

# Peer to Peer

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WHAT  
INNOVATION  
LOOKS  
LIKE**

# Social Media Considerations and Challenges in eDiscovery

BY DEREK J. BOOR AND JANICE JACO

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## Social Media is the New Email

Today, social media is universally used by people, companies and even governments. Social media users of all ages can target audiences of one or billions. It is not just for sharing posts and staying in touch with family and friends. Rates of user adoption of platforms such as Slack are overtaking the use of email in companies around the world. Companies use Facebook Workplace to help employees stay connected and engaged with company events and personal interests. Social media was once a novelty; now most people view it as a necessity to stay connected to peers, family and friends.

Social media's proliferation means it is now a staple source of critical electronically stored information (ESI) in litigation and investigations. Because it is changing constantly on the backend, defensible collection practices are a moving target for legal practitioners. Case teams must take a nuanced approach to defensibly identifying, preserving, collecting and producing individual elements of social media to meet their client's discovery obligations.

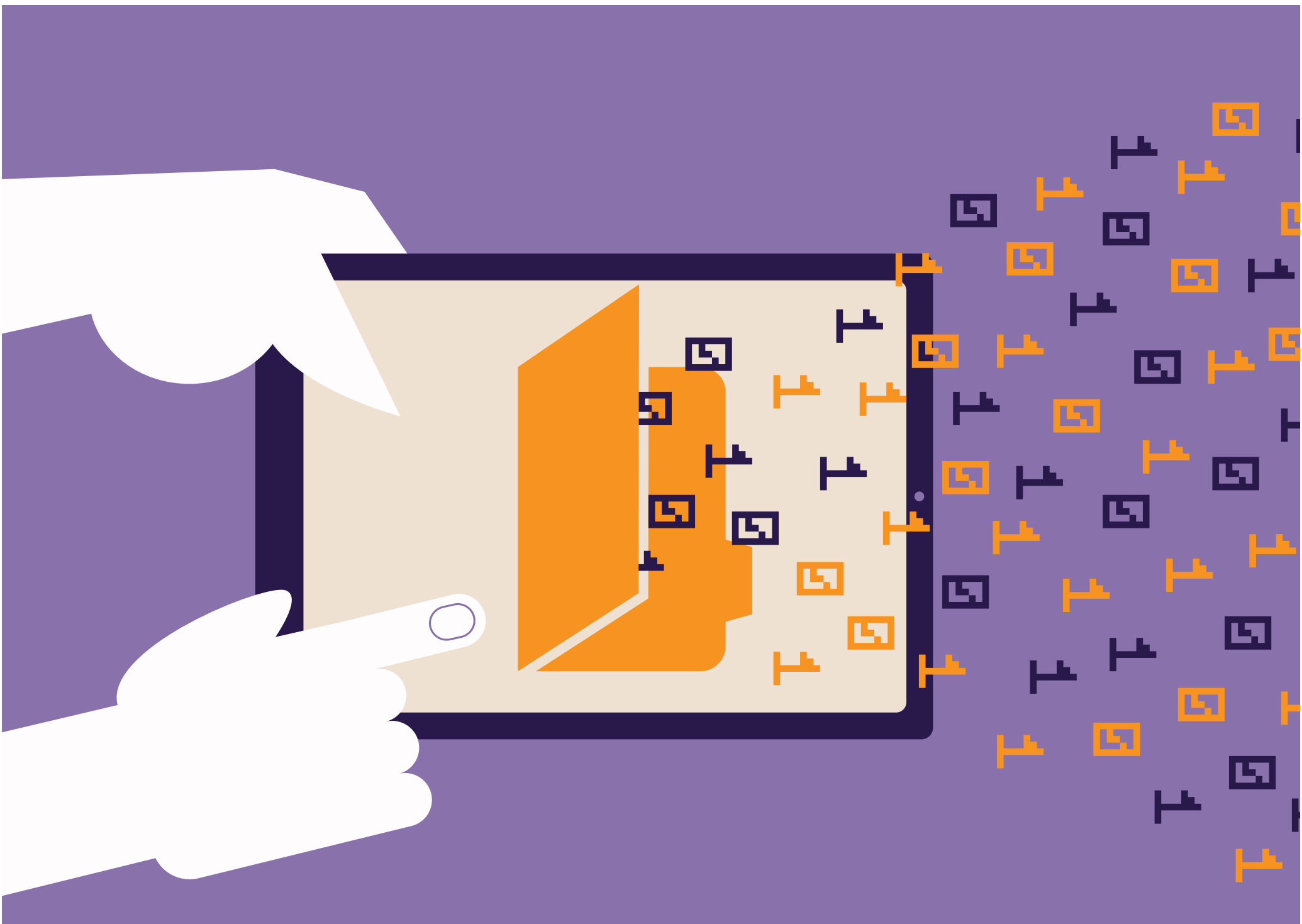
## Scoping Elements of Social Media

The elements of social media that will define scope are different for every collection and case. Potential

elements can include webpage links, documents, photos, posts, logins or geolocation data. Content must be captured in a manner that enables triers of fact to be certain of its authenticity. For example, a photo on a Facebook page with no exif metadata displaying the date or place it was taken may be insufficient to prove up the facts.

Parties may need to parse individual webpage elements, and they may also need to be able to demonstrate the same interactive experience that was available on the live website. Triers of fact may need the interactive experience of historical webpage navigation to fully appreciate the context of the evidence. These considerations will drive decisions about what tools to use to preserve and produce social media. Proportionality will also factor into such decisions. High stakes cases with critical interactive webpage evidence will almost certainly need a robust preservation and production tool and workflow. Conversely, a single LinkedIn post or message may be sufficiently preserved by a user initiating an archive request and downloading his own data.

We asked questions of Evan Gumz of Hanzo, David Horrigan of Relativity, and Robert Fried of Consilio, to get their input on how they help clients deal with social media in discovery. Here is what they had to say.





**Evan Gumz**  
Senior Account  
Executive, Hanzo  
Archives

**Do you have a questionnaire you use when a client calls asking about the correct steps that need to be taken to collect social media from multiple platforms (e.g., YouTube, Instagram, Facebook etc.)**

**EG** Hanzo asks its clients the following questions:

- What kinds of sites need to be collected? Popular social media (FB, Twitter, Instagram, LinkedIn, Google Plus, Pinterest), blogs like Tumblr and Wordpress, personal webpages, newer platforms like Slack?
