# SOCIAL MEDIA – Discoverability & Admissibility

## 1. What is Social Media?

One of the biggest issues related to the use of social media evidence in the courts is the lack of a clear definition of what constitutes "social media." To some, social media is limited to those websites and applications that they themselves use or are familiar with. Common examples include Facebook, Myspace, Instagram, Snapchat, or LinkedIn. To others, social media may include sites that allow for connection and interactions among users in general like YouTube and Tumblr or applications like Tinder and Whisper.

The legislature has attempted to define this term numerous times. These attempts tend to result in conflicting definitions or, oftentimes, overbroad definitions. For example, Title 3 of the Louisiana Revised Statutes defines a social media account as:

> (6) "Social media account" means an internet-based service that allows individuals to do the following:
>
> (a) Construct a public or semi-public profile within a bounded system created by the service.
>
> (b) Create a list of other users with whom they share a connection within the system.
>
> (c) View and navigate their list of connections and those made by others within the system. (La. R.S. 3:2462)

Under this definition, many sites commonly not considered to be social media, would be considered as such. For example, Hotmail is an email service that has built in a feature that allows a user to connect with others on the platform and create a brief profile that provides information for others to view. An email service is generally not regarded as social media, however, under this definition, it may be. There are other examples that may fall under this category, such as websites that host forums and, in order to post on them, a profile must be created.

Similarly, the legislature in California attempted to define social media in the Education Code as "an electronic service or account, or electronic content, including, but not limited to, videos or still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations." (Educ.Code, § 99120). Such definition certainly encompasses social media, but it is certainly overbroad.

The legislators continue to attempt to define this term. 2019 Louisiana House Bill No. 465 defines a social media website as:

> (9) "Social media website" and "social networking website" mean any internet website or application that enables users to do the following:
>
> (a) Create and share content.
>
> (b) Participate in social networking which facilitates social interaction with other users of the website or application.

(c) Create a web page or profile about themselves which is available to the general public or to other users.
(d) Communicate with other users directly.

This Bill was introduced to create the "Internet and Social Media Privacy and Protection Act." The purpose of this act is to provide for internet privacy and the protection of consumer personal information, to provide definitions, to provide basis for consent, and other related matters.

Like Louisiana and California, many states have had difficulty establishing a definition of social media. That has left the courts in a position where they must define social media. In an age where social media is broadly used and new applications and websites are created daily, a clear definition of social media is sorely needed.

## 2. Who uses social media

The statistics around the use of social media are mindboggling. Oftentimes hard to believe. Here is some information to illustrate how ubiquitous social media is as of 2019:

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| 1. | Number of social media (SM) users in the U.S.: | 243.6 Million |
| 2. | % of U.S. population who uses any type of SM | 79% |
| 3. | % of adults aged 18-29 who use SM (in the US) | 88% |
| 4. | % of adults aged 30-49 who use SM (in the US) | 78% |
| 5. | % of adults aged 50-64 who use SM (in the US) | 64% |
| 6. | Number of active Facebook users in the U.S. | 221 Million |
| 7. | Average time spent on Facebook daily | 38 minutes |
| 8. | Average time spent on Snapchat daily | 26 minutes |
| 9. | Average time spent on Instagram daily | 27 minutes |

Source: https://www.statista.com/topics/3196/social-media-usage-in-the-united-states/

The use of social media is growing and the list of social media websites and applications is growing as well. Here is a list of the most popular social media sites based on length of session engagement.

1. Pinterest
2. Reddit
3. Facebook
4. Tumblr
5. Facebook Groups
6. Instagram
7. Skype
8. Twitter
9. WhatsApp
10. Kik
11. VK

12. Google Hangouts
13. Discord
14. Telegram
15. Snapchat
16. Facebook Messenger
17. LINE
18. GroupMe
19. Messenger by Google
20. WeChat

The use of social media has become so ubiquitous that the number of social media users is projected to rise by 11 .7 million users by 2023.

