Georgia Defense Lawyers Association
Advancing the Civil Defense Bar©
www.gdla.org | 404.816.9455

GEORGIA DEFENSE LAWYER©

Volume XII, Issue I • Spring 2015

Social Media As Evidence: *A Georgia Overview*

By Nick Hinson
The Hinson Firm, Athens

The ever-increasing reach of the Internet in recent decades has had numerous effects on the dynamics of litigation; among other things, the widespread use of social media has created a virtual treasure trove of information for parties involved in lawsuits. Federal courts across the nation seem to have reached a general consensus that social media is discoverable evidence so long as it is the subject of a request that is reasonably calculated to lead to the discovery of information bearing on the claim at issue, under Federal Rule of Civil Procedure 34. *See, e.g., Davenport v. State Farm Mut. Auto. Ins. Co.*, No. 3:11-CV-632-J-JBT, 2012 WL 555759, at *1 (M.D. Fla. Feb. 21, 2012); *Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 570 (C.D. Cal. 2012); *Tompkins v. Detroit Metropolitan Airport*, 2012 WL 179320, at *2 (E.D. Mich. Jan.18, 2012). Nonetheless, there is much variation in how courts permit the discovery of social media content to be conducted.

As an initial matter, courts have consistently held that, by sharing social media content with others – even if only with a limited, select group of contacts, a litigant has no objectively reasonable expectation of privacy with respect to that content. Consequently, discoverability of social media is governed by the standard analysis and is not subject to any "social media" or "privacy" privilege.

Social media data is subject to the same duty to preserve as other types of electronically-stored information. Generally, all evidence in a party's "possession, custody, or control" is subject to the duty to preserve and the duty to preserve is triggered when a party reasonably foresees that the evidence may be relevant to issues in litigation. Evidence generally is considered to be within a party's "control" when the party has the legal authority or practical ability to access it. Many social media platforms make preservation of information simple; for instance, Facebook offers

Continued on page 48

Inside This Issue

GDLA Honors Atlanta Judges at 12th Annual Reception

The GDLA hosted its 12th Annual Judicial Reception on February 5, 2015, at the State Bar of Georgia. More than 150 members and judges enjoyed the evening.

This yearly gathering honors Atlanta area judges from the state's appellate courts, state and superior courts, State Board of Workers' Compensation, as well as the federal courts.

See pages 40-41 for more scenes from the reception.

Photo courtesy of John Disney, *Daily Report*

Pictured at the event are Georgia State Senator Bill Cowsert (left) of Cowsert & Avery in Athens and Judge Steve C. Jones of the U.S. District Court for the Northern District of Georgia.

Continued from page 1

the ability to download a file containing timeline information, posts, messages, and photos, as well as a history of the ads on which the user has clicked and IP addresses that are logged when the user accesses his or her Facebook account. Twitter offers a similar – albeit less comprehensive – option, allowing users to download all Tweets posted to an account by requesting a copy of the user's Twitter "archive."

Spoliation of social media account information may authorize sanctions. For instance, in *Frank Gatto v. United Air Lines*, No. 10-cv-1090-ES-SCM, 2013 U.S. Dist. LEXIS 41909 (D.N.J. March 25, 2013), after receiving a request to preserve his social media data, the plaintiff deactivated his Facebook account, which was then automatically deleted 14 days later. Defendants ultimately sought and won an adverse inference spoliation sanction against the plaintiff for failing to preserve the account.

There are a variety of ways to handle the fulfillment of a social media discovery request. Some courts have compelled the respondent to provide full account access to the requesting party for a limited time period. *See, e.g., Largent v. Reed,* No. 2009-1823, 2011 WL 5632688 (C.P. Franklin Co. Penn. Nov. 8, 2011). However, turning over the keys to the account appears to be an acceptable solution in only a minority of cases. Several jurisdictions, in fact, have confirmed that requests for an account's log-in and password information are per se unreasonable. *See Trail v. Lesko*, No. GD-10-017249 (Pa. C.C.P. July 3, 2012); *Chauvin v. State Farm Mutual Automobile Insurance Company*, No. 10-11735, 2011 U.S. Dist. LEXIS 121600 (S.D. Mich. Oct. 20, 2011).

Alternatively, many courts have ordered in-camera reviews of the subject social media accounts, and have limited production to only information that is responsive to the discovery request. *See, e.g., Offenback v. Bowman*, No. 1:10-cv-1789, 2011 U.S. Dist. LEXIS 66432 (M.D. Pa. June 22, 2011); *Douglas v. Riverwalk Grill, LLC*, No. 11-15230, 2012 U.S. Dist. LEXIS 120538 (E.D. Mich. Aug. 24, 2012); *Nieves v. 30 Ellwood Realty, LLC*, 39 Misc. 3d 63, 966 N.Y.S.2d 808 (N.Y. App. Div. Apr. 11, 2013). At least one court has tried another solution: appointing a neutral forensic computer expert to access the private portion of the plaintiff's Facebook account and identify relevant materials. *See Perrone v. Lancaster Reg. Med. Center*, No. CI-11-14933 (C.P. Lanc. Co. Penn. May 3, 2013).

