Time to "Like" Social Media in Litigation

By Charles W. Cohen | Ignatius A. Grande

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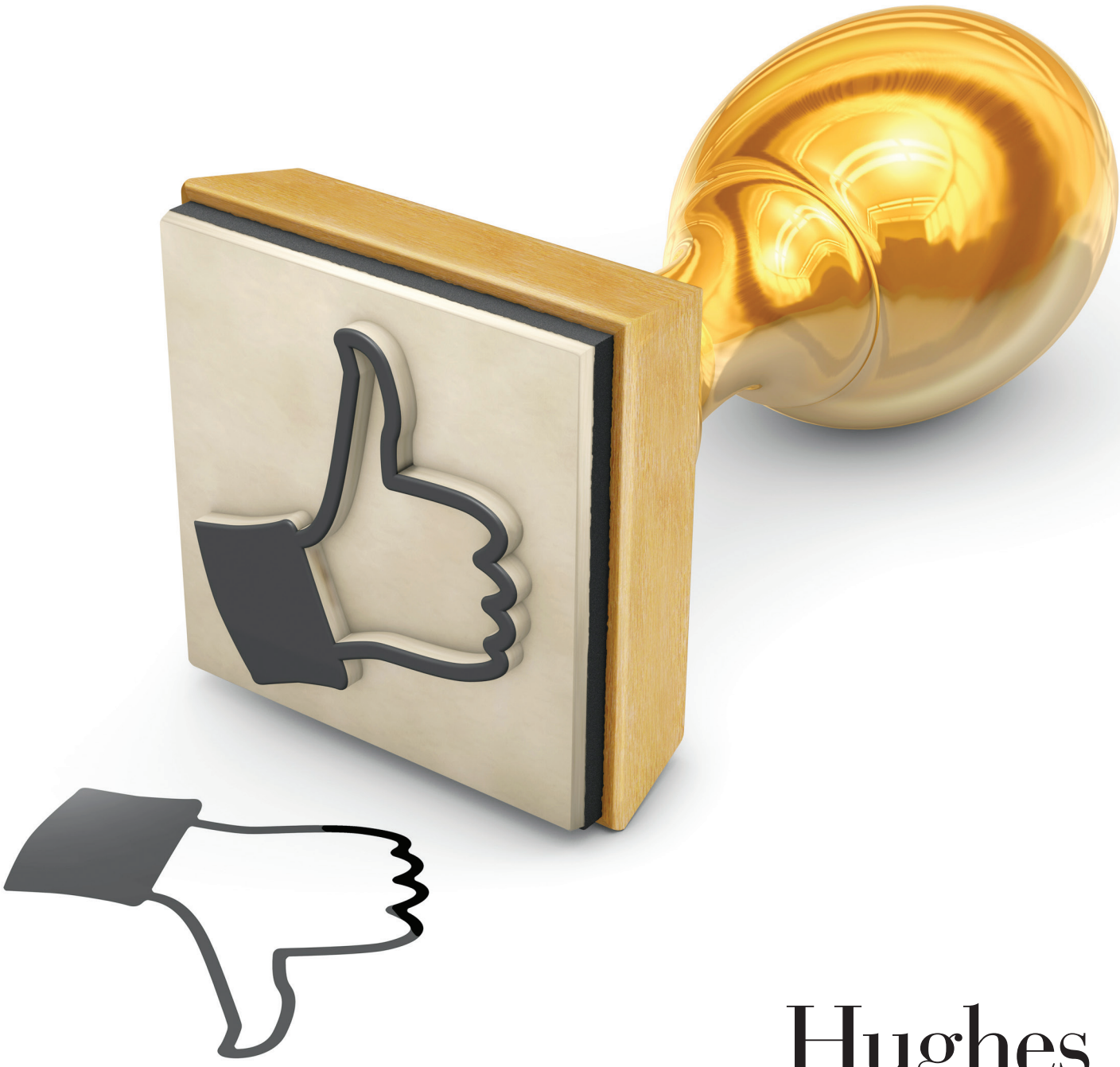

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Time to "Like" Social Media in Litigation

By: Charles W. Cohen and Ignatius A. Grande[1]

As the use of social media becomes more and more a basic part of the American lifestyle, it is having a noticeable impact on litigation practice. For many years, seasoned litigation attorneys who swore off or didn't understand social media, felt no obligation to use social media in their cases or to talk to their clients about their own social media use. However, in today's legal climate, not understanding or utilizing social media in your cases can be a costly oversight and in some situations could be the difference between winning and losing a case.

Ethical Obligations re: Technology

If you are a litigator, there are many ways in which social media can help or hurt your case. Since social media is still a changing and developing mode of communication, keeping on top of all of the relevant social media data that is available may be difficult, but it has become clear that attorneys need to make efforts to understand their clients' use of social media and to search for or request potentially relevant social media information from opposing parties.

