

Family Law

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Gathering and Using Social Media Evidence

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There are more than 4 billion active social media users worldwide—and this figure includes active user accounts for the big players like Facebook (over 2 billion), Instagram (over 1 billion), Snapchat (498 million), Twitter (330 million), LinkedIn (260 million).¹ Other social media platforms—such as YouTube, TikTok, Reddit, and Twitch—are constantly emerging, evolving, and gaining millions of active users. Mobile apps for social media platforms allow constant contact and interaction between users no matter where their physical location.

The omnipresence of social media makes it impossible to ignore. Even if you are one of the few who do not personally use social media, as a lawyer, you have an obligation to be aware of its effects and the implications for your cases. The Illinois Rules of Professional Conduct instruct practitioners that “[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education...to which the lawyer is subject,”² which, arguably, includes social media evidence given how often this type of evidence arises in family law cases.

Social media can be a key source of significant information in almost every family law case. Social media content can provide relevant, discoverable evidence on issues relating to cohabitation (see, e.g.,

In re Marriage of Miller, 2015 IL App (2d) 140530 and *In re Marriage of Aspan*, 2021 IL App (3d) 190144), income for support (*In re Parentage of I.I.*, 2016 IL App (1st) 160071), civil contempt (*In re Marriage of Weddigen*, 2015 IL App (4th) 150044), and other matters. Practitioners should be sure to not only keep up with new social media trends and technologies, but also to ensure that your discovery requests are tailored to capture relevant social media evidence and, once you have this information, that you are able to effectively use it in your case.

Dos and Don'ts for Gathering Social Media Evidence: Social media evidence can be harvested directly from the source—the user's Facebook, Instagram, Twitter, etc. content—or via a Rule 214 discovery request.

A person's profile on social media platforms can often be set for different levels of privacy. If a profile is public, anyone and everyone can see what the user has posted online, whereas a private profile allows the user to select specific people who can see their online content. You should advise your client of the potential consequences of having readily accessible social media content, including that any of their posts and other content could potentially be used against them in the litigation. Clients should make sure that their profile settings across all social

media accounts are set to private as soon as possible and they carefully review the list of people who can see their social media content. Advise your client to be mindful about what they post and/or comment on their own or other's social media accounts. As a rule of thumb, clients should assume that any communication (social media content, e-mail, text, etc.) could be read or reviewed by their Judge at some point and they should consider that before writing or posting anything related to any aspect of their case.

Even with social media accounts set to private, past posts may come back to haunt a client. More likely than not, both parties have had (or still have) access to the other's social media postings. If your client has access to the other party's social media, they will undoubtedly have posts, comments, photos, and other content that they can download and provide to you. Further, a party's privacy settings may include mutual friends and family who may download the social media content and forward it to the other party.

Can you, the lawyer, gather additional information about the opposing party from social media? If the opposing party's social media account is public, then yes. It's a good idea to do your opposition research early on in a case. Search the internet for the opposing party's social media presence and, if their information is public, review it

carefully. Any relevant posts should be saved immediately.

If the opposing party does not have public social media content, then your options for gathering information from this source are limited to what your client is able to access and what may be tendered by the other party during discovery. Do not try to access the other party's social media content by sending a friend or follow request. Per Illinois Rule of Professional Conduct Rule 4.2, a lawyer cannot communicate with a person that the lawyer knows to be represented by another lawyer unless the first lawyer has obtained the consent of the lawyer representing the other party. Something as simple as sending a friend request on Facebook or asking to follow an opposing party's Instagram account clearly constitutes an improper communication if the person is represented. Even the nature of a "friend" request is in and of itself, is somewhat misleading. Self-represented or unrepresented parties may be easily confused as to the nature of your relationship with them as the opposing party's counsel, and such a request further muddies the waters.

In addition to gathering relevant information and evidence directly from a party's social media content, relevant social media evidence can be obtained via discovery. Social media content falls under the scope of "electronically stored information" (ESI) to be disclosed pursuant to a discovery request. ESI is defined in [Rule 201\(b\)\(4\)](#) as including "any writings, *** photographs, sound recordings, images, and other data or data compilations in any medium from which electronically stored information can be obtained either directly, or if necessary, after translation by the responding party into a reasonably useable form." A Rule 214 discovery request to an opposing party for that party's social media information may include: content posted by that party during the relevant time period of the discovery request or copies of any posts, updates, videos, stories, and/or photos made by the opposing party and/or in which the opposing party is "tagged" that relate to any relevant issue in the case (i.e., cohabitation, allocation of parental responsibilities, etc.). Be sure to specify the various social medial platforms (Facebook, Instagram, LinkedIn,

Twitter, etc.) for which the opposing party has an account.

Assume that a party may scrub their social media presence once a case is filed, or soon thereafter. A Rule 214 request puts recipient on notice that information is not to be destroyed, so be sure to send out your Rule 214 requests early to avoid spoliation.

Making the Most of Your Social Media

Evidence: Now that you have the smoking gun Instagram post that shows the other party on a luxury vacation in the Maldives when they claim to have no money to pay past-due support, what do you do with it?

Rule 901 of the Illinois Rules of Evidence requires that to be admissible in evidence, the social media post must be authenticated. Proper authentication requires evidence sufficient knowledge to satisfy the trial court that the item is what its proponent claims it to be. Authenticating evidence can include testimony of a witness who has sufficient personal knowledge of the item—for example, the testimony of the person(s) pictured in the social media post or testimony from the person who took the photograph that was posted.

The opposing party can authenticate their own social media content if they are the author of the post or other content. Thorough trial preparation should include questioning the opposing party at their deposition about any social media posts that you intend to submit as evidence in your case. If, under oath at their deposition, the party acknowledges authorship of the post or that the post came from their social media profile or that they are pictured in the post, then that testimony can be used for impeachment purposes if they later try to disavow knowledge of the post at trial. Another good rule of thumb: never ask a question during adverse or cross-examination for which you do not know the answer. Deposing a party about their social media content can help you prepare to get that evidence admitted at trial and save you the panic and headache of trying to figure out your evidentiary strategy on the fly at trial.

Of course, an opposing party may not readily admit authorship of a particularly incriminating post or that they are the person "tagged" in a Facebook or Instagram

photo. Practitioners should be prepared with more than one method to authenticate their evidence. *People v. Kent*, 2017 IL App (2d) 140917, provides a non-exhaustive list of possible means of authenticating social media content including: (1) the purported sender admits authorship, (2) the purported sender is seen composing the communication, (3) business records of an Internet service provider or cell phone company show that the communication originated from the purported sender's personal computer or cell phone under circumstances in which it is reasonable to believe that only the purported sender would have had access to the computer or cell phone, (4) the communication contains information that only the purported sender could be expected to know, (5) the purported sender responds to an exchange in such a way as to indicate circumstantially that he was in fact the author of the communication, or (6) other circumstances peculiar to the particular case may suffice to establish a *prima facie* showing of authenticity. *Kent* at ¶ 118. Other circumstantial facts that could help authenticate a social media post an opposing claims to have no knowledge could include charges on bank or credit card statements from the same general time and location of the post, testimony of another witness who was present at the event or in the photograph depicted in the post, testimony from a witness who "tagged" the opposing party in the post, comments on the post from the party's known family, friends, coworkers, or from the party.

Social media has opened a whole new area of discovery which can and should be used. Failing to keep informed of changes in the law regarding social media or changes in social media platforms, may result in your client's position not being fully presented to the court. ■

1. www.pagefreezer.com and www.dreamgrow.com/top-15-most-popular-social-networking-sites.
2. Comment 8 to Illinois Rule of Professional Conduct 1.1.