- Have you identified the social media accounts, or do you need assistance with finding the accounts?
- Is the content public or not - is it something that any user of the social media site could see? Would you need to login as the account holder to see content?
- Should we collect all posts or apply date limits? For example, would you like all available posts going back to the beginning of an account, or do you only need posts going back to 2016? Do you only need single posts?
- What is the frequency of capture (single instance or daily, weekly, monthly)?

**Do you have any quick tips for finding and using social media evidence? Are there any free or low cost apps on the internet that you suggest clients should use?**

**EG** Whenever possible, we recommend working with service providers that can provide investigation services (such as an

open source intelligence report). That's the most defensible way to find and identify social media accounts. In terms of low cost / free services, there is searchisback.com for Facebook. But services like this may not work anymore in light of Facebook's new privacy policy and Application Programming Interface ("API") restrictions arising from the Cambridge Analytica scandal. Also, these third party sites may not be robust enough to identify relevant social media for certain types evidence needed in litigation.

Another quick method of finding a person's social media is by searching their user handle. There's a good chance a person uses the same handle on multiple sites (though you should verify you have the right person!). Going through the standard discovery process, attorneys can make requests for admission such as "Do you have a Facebook account?"

**What tools do you use for social media collection? Do you partner with vendors or do you have your own in-house solution?**

**EG** Hanzo has its own solution that we provide to law firms and eDiscovery service providers. We use a specialized web crawler that collects social media pages in accordance with the Web Archive ("WARC") ISO 28500 standard, which means we're getting the defensible, native format of the pages (not just the static images and text - but also video, animation, and interactive elements, like "hover-overs" and image galleries). It's much more than a screenshot. You can browse a working replica and see how the page actually worked when it was live. This gives you the context that would be missing in a screenshot. For example, suppose we capture someone's Instagram and you're reviewing the replica. You're looking at the grid of photos, and as you're scrolling down the page, you come across a post of interest. You can hover over the post to see how many people loved it or

commented, and open the post into its own page to read the user comments. If people are tagged in the photo, you can click the photo and their name tags will appear. If multiple photos are embedded in the same post, you can click through the gallery.