The American Bar Association ("ABA") has set a high bar in recent years for the required technological know-how to practice law. There was a time when technology and the law were not so intertwined, but the ABA and other bar associations have concluded that in order to ethically practice law an attorney must have an understanding of technology and how it can

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1. Charles Cohen is a partner at Hughes Hubbard & Reed LLP, where he is a co-chair of the eDiscovery Practice Group and a co-chair of the Firm's Technology Committee. He has an international litigation and eDiscovery practice, and lectures frequently on litigation and eDiscovery matters. He has been recognized by publications such as *Chambers USA* and *The International Who's Who of Product Liability Defence Lawyers*. He may be contacted at charles.cohen@hugheshubbard.com. Ignatius Grande is Senior Discovery Attorney/Director of Practice Support at Hughes Hubbard and co-chair of the New York State Bar Association's Social Media Committee. He frequently advises clients on the management of their social media presence and in the preservation and collection of social media information. He may be contacted at ignatius.grande@hugheshubbard.com.

aid and hurt one's case.[2] In 2012, the ABA revised Comment 8 to Model Rule 1.1 to state that in order to "…maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**…"[3] The ABA Commission on Ethics 20/20 Report noted that this amending comment was critical given the "growing importance of technology to modern law practice."[4]

So what does that mean for a lawyer who is in the midst of discovery or planning for a trial in a civil matter? In order to be in compliance with the Model Rules and the ethical obligations put in place by the ABA and state bar associations, attorneys must understand the social networking sites that their clients and opposing parties are using and how these social media platforms operate.

Public Social Media Information

One of the more popular social media platforms is Facebook. While many people think that everything that they post on Facebook is subject to stringent privacy settings, oftentimes that is not the case, and a review of publicly available social media information can result in a treasure trove of data.[5] For example, if an individual "comments" on or "likes" a post that is not subject to privacy settings, that information will be publicly available. Also, an account owner may believe that certain photos that she posted are private, but if they are profile photos or are

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2. Law schools have been following this change and are starting to develop courses that are more in line with this new age. *See* Monica Bay, *Cardozo Law Offers New Technology Programs*, Law Technology News (Oct. 14, 2014), http://www.lawtechnologynews.com/id=1202673346475/Cardozo-Law-Offers-New-Technology-Programs#ixzz3J1OctbDB.

3. ABA Model Rule 1.1, Comment 8 (emphasis added).

4. ABA Commission on Ethics 20/20 Report (May 8, 2012).

5. Shea Bennett, *Facebook, Twitter, Instagram – How Public is Your Private Information? [INFOGRAPHIC]*, Media Bistro (Nov. 4, 2014), http://www.mediabistro.com/alltwitter/social-public-private-information_b61338.

converted to profile photos, they may be more publicly available than anticipated by the account owner. Photos that are posted on social media sites, including Facebook, may have metadata embedded within them that memorializes the time and possibly the location where each photo was taken. Finally, an individual has no power to affect the metadata or privacy settings of photos posted by friends or acquaintances on Facebook, which makes it more likely that potentially relevant information will be publicly available on Facebook.

Another potential source for publicly available social media information is Twitter. Unlike Facebook, all Twitter posts on a normal Twitter account are publicly available.[6] A Twitter user has a certain number of "Followers" and accounts that she follows. However, anyone who has access to the internet can download all of a user's Twitter posts.[7] Just as is the case with Facebook, photos that have been posted on Twitter may contain a great deal of information that an account owner may not anticipate has been captured, such as the time and date of a photo and the location where that photo was taken. As Twitter becomes a more popular social media site, attorneys should definitely search Twitter for information that might support their case.

Even if someone is able to use privacy settings on Facebook or other platforms to "protect" all potentially relevant information in a given case, a court may still find that social media content to be discoverable. Courts may issue orders requiring a party to produce private social media information, if it is relevant to the issues at play in that litigation. Setting privacy settings to "friends only" or "private" does not protect such social media content from being

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6. Twitter accounts can be modified so that only individuals following an account can view tweets, but this is not the default setting and very few Twitter users set up their accounts in this manner.

7. Twitter users can send "direct messages" to another Twitter account owner which can't be publicly downloaded.

disclosed. A judge may even order a party to produce what a user believes to be private messages sent using Facebook Messenger (which are akin to text messages or emails), if they contain content that is relevant to the issues at play in the lawsuit.

Private Social Media Information

When a party seeks private information from a social media account, courts have generally applied the same basic analysis to determine whether to compel a response to a specific social media discovery request as they would to determine whether to compel a response to a non-social media discovery request. Courts have held that the mere filing of a lawsuit is not enough of a basis to permit unlimited access to a party's social media sites. For example, in *Pecile v. Titan Capital Group, LLC*,[8] the Court denied Defendants' request for access to Plaintiffs' social media sites on the ground that Defendants did not offer a sufficient basis for requesting the disclosure, but merely generalized assertions that the information on the social media site could contradict Plaintiffs' claims of emotional distress.

Other courts have noted that parties have an obligation to produce responsive information from their social media account, just as if it was data stored in other locations such as email. In *Giacchetto v. Patchogue-Medford Union Free Sch. Dist.*,[9] the Court explained that a plaintiff should not be required to turn over the entire private section of his Facebook profile merely because the public section undermines the plaintiff's claims. However, the Court concluded that a plaintiff and their counsel should be required to review the private section of the profile and produce any relevant information under the basic principles of discovery, regardless of what is reflected in the public section. The Court found that while Plaintiff's emotional distress claim

8. 2014 N.Y. App. Div. LEXIS 420 (1st Dep't Jan. 23, 2014).

