

## MEDIATION AND SOCIAL MEDIA EVIDENCE

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Recent mediation experience has impressed upon me the significant impact that social media evidence can have on a case *if* it is relevant, legally acquired, capable of authentication and admissible.

Social media evidence may come into play in the evaluation and mediation of any case for the simple reason that it is becoming a routine aspect of evidence gathering by all sides in litigation. People are sharing personal and sensitive business information through an increasing number of social media platforms, including Facebook, Twitter, My Space, Linked-In and, perhaps most recently, Words With Friends “Messaging.” It is reported that Facebook alone has 600 million subscribers, and Twitter 190 million. In addition, there has been a proliferation of personal and business blogs.

Attorneys now routinely “google” the names of plaintiffs and defendants, as well as known officers, directors, employees and agents of defendants, and even spouses and other family members, “mining” for publicly available background information, and sometimes even arguably private communications. Discovery increasingly includes more searching attempts to seek access to social media-based evidence directly from an opposing party and by third party subpoenas. Court orders to either compel or prevent disclosure are sought by parties, as well as by third parties, which turn on disputes about relevance, over breadth and privacy, among other things.

Social media and other Internet acquisitions are playing a part in case preparation on both sides of the bar. As social media started to impact litigation, it seemed that discussions of the topic focused primarily on issues related to plaintiff impeachment and juror misconduct. However, the potential impact on defendants, including individuals, businesses and governmental entities, has become apparent. For instance, businesses use Twitter and Facebook for marketing, and employees from the bottom to the top of businesses generate social media postings (even Rupert Murdoch, to the apparent dismay of his spouse and colleagues, has “tweeted!”).

The key issues addressed by statutes, rules and case law include retention and dissemination, discovery, authentication, admissibility, impeachment, juror misconduct and attorney ethical considerations (see legal resource list below). As a review of the developing law in this area will indicate, a number of potential obstacles can stand in the way of acquiring social media-based evidence. In addition, the acquisition of social media-based evidence does not assure that it can be introduced into evidence or otherwise used at trial for intended effect, such as for impeachment of a party or witness.

At this writing, there have been only a relative smattering of published appellate opinions on the subject, but there will be an inevitable outpouring of them in the coming years all across the country and on a wide range of issues. For instance, the U.S. Supreme Court just let stand an appellate court's rejection of school district attempts to discipline students based on "social media speech." (*Kowalski v. Berkeley County Schools* - No. 11-461). And to the dismay of employers, the NLRB recently began applying Section 7 of the National Labor Relations Act of 1935 to worker complaints about being disciplined or fired for disparaging their employer on social networking sites such as Facebook and Twitter (*Labor Law Applies to Social Media*, Daily Recorder, Jan. 3, 2012).

[**Note:** Mediations are conducted in complete confidentiality. This article does not relate to, or derive from, any mediation in which I have participated. The sources of law and other information regarding social media are fully identified below, and are publicly available to all members of the bar].

Legal resources addressing social media evidence, including statutes, rules and case law, include the following:

**Preservation and dissemination of electronically stored information:**

The Stored Communications Act (18 U.S.C. §2701-2712)

Fed. Rules Civ. Proc., Rule 37(e) (safe harbor; lost information)

Cal. Code Civ. Proc. §§2031.060(i)(1) and 2031.300(d)(1) (safe harbor; lost information )

*Gipetti v. UPS, Inc.*, 2008 WL 3264483 (N.D. Cal. 2008) (safe harbor; lost information)

*Juror Number One v. State*, 2011 WL 567356 (E.D. Cal. Feb. 14, 2011) (social media site motions to quash subpoena)

*O'Bar v. Lowe's Homes Centers, Inc.*, 2007 WL 1299180 (W.D.N.C. 2007) (court guidelines)

*Pension Comm. of Univ. of Montreal Pension Plan v. Bank of Am. Sec's LLC*, 685 F.Supp.2d 456 (S.D.N.Y. 2010) (duty to preserve)

*Suzlon Energy Ltd. v. Microsoft Corp.*, 2011 WL 4537843 (9<sup>th</sup> Cir. 2011) (subpoenaed e-mail)

*Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) ("Zubulake I") (standards re duty to preserve)

*Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) ("Zubulake V") (sanctions)

## Discovery:

- Barnes v. CUS Nashville LLC*, 2010 WL 2265668 (M.D. Tenn. June 3, 2010) (in camera review via “friending” party)
- Bass v. Miss Porter’s School*, 2009 WL 3724968 (D. Conn. 2009) (court-ordered production)
- Beswick v. North West Medical Center*, 2011 WL 7005038 (Fla. Cir. Ct., Nov. 3, 2011) (non-expectation of privacy)
- Crispin v. Audigier*, 717 F.Supp.2d 965 (C.D. Cal. 2010) (party motions to quash subpoena)
- EEOC v. Genesco, Inc.*, No. 09-cv-952 WJR/RHS (D. N.M. Feb. 15, 2011) (court-ordered subpoenas and releases; suspected tampering)
- EEOC v. Simply Storage LLC*, 270 F.R.D. 430 (S.D. Ind. 2010) (protective orders)
- Guest v. Leis*, 255 F.3d 325 (6<sup>th</sup> Cir. 2001) (pre-Facebook “bulletin board” non-expectation of privacy)
- Han v. Futurewei Tech’s, Inc.*, 2011 WL 4344301 (S.D. Cal. 2011) (showing required for hard drive access)
- Mackelprang v. Fidelity Natl. Title Agency of Nevada*, 2007 WL 119149 (D. Nev. 2007) (narrowness of inquiry requirement) (see also *T.V. v. Union Bd. of Educ.*, No. UNN-L-4479-04 (N.J. Supr. Ct., June 8, 2007) (non-published).
- McCurdy Group v. American Biomedical Gp., Inc.*, 9 Fed.Appx. 822 (10<sup>th</sup> Cir. 2001) (showing required for hard drive access - mutuality of access)
- Moreno v. Hanford Sentinel, Inc.*, 172 Cal. App.4th 1124 (2009) (whether expectation of social media posting privacy exists)
- McMillen v. Hummingbird Speedway, Inc.*, 2010 WL 4403285 (Pa. Ct. Com. Pl. Sept. 9, 2010) (court-ordered user names and passwords)
- Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010) (court-ordered authorizations)
- Thayer v. Chiczewski*, 2009 WL 2957317 (N.D. Ill. 2009) (court-ordered personal request for e-mail)

*White v. Graceland College Center for Prof. Devel. etc.*, 2009 WL 722056 (D. Kan. 2009)  
(forensic computer expert; hard drive access)

*Zimmerman v. Weis Markets, Inc.*, 2011 WL 2065410 (Pa. Ct. Com. Pl. May 19, 2011)  
(court-ordered user names, passwords and log-ins)

*Muniz v. United Parcel Services, Inc.*, 2011 WL 311374 (N.D. Cal. Jan. 28, 2011)  
(vagueness, over breadth, irrelevance)

### **Authenticity and admissibility:**

*Commonwealth v. Williams*, 926 N.E.2d 1162 (Mass. 2010) (two-fold authenticity test)

*Griffin v. State*, 19 A.3d 415 (Md. 2011), quoting *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 541 (D.Md. 2007) (authentication scrutiny)

*People v. Valdez*, \_\_\_ Cal. App.4th \_\_\_, 2011 WL 6275691 (2011) (burden of producing evidence; circumstantial evidence; limiting instructions)

*People v. Buckley*, 185 Cal. App.4th 509 (2010) (lack of reliability and authenticity)

*St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F.Supp.2d 773 (S.D. Tex. 1996)  
(trustworthiness requirement)

*St. Luke's Cataract & Laser Inst. P.A. v. Sanderson*, 2006 WL 1320242 (M.D. Fla. 2006)  
(personal knowledge requirement)

*Toytrackerz, LLC v. Koehler*, 2009 WL 2591329 (D. Kan. 2009) (website security and chain of custody)

### **Impeachment:**

*Purvis v. Comm'r of Soc. Sec.*, 2011 WL 741234 (D. N.J. 2011) (attorney Internet research of witnesses for purposes of impeachment)

### **Jurors:**

*Carino v. Muenzen*, 2010 WL 3448071 (N.J. Super. Ct. App. Div. 2010) (attorney web research of jurors during voir dire)

*Wilgus v. F/V Sirius, Inc.*, 665 F.Supp.2d 23 (D. Me. 2009) (juror Internet research-based prejudice)

**Ethics:**

ABA Model Rules of Professional Conduct, Rules 4.1, 4.2 and 8.1

New York City Bar, Formal Opinion 2010-2 (see [www.nycbar.org](http://www.nycbar.org))

New York State Bar Ethics Comm., Opinion 843

Philadelphia Bar Assn., Professional Guidance Opinion 2009-02 (see [www.philadelphiabar.org](http://www.philadelphiabar.org))

San Diego County Bar Assn. Legal Ethics Comm., Opinion 2011-2

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**Sources:**

In addition to independent research, sources also included the following:

Campbell, *The Defendant's Perspective: Use of Social Media* (ABA-TIPS Tort Source, Fall 2011)

Dimitroff, *Social Media and Discovery* (Thomson Reuters/Aspatore 2011)

Grimm et al., *Admissibility and Authentication of Social Media* (ABA-TIPS Tort Source, Fall 2011)

Martinez-Cid, *Discoverability of Social Media from the Plaintiff's Perspective* (ABA-TIPS Tort Source, Fall 2011)

Olsen and Links, *The Smoking Tweet* (California Lawyer, Jan. 2012)

Sumers, *Labor Law Applies To Social Media* (Daily Recorder, Jan. 3, 2012)

**Note:** This document is not intended to constitute a complete discussion of, or listing of, all potentially applicable law, or to constitute legal advice, or to be used as a substitute for personal review of the statutes, rules and cases listed herein and further research.

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