Social media evidence has played a pivotal role in recent Georgia trials. *Griffin v. New Prime Inc.*, No. 1:10-CV-1926-WSD

(N.D. Ga.), and companion case *Lewis v. New Prime Inc.*, No. 1:10-CV-1228-WSD (N.D. Ga.) concerned a multiple-fatality accident that occurred after a tractor-trailer was hit by a van transporting prisoners. Defense counsel used a Facebook search to secure evidence impeaching the testimony of one of the plaintiffs, who claimed a head injury from the accident prevented him from being able to taste food or be outside in the sunshine. Defense counsel presented the jury with a photograph of the plaintiff's new beach house, which lacked handicap accessibility, as well as photographs of plaintiff's new boat, shark fishing trips, and a Hawaiian vacation (complete with photos of his meals).

Georgia courts have generally attempted to impose reasonable limits on social media discovery requests, noting that litigants are not entitled to launch "fishing expeditions" with the hopes of turning up relevant social media information. For instance, the United States District Court for the Northern District of Georgia, in *Jewell v. Aaron's, Inc.*, No. 1:12-CV-0563-AT (N.D. Ga. 2013), addressed the defendant's request for "all documents, statements or any activity available that you posted on any internet Web site or Web page, including, but not limited to, Facebook, MySpace, LinkedIn, Twitter, or a blog from 2009 to the present during your work hours at Aaron's store," which was presented to 87 opt-in plaintiff employees who alleged that they were forced to work through meal periods.

Defendant contended, based on the findings from one exemplar plaintiff's Facebook activity, that the social media data was likely to show that the plaintiffs had made social media posts during working hours, thus refuting their claims that the plaintiffs were unable to take breaks during the day because they "had too many work pressures."

Although the court noted that Facebook allows users to download a copy of their Facebook data into a time-stamped document, and thus the request would not require an unreasonably burdensome effort to complete, the court ultimately found that the defendant failed to reach the threshold showing of relevancy for the broad range of electronic data requested.

Georgia courts have generally attempted to impose reasonable limits on social media discovery requests, noting that litigants are not entitled to launch "fishing expeditions" with the hopes of turning up relevant social media information.

The court explained that the available evidence and the defendant's proffered rationales for production did not convince the court "that the broad nature of material [Defendant] seeks is reasonably calculated to lead to the discovery of admissible evidence." *Id.* at 8. Further, the court noted that "whether or not an opt-in plaintiff made a Facebook post during work hours may have no bearing on whether or not the opt-in plaintiff received a bona fide meal period..." *Id.* at 8. Concluding that the burden of the defendant's request outweighed the potential relevance of the information, the court denied the request.

It is instructive to contrast *Jewell*, *supra*, with *Bryant v. Perry*, No. 5:09-CV-060, doc. # 30 (S.D. Ga. Apr. 22, 2010), in which the plaintiff claimed injury resulting in a reduced quality of life, and sought compensation for past and future pain and suffering, past and future medical treatment, and lost wages. Defendant filed a motion to compel, requesting an inspection of all data contained in the plaintiff's Facebook account, on the grounds that the account likely contained information about the plaintiff's life, activities, physical condition and quality of life since the subject accident occurred.

The court noted that the plaintiff's Facebook account privacy settings prevented anyone outside of his 339 friends from viewing his profile, but held that the Facebook page likely contained photographs, wall postings or comments relevant to the claims and defenses of both parties.

The court denied the defendant's request to access the Facebook account directly, but ordered that the plaintiff would accept a Facebook friend request from a 'John Doe' account created by the court, and the court would then perform an in-camera review of the plaintiff's account and provide defendant with responsive information relevant to the plaintiff's contentions (after giving plaintiff's counsel an opportunity to review and object to the production of any portions of the materials).

The law relating to discovery of social media data is still relatively new and developing, but decisions from courts across the country make clear that a litigant's Facebook, Twitter, Pinterest, Instagram and other such accounts may be subject to discovery requests under certain circumstances. It behooves anyone involved with ongoing or potential future litigation to be mindful about the social media that may exist pertaining to the existing or potential claim, and to assess how that information may impact the matter. ❖

Nick Hinson is a graduate of the University of Georgia School of Law. He is an attorney with The Hinson Firm, a litigation boutique in Athens.