9. 293 F.R.D. 112 (E.D.N.Y. May 6, 2013).

did not justify unfettered discovery of social media, Defendant was entitled to all mentions of emotional distress a plaintiff may have made as well as any postings on social media websites that refer to an alternative potential source of emotional distress. Postings or photographs that reflected physical capabilities inconsistent with a plaintiff's claimed injury would also be relevant. On the other hand, the Court cautioned that "a plaintiff's entire social networking account is not necessarily relevant simply because he or she is seeking emotional distress damages."[10]

Courts will not condone "fishing expeditions" on social media and this was made evident in *Salvato v. Miley.*[11] In this matter, the Court found that a party seeking discovery of social media must be prepared to establish that the social media information is discoverable under the generally applicable rules of civil procedure. The Court held that this means that a party seeking discovery of privately held social media information must point to a prior investigation of publicly available social media or some other basis on which to believe that the non-public data contained on social media platforms is discoverable.[12] Avoiding charges of a "fishing expedition" requires careful drafting of social media discovery requests.

Sanctions for Deleting Social Media Content

Now that social media content is known to be a potential source of powerful evidence in a case, questions will arise regarding under what circumstances social media sites or social media content can be taken down or revised. It has been known for several years that an attorney cannot advise a client to take down or delete social media information if a litigation hold is in

10. *Id.*

11. 2013 U.S. Dist. LEXIS 81784, 3-4 (D. Fla. 2013).

12. *Id.*

place.[13] However, some lawyers continue to misunderstand their party's obligations with regard to the preservation of social media content. For example, in the recent case of *Painter v. Atwood*, Defendants requested that sanctions be issued due to Plaintiff's failure to preserve her Facebook posts.[14] There was no dispute that the Plaintiff had deleted Facebook posts, which the judge had determined were directly relevant to the litigation. The Court held that "[o]nce Plaintiff retained counsel, her counsel should have informed her of her duty to preserve evidence and, further, explained to Plaintiff the full extent of that obligation."[15] The judge determined that spoliation had occurred and imposed an adverse inference sanction.[16]

In another recent case in Florida,[17] the Plaintiff began deleting photographs from her account after the Defendant had requested production of all of the content of the plaintiff's Facebook page. The court then ordered that Plaintiff produce the entire contents of her Facebook account. However, Plaintiff only produced two copies of a single photograph and about 83 pages of undecipherable computer code.[18] The Court held that Plaintiff made this production "knowing that it was not the information sought by Defendants and, more importantly, was not the information th[e] Court ordered her to produce."[19] Defendant moved for sanctions and the

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13. *Lester v. Allied Concrete Co.,* Nos. CL 08-150, CL09-223 (Va. Cir. Ct. Sept. 1, 2011) (Court sanctioned attorney and counsel to pay expenses totaling $722,000 and the Court referred ethics-based allegations against counsel to the Virginia State Bar and the matters relating to the alleged perjury of the client to the Commonwealth's Attorney for the City of Charlottesville).

14. 2014 WL 1089694 (D. Nev. Mar. 18, 2014).

15. *Id.*

16. *Id.*

17. *Kemp v. Trustees of Mease Hosp., Inc.*, No. 09-013084 CI, slip op. (Fla. Cir. Ct. Oct. 22, 2013).

18. *Id.*

19. *Id.*

Court ordered that Plaintiff provide Defendant with the log-in information for her Facebook account so that Defendant could view all of the information on Plaintiff's Facebook account. After viewing the account, Defendant identified hundreds of pages of photographs and posts, many of which directly contradicted Plaintiff's allegations in the case.

The Court held that "[plaintiff] has intentionally destroyed relevant evidence that goes to the heart of her claims in this case and has repeatedly displayed the type of contumacious disregard of this Court's authority that is worthy of the most severe of sanctions."[20] The Court found that Defendant was prejudiced through undue expense and loss of evidence, and that Plaintiff had failed to provide a reasonable justification for not complying with the court's orders. The Court granted defendant's motion for sanctions, striking plaintiff's complaint and dismissing the case with prejudice.[21] In addition, the Plaintiff was ordered to reimburse Defendant for attorneys' fees and costs incurred in requesting the social media information.[22]

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In sum, attorneys must understand the social media platforms their clients and opposing parties are using since the utilization of such information has become such an important part of any litigation. It is also vitally important to remember that information from social media platforms needs to be preserved to the same extent as other data. The failure to preserve such information can lead to spoliation sanctions and grave repercussions not only for the client but for the attorney as well.

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20. *Id.*

21. *Id.*

22. *Id.*

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Charles W. Cohen
Hughes Hubbard & Reed LLP
One Battery Park Plaza
New York, NY 10004
(212) 837-6856
charles.cohen@hugheshubbard.com

Ignatius A. Grande
Hughes Hubbard & Reed LLP
One Battery Park Plaza
New York, NY 10004
(212) 837-6120
ignatius.grande@hugheshubbard.com