Another aspect of Hanzo's collection, which we automatically do with sites like Facebook and Twitter: if people are sharing external links, we include these within the scope of capture, so you can click the link and see what is being shared. The external pages are also preserved at capture time, so their content won't update or change as it could on the web. Along with the native format preservation, we also create very presentable PDFs of the pages, gather metadata, and pull videos—which can be easily exported, reviewed and used by case teams at depositions and trial. The collection is comprehensive and designed to meet the highest standards in authenticity and legal defensibility.

Hanzo recently launched automated social media investigations, where we crawl the web and find social media evidence belonging to parties, witness and other individuals of interest. We identify a person's sites and highlight potentially relevant content in posts based on search criteria the law firm provides to us.

### What are you doing once you collect the data and have to review it?

**EG** After Hanzo has collected the data, our clients have a couple options for review. First, they can use our Viewer application to browse the native format capture (the working replica). This enables you to review the site the same way a person would have browsed it when it was live. You can also run text searches and searches against metadata using our application. Second, we provide load files for document review tools like Relativity, Concordance and Ringtail. The load files contain the complete export: PDFs, metadata,

## It's easy to search for keywords in the posts, comments, and replies – and you can also search against metadata for posts within a certain date range.

extracted text, and videos. It's easy to search for keywords in the posts, comments, and replies – and you can also search against metadata for posts within a certain date range. One big advantage is that we capture on the post level, in addition to collecting the larger timelines. If a Facebook timeline has 100 posts, we get 100 PDFs for the posts (plus a large PDF showing the timeline). This allows the case team to use the posts individually if that's more convenient. When you're looking at the PDF of a Facebook post, you can see the comments and replies expanded in full.

### What are you doing to deal with emojis and emoticons?

**EG** We capture them. You can see the emojis and emoticons on the PDF - as well as in the extracted text. We can also make custom metadata fields for the emoji reactions on Facebook if you'd like to pull up a list of users who reacted a certain way to a post.

### What key elements are collected when metadata is needed?

**EG** The key elements are the URL of the captured page, the capture timestamp (when

we captured the page), and hash values (of the native format capture, PDF rendition, and extracted text). We also pull metadata straight from the social media page, and the key one for case teams is the timestamp of the post.

### Can your processing tool extract geolocation data? What other elements can be fielded for review?

**EG** It's our understanding that you need the API to extract geolocation, but most APIs aren't available right now. However, if geolocation information is on the face of the page, we can pull it and field it in the metadata.

We can field many elements for review. The metadata is fielded in the load file, so it's easy to run a search and find the posts you need. Importantly, we pull the unique URL of each post (in addition to the primary account URL) – so you're able to refer to that specific post in court filings. Likewise, we provide metadata for each post. This enables you to search by timestamp and find posts in a specific year, month, day, even hour. Elements we field include the post timestamp, post author, comment author, like author, and with customization we can field many other elements (reaction

WHEN IT COMES TO SOCIAL MEDIA, THE BIG ONE IS YOU CAN'T SUBPOENA FACEBOOK AND OTHER SOCIAL MEDIA COMPANIES TO GET DISCOVERY OF SOMEONE'S ACCOUNT. MOST COMPANIES WILL RELY ON THE STORED COMMUNICATIONS ACT, WHICH PROHIBITS A SERVICE PROVIDER FROM DISCLOSING THE CONTENTS OF COMMUNICATIONS ON THEIR SERVICE.

author, emoji author). Forensic metadata about the collection includes the page URL, the capture timestamp (when we collected the page), and several hash values for authentication (native format digest, PDF digest, etc.) There are several other pieces of metadata we record, such as the server requests and responses when we collect from a site. You have a complete audit trail, which establishes the digital chain of custody, and makes it easy to authenticate.

### **How are courts treating social media evidence in the discovery process? Are their cases or case law to support the collection/review that you are aware of?**

**EG** Social media evidence is discoverable under the Rules of Civil Procedure, and it's admissible as evidence in court. If the content is publicly available, it's generally considered fair game. You can also make a request for production of private content if you show to the court that's it relevant to the litigation. Suppose you're defending a personal injury case and the plaintiff claims they're unable to do any physically strenuous activity. Even though their account is private, you can see the plaintiff rock climbing in their profile picture (which is visible to the public). You can use that picture as a good faith basis for requesting the private content. You're more likely to prevail if you keep your request specific and proportional to the needs of the case—not necessarily asking for every single post, but keeping it to a certain date range. (This is consistent with the 2015 amendments to the Federal Rules of Civil Procedure.)

When you get to court, the threshold test is authentication. There are two schools of thought when it comes to social media evidence. Some courts follow the Maryland approach (*Griffin* line of cases), and others take the Texas approach (*Tienda* line of cases). The Maryland approach is strict, and you have to convince the court that the account

wasn't hacked and the content isn't fake. The Texas approach, on the other hand, follows the usual rules of authentication. You can get the content into evidence if there is sufficient proof. Such proof includes the "distinctive characteristics" of the evidence in accordance with FRE 901(b) (4). If what you're offering into evidence has the distinctive characteristics of a social media page (looks the way it should, works the way it should), then a jury can make the factual determination of authenticity. My understanding is that most courts are now taking the Texas approach. Also, attorneys should keep in mind the new Federal Rules 902(13) and (14) which allow for self-authenticating ESI. Basically, you don't need a live witness at trial to lay a foundation; you can rely upon the certification of a qualified person, which likely means a forensic collections provider.

### **What are some concerns attorneys must be aware of when dealing with social media?**

**EG** When it comes to social media, the big one is you can't subpoena Facebook and other social media companies to get discovery of someone's account. Most companies will rely on the Stored Communications Act, which prohibits a service provider from disclosing the contents of communications on their service. If an account is private, it's best to request access from the other side or to make a motion to compel discovery. A compelling argument will be needed to demonstrate there's likely to be relevant evidence to be found.

There are definitely ethical considerations. Attorneys shouldn't be messaging parties, sending friend requests or using pretext to gain access to private social media. At the same time, they should be careful about inadvertently making contact with witnesses and jurors when doing research on social media sites.

Attorney should also be mindful of spoliation and loss of evidence. While it might be okay for a party to change his privacy settings on your social media, a party to litigation has a duty to preserve content, and they should not delete or edit anything once a trigger event has occurred.

### **What are some the privacy issues that concern you when it comes to social media collection/review?**

**EG** In terms of private social media, the first rule needs to be authorization. When a party's social media is private, you need to be mindful of ethics (no friending or pretext to gain access), as well as the Stored Communications Act. There is a case *Ehling v. Monmouth-Ocean Hospital Service*, 961 F. Supp. 2d 659, 661–63 (D.N.J. 2013), where the employee had a private Facebook account, but many of her friends were coworkers. When her coworker saw certain posts she made, he shared them with management. The employee claimed this violated the Stored Communications Act. While the court found the employee's private Facebook was covered by the Act, it also determined she had effectively authorized access to her coworker, and this satisfied the "authorized user" exception. Importantly, the court noted the coworker hadn't been coerced by management and had provided the posts voluntarily.

Certainly Ehling is very fact specific, and you won't always have a witness who will volunteer access. When an account is completely private, the best practice is to go through the regular discovery process, make a showing of relevance and proportionality, and request production.



**David  
Horrigan**  
*Discovery  
Counsel and Legal  
Education Director,  
Relativity*

**The electronic discovery of social media has been an important topic over the last several years as new platforms and evolving technologies change the rules of the ballgame.**

Courts have provided guidance on the admission of social media evidence over the years, and the 2017 amendments to Federal Rule of Evidence 902 made a significant change to how litigants can get social media data into court.

Of course, the new Fed. R. Evid. 902(13) and Fed. R. Evid. 902(14) aren't the only rule changes affecting the e-discovery of social media. The 2015 amendments to the Federal Rules of Civil Procedure—perhaps most notably, the amended proportionality provisions of Fed. R. Civ. P. 26(b)(1)—have impacted social media discovery.

Social media evidence has become an important tool in litigation, many times taking the place of investigative tools of a bygone era when private investigators with cameras stalked their subjects.

Who needs a private eye when you can get all the data you need from Facebook?

**How are courts treating social media evidence in the discovery process?**

**DH** It's highly unlikely a litigant could go into court and say to opposing counsel, "Give me the entire contents of your client's Facebook account." Although in some early cases, such as *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430 (S.D. Ind. 2010), courts rejected privacy arguments and ordered broad social media production, courts have consistently placed limits on what social media evidence a litigant can get.

For instance, in *Mailhoit v. Home Depot U.S.A., Inc.*, No. CV 11-03892 (C.D. Cal. Sept. 7, 2012), a federal district court rejected Home Depot's attempt to get broad social media discovery in an employment discrimination action.

Home Depot argued it was entitled to Ms. Mailhoit's social media data to conduct discovery on her claims about her emotional and mental state. Ms. Mailhoit conceded that Home Depot was entitled to "adequately tailored" social media discovery, but she argued Home Depot was attempting to "rummage" through her social media "in the hope of concocting some inference about her state of mind."

For the most part, the court sided with Ms. Mailhoit, rejecting three of Home Depot's four requests for social media data. The court noted, "Plaintiff has placed her emotional state at issue in this action and it is conceivable that some [social network site] communications may support or undermine her claims of emotional distress." However, the court held Home Depot's broad requests—including a request for all posted photos over a seven-year period—was overly broad.

In rejecting most of Home Depot's social media discovery requests, U.S. Magistrate Judge Suzanne Segal illustrated the shortcomings of broad social media discovery:

*"Even if the first part of this category, which seeks communications relating to 'any emotion,' could be understood to encompass only communications containing specific emotive words (which the request does not identify), the category would still arguably require the production of many materials of doubtful relevance, such as a posting with the statement, 'I hate it when my cable goes out.' The second part of the category, which seeks communications relating to 'events' that could 'reasonably be expected to produce a*



*significant emotion,' is similarly vague and overbroad. Arguably, watching a football game or a movie on television is an 'event' that may produce some sort of 'significant emotion,' but it is unclear whether Plaintiff would be required to produce messages relating to such activities."*

In more recent years, courts have noted that social media discovery is very case-specific. For instance, in *In re Cook Med., Inc.*, No. 1:14-ML-2570 (S.D. Ind. Sept. 15, 2017), both sides cited *Mailboit* in their attempts to obtain—and defend against—social media discovery requests.

The *Cook* court noted that, in *Mailboit*, Home Depot sought “all social media posts that revealed, referred, or related to any emotion, feeling, or mental state” of the plaintiff. The *Mailboit* court noted that all statements in one way or another evidence a person’s mental state, but added a party is not entitled to compel a person to produce all of their statements.

However, the *Cook* court noted that requesting party in *Cook* was entitled to compel a response to interrogatories asking the same questions, which were aimed—not at overall mental state—but at particular aspects of alleged injuries, *e.g.* the ability to travel more than two hours or participate in social engagements.

Likewise, in a civil action this year, *Hinostroza v. Denny's, Inc.*, No. 2:17-2561 (D. Nev. June 29, 2018), the court allowed social media discovery, but limited the scope.

In a personal injury action, Denny’s had sought all social media data from any account plaintiff Monica Hinostroza had for the five years preceding the incident. Although U.S. Magistrate Judge Nancy Koppe granted Denny’s request for social media discovery, she limited the scope of discovery—both in terms of date range and in method of collection, review, and production.

The court noted, “Social media discovery must allow the requesting party a sufficient sample size from which a potential

pattern of content could reveal an emotional or mental state or physical capability that undermines a party’s claim.”

Although Judge Koppe noted that courts have ruled that one year of social media discovery is reasonable, she ordered discovery of Hinostroza’s social media data for a period of February 22, 2015 to the present—longer than the one year of data in the cited case law, but shorter than the five years Denny’s requested.