A big contributor to the rise in social media usage has been the concept of FOMO. FOMO stands for "Fear of Missing Out." Because such a large portion of social interaction is taking place on these platforms, users spend more time on them in an effort to not miss out on the cultural happenings of the day, from viral videos to breaking news stories. This fear of missing out continues to push users into using these platforms more and more.

## 3. Social media and the law

The use of social media is growing and the legislature, at both state and federal levels, recognizes the importance of having some oversight on certain aspects. To date, there are several federal laws that address privacy concerns related to the use of social media, such as, the Communications Decency Act (CDA) and the Children's Online Privacy Protection Act (COPPA).

The Stored Communications Act, which provides the law regarding voluntary and compelled disclosure of stored wire and electronic communications and transactional records, is an interesting law as it was enacted prior to the existence of what would be considered social media, in 1986. Despite that, the Act has been applied to certain social media accounts and features. Particularly, in *Crispin v. Christian Audigier, Inc*. the court stated that "In considering webmail email services provided by web hosting website and social networking websites, under Stored Communications Act (SCA), such websites act as "electronic communication storage (ECS) providers" in respect to messages that have not yet been opened, and operate as "remote communication services (RCS) providers" in respect to messages that have been opened and retained on the website by the account holder." (717 F.Supp.2d 965). As a result, social media websites have stated that they are bound by the SCA and are therefore unable to release information on a user without their consent or under the governmental entity exception. However, a court can order an individual to provide consent for access. While this Act applies specifically to requests made directly to social media companies, it does not address information sought directly from the user.

States too have made efforts to protect a user's privacy. This is not limited to the protections related to the use of social media, for example, California Civil Code 1798.82, requires the disclosure of any data breach. California is not alone in this as many jurisdictions

have protections in place that attempt to secure user privacy. There are many laws around the country that focus on specific aspects of social media, such as:

- Laws that make the posting of sexually explicit images or videos, generally by a former partner, without the consent of one of the parties, and for the purpose of embarrassing or humiliating them illegal. In response to these kinds of laws, Facebook developed technologies that match photos to those previously identified as non-consensual to immediately block the sharing of such. In Louisiana LSA-R.S. 14:283.2, protects individual from the nonconsensual disclosure of private images

- Many states have also enacted cyber bullying laws in an attempt to protect users, particularly young school aged users, from being subjected to bullying on social media websites. In Louisiana, LSA-R.S. 14:40.7, provides for criminal punishment for actions determined to fall under this statute.

- Many states have also enacted laws that protect a job applicants' information and prevent a prospective employer from requiring access to social media, requiring the adding of co-workers or supervisors to the connection list of that particular network, and requiring employees to change their privacy setting to provide the employer access. In Louisiana, in 2014, the state legislature enacted LSA-R.S. 51:1951, commonly known as the "Personal Online Account Privacy Protection Act."

One of the biggest issues that the social media landscape is facing is the companies' ability to ban users and reason to doing so. Facebook has recently come under fire for seemingly blocking users of a particular political persuasion that espouse and communicate certain beliefs. This became a big issue with the banning of political commentator Alex Jones. Similarly, Twitter has been accused of banning from the platform users who they feel have violated their terms of use but have offered no explanation and no ability to appeal.

Laws continue to be enacted around the country in an attempt to standardize what social media is and how it should be allowed to be used. Additional laws are constantly created that push for more regulation

**4. Discoverability**

Social media has become so prevalent in our culture that the use of social media evidence has become a powerful tool in legal proceedings. However, there are many considerations that affect the use of such evidence. Similarly, there are several issues that affect the discoverability of such evidence.

The first issue affecting the discoverability of information posted on social media is the issue of privacy, which is largely due to the ability of users to restrict certain information while allowing other information to flow freely in the social media landscape. In Katz v United States, the Court, in Justice Harlan's concurrence, stated that there is a two-pronged requirement regarding the expectation of privacy. Specifically, they stated "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation

be one that society is prepared to recognize as 'reasonable.'" Katz v. United States, 389 U.S. 347, 361 (2004). Further, the court stated, "Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable." Id.

