been asked to produce material from social media websites for E-discovery.” February 17, 2011. Available at www.gartner.com/it/page.jsp?id=1550715

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