However, as noted above, Judge Koppe also controlled the method of review and production. Rather than granting Denny’s request for Hinostroza to produce five years of social media data, the judge ordered Hinostroza’s counsel to review all of her social media data (as opposed to Denny’s counsel reviewing it) and produce responsive data for the shorter period of time, but the judge reminded counsel of the duty of candor.

### What are some concerns for attorneys when dealing with social media?

**DH** In *Hinostroza*, Judge Koppe reminded counsel of the duty of candor, and attorneys must remember that they themselves may face serious repercussions if social media discovery goes awry.

Perhaps the most well-known example is *Allied Concrete Co. v. Lester*, 285 Va. 295 (Va. 2013). Lester was a wrongful death action, including a claim for loss of consortium. In reviewing the Facebook account of a plaintiff, the surviving spouse, plaintiff’s legal team discovered a photo of Mr. Lester donning a t-shirt reading, “I [heart] Hot Moms.”

For obvious reasons, Mr. Lester’s counsel did not want that photo coming out in discovery, and he instructed his paralegal to tell Mr. Lester to “clean up” his Facebook page.

This spoliation of evidence had serious consequences.

Although Mr. Lester prevailed in this action against Allied Concrete, the court ordered sanctions of \$180,000 against Mr. Lester and \$542,000 against his counsel. In addition, counsel faced disciplinary proceedings with the state bar.

Moral of the story: You may not have to produce all social media data your client has, but you can’t have them destroy it either.

### Practical issues in social media collection

Emerging aspects social media create new issues for counsel. For instance, what about emojis, emoticons, and geo-location data?

Software applications built on the Relativity platform can search social media for emojis, and Relativity itself can provide geo-location data in processing. (*Disclaimer: one of the authors of this article is employed by Relativity.*)

These data can provide critical information in discovery. For example, as e-discovery expert Craig Ball has noted, a smiling emoji can completely change the meaning of a statement. Likewise, a case can turn on the location of a post, which can be discovered with advanced e-discovery technology.



**Robert Fried**  
Senior Director,  
Digital Forensics  
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Consilio

**Do you have a questionnaire you use when a client calls asking about the correct steps that need to be taken to collect social media from multiple platforms (e.g., YouTube, Instagram, Facebook etc.)**

**RF** Consilio utilizes an “Electronic Discovery Checklist” when necessary to discuss data sources that may be relevant to a matter. A member of the Consilio Data collection team will inquire about the possible relevance of social media platforms to the matter. If helpful, the Consilio Team member may ask questions such as:

- What specific platforms are utilized by the data custodian?
- What specific content type is relevant?
- Will public or private content be needed?
- For non-public accounts, are user account credentials available?

Counsel may need to ask questions, including:

- What is the difference between public and private content?
- What content type can be captured?
- How quickly can the content be preserved?
- What information is needed to begin the preservation?
- What format(s) can the content be preserved and reviewed in?

The client/account owner may ask questions, including:

- Can the account password be changed prior to the preservation process beginning?
- What content type will be preserved?
- How much time will the preservation take?

**Do you have any quick tips for finding and using social media evidence? Are there any free or low cost apps on the internet that you suggest clients can use?**

**RF** Depending on the case, social media can play a significant role in an investigation. Whether it be on a computer or on a mobile device, Consilio has several tools or methods in its arsenal to identify, preserve and parse social media evidence. These tools offer the advantage of capturing metadata, logs and other useful information for evidentiary purposes. There are social media platforms that offer their own methods by which users can archive account content; however, not all information may be captured, and logging may not be an available option. Whenever possible utilize a third-party service provider to perform the data collections, who will be able to perform the data preservation in a manner that is defensible, and can also speak to the process in court, if necessary.

Today, billions of people use social media platforms; evidence from these platforms can be utilized to establish a data custodian’s activities and help to verify critical events in the case timeline.

There are many websites (free and paid) that can be utilized to locate social media evidence. Many such sites can be found using an internet search.

WHENEVER POSSIBLE UTILIZE  
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### What tools do you use for social media collection? Do you partner with vendors or do you have your own in-house solution?

**RF** Consilio utilizes X1 Social Discovery for web-based social media platforms and Cellebrite for mobile/mobile-app based social media platforms. Other tools (such as commercially available tools that can crawl web pages or generate screen captures, for example), can be utilized as necessary depending on the scope of the work or specific needs of the client or matter. Note that some social media platforms allow users to archive account content; these archives can be preserved as well.

### What are you doing once you collect the data and have to review it?

**RF** Post-collection, Consilio works closely with the client to determine the recommended format based on how the data will be presented or reviewed.

### What key elements are collected when metadata is concerned?

**RF** Information such as file names, dates and times, MD5 Hash values of the content preserved will be captured.

### How are courts treating social media evidence in the discovery process? Are there cases or case law to support the collection/review that you are aware of?

**RF** Requests to preserve evidence on social media platforms have increased in the past several years. Either we receive the requests directly from site owners to preserve content, or we are asked to perform a forensic analysis on content. The types of cases where this evidence has been requested include: employment disputes, harassment disputes and personal injury-type cases. Often, the content and activity on the platform is preserved to corroborate specific events and timelines potentially relevant to a matter.

### What are some concerns attorneys must be aware of when dealing with social media?

**RF** There are a lot of different types of content available, such as: chats, posts, external links and linked content. Consideration should be given to all types of content that may be relevant. There could also be additional accounts on a platform or other platforms that need to be considered.

Some content, like embedded objects and objects with external links, may be difficult to collect.

Additionally, social media platforms are frequently changing on the backend, resulting in changing challenges in collecting the data needed.

Much like mobile phones, the social media world is a rapidly evolving segment of ESI. New platforms and changes to existing platforms impact what can or cannot be collected. Collection tools utilize published API's that platform developers are continually changing to meet the needs of subscribers and, of late, to plug security gaps.

### What are some the privacy issues that concern you when it comes to social media collection/review?

**RF** The difference between public and private content needs to be discussed with clients, so that they understand what may or may not be available for collection. If private content is requested, a password will be required. Often data custodians are hesitant to provide unfettered access to social media accounts and want to be confident that collection is limited to only the relevant data and time period.



**Derek Boor**

Derek Boor has provided service at Dentons US LLP for 17 years in Litigation Support. He started his career in Litigation Support as a data analyst and eventually moving into the Discovery Technology Services role overseeing the firms applications and data infrastructure. Derek has managed various projects ranging from document reviews of millions of documents to mergers and acquisitions of data into the Dentons environment. Derek has supported and had involvement in 80 remote locations across the US for arbitrations, meditations and trials.



**Janice Jaco**

Janice Jaco, ACEDS 2015 eDiscovery Person of the Year, is a senior eDiscovery Project Manager for boutique litigation powerhouse Keesal, Young & Logan. Janice's professional volunteer work includes extensive involvement in authoring LTC4's eDiscovery Core Competency, participation in ACEDS' CEDS Exam Standard Setting Exercise, and updating ACEDS' University online content. Janice is currently a member of ILTA's Litigation & Practice Support Content Team and recently completed the BARBRI Cybint courses in Cyber Protection and Intelligence.

### The Elements You Need to Authenticate Will Drive the Choice of Tool and Approach

At the end of the day, decisions about how to collect and produce social media evidence will turn on authentication. Authentication is always fact-specific, but courts generally agree the testimony alone of the person who downloads or prints social media is insufficient to establish authenticity. Today, anyone can put any content on the internet, and we all know the the web is not monitored for accuracy. Moreover, users with modest sophistication in any word processor could create a document that, when printed, appears exactly the same as a printed webpage would appear. A PDF or paper print of an alleged webpage can be easily defeated in the arena of authenticity.

Conversely, social media discovery is not necessarily complex and expensive. Some social media sites offer account owners tools to capture some information from their accounts. Guidance can often be located in the support section of these websites. While this approach can satisfy evidentiary requirements in some matters, it likely cannot satisfy all requirements in all matters. Careful consideration of critical evidence and how it will be displayed, reviewed and produced will need to be made by stakeholders with subject matter expertise in evidence and social media collection. **ILTA**