In the social media landscape, a user can change the privacy settings for particular information. This allows a user to set a reasonable expectation of privacy on certain information. However, because of the public nature of social media, courts have remained divided on this matter. In U.S. v Meregildo, the court stated that,

> Facebook—and social media generally—present novel questions regarding their users' expectations of privacy. Facebook users may decide to keep their profiles completely private, share them only with "friends" or more expansively with "friends of friends," or disseminate them to the public at large. (See Facebook Help Center, http://www.facebook.com/help/privacy (last visited Aug. 10, 2012).) Whether the Fourth Amendment precludes the Government from viewing a Facebook user's profile absent a showing of probable cause depends, inter alia, on the user's privacy settings. U.S. v. Meregildo, 883 F. Supp. 2d 523, 526 (S.D.N.Y. 2012).

The court went further in their analysis of Katz in stating,

> When a social media user disseminates his postings and information to the public, they are not protected by the Fourth Amendment. See Katz, 389 U.S. at 351, 88 S.Ct. 507 (1967) (citations omitted). However, postings using more secure privacy settings reflect the user's intent to preserve information as private and may be constitutionally protected. See Katz, 389 U.S. at 351–52, 88 S.Ct. 507 (citations omitted). U.S. v. Meregildo, 883 F. Supp. 2d 523, 526 (S.D.N.Y. 2012).

Alternatively, in Farley v Callais & Sons LLC, the court, when addressing discoverability of social media communication, stated,

> The present motion is about discovery of social media communications, which some lawyers and litigants apparently perceive to be different in kind than "other" discovery we are more accustomed to seeing. The Federal Rules do not allow for that distinction. The question created by the present motion and counsel's argument in support of it is whether the manner in which something is communicated to a select group of people ("friends" in the SNS parlance) matters under Rule 26. When it comes to one of the key indices of discoverability—relevance—is there a meaningful difference between typing a message into a cellphone or a computer keyboard, as opposed to speaking it out loud to another person or writing it on paper? In this Court's view, the answer to that question must be "no." No. 13–CV–2605, 2014 WL 2804188 (D. Kan. June 20, 2014).

The courts have established that social media postings are discoverable. However, they continue to be split as to the effect a user's chosen privacy settings has on discoverability.

This issue will likely be affected by the recent US Supreme Court Decision in *Packingham v. North Carolina,* which is a case stemming for a law in North Carolina that prevented the use of social media by a registered sex offender. The North Carolina law was so broad that to abide by if would even prevent the individual from accessing the Washington Post website. In their opinion, the Supreme Court stated:

> To foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives. (137 S. Ct. 1730).

The Supreme Court's application of the Public Forum Doctrine to social media may affect the discoverability of social media evidence when issues of privacy arise.

The second issue related to the discoverability of social media evidence is the broadness of the requests. Most social media platforms retain the information posted by a particular user indefinitely. Regardless of the privacy settings for that user, the posts remain unless intentionally deleted. The issue when such a request is made, is the natural inclination to make the request broad because of the lack of information related to what the social media profile contains. The courts have all remained consistent in their denial of discovery requests which are too broad. However, the courts have been inconsistent in what they consider to be too broad. In Smith v Hillshire Brands, the court, when addressing the broadness of discovery requests, stated:

> Ordering plaintiff to permit access to or produce complete copies of his social networking accounts would permit defendant to cast too wide a net and sanction an inquiry into scores of quasi-personal information that would be irrelevant and non-discoverable. Defendant is no more entitled to such unfettered access to plaintiff's personal email and social networking communications than it is to rummage through the desk drawers and closets in plaintiff's home. Smith v Hillshire Brands, No. 13–CV–2605, 2014 WL 2804188 (D. Kan. June 20, 2014) citing Ogden v All-State Career School, 299 F.R.D. 446.

Alternatively, in E.E.O.C. v Original Honeