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Social Media Discovery

STEPHEN G. LOWRY AND MADELINE E. MCNEELEY

In-depth discovery requests for plaintiffs' social media data are becoming increasingly common. Preparation and strategy are key to protect your clients from the disclosure of extraneous information. As early as possible, advise them to change their account settings to private, refrain from posting anything related to their case, and not delete anything that has already been posted to avoid spoliation.

Exercise your power to object. Defense attorneys often overreach with social media requests. Depending on the scope, such as a request for Facebook "raw data," you likely will be able to argue the request violates Federal Rule of Evidence 403 as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

You also may be able to assert a privacy objection to a social media request if only to preserve the issue for appeal—be sure to check the law in your jurisdiction. Some courts have held that parties do not have a right of privacy in their social media posts, but it remains an open question in others. Privacy objections are especially justified when requests seek account passwords, direct messages, chat transcripts, or data that would disclose the private information of third parties.

Determining Defendant Entities

JOHN COCO

When preparing to sue an entity, an often complex question is: "What is the defendant's proper legal name?" The answer is crucial to a successful outcome. A diligent presuit investigation will ensure that each defendant is properly named and identified.

Be aware of similar names. You may encounter multiple similar names for a defendant. For example, in a premises liability case against a beauty salon, the salon's sign says "Nails Inc." You commence the lawsuit, naming Nails Inc., as the defendant—but unbeknownst to you, Nails Inc., is a minimally insured entity created by its owners to limit liability and protect its businesses, which are incorporated under New Nails, Inc., and Nails, Ltd. Failing to name the proper entity can lead to myriad problems for your client, particularly if the entity with insurance is not named.

Perform a thorough search. Begin with a search of the company's website, where you may find additional names or the proper entity name. Next, search the database that tracks corporations in your state. Select the broadest search parameters, and narrow the results from there. If

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Be prepared to make a reasonable production. If the photographs, videos, tweets, or Facebook posts would be discoverable had they been written in a journal or pasted into a photo album, you should be prepared for the judge to find them discoverable here. Producing screenshots of the directly relevant posts will help show your good faith if a dispute arises over more detailed data.

Know the law. Even if you make a good-faith production and attempt to negotiate a narrower scope, the defense may still file a motion to compel in hopes of finding damaging character evidence. Some appellate courts have addressed social media discovery, but rulings remain largely at the trial court level, so know your jurisdiction's standards and plan early.

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possible, use a "partial" search tool, which will identify entities with even a partial match and search for inactive corporations as well. Next, search state licensing websites and local property records by address. Last, search court records to determine if the entity has been sued before and—if applicable—which names and parties were included in the suit. In certain cases, it may be prudent to hire a private investigator if your search is complex.

File suit immediately. Commence suit against every entity variation, as it is likely impossible to determine before discovery which entity is liable, which entity is insured, and which entity is a shell company. Filing early also may allow time to identify and add proper parties before a statute of limitations expires.

Failure to rigorously investigate possible defendant entities can jeopardize your case—and your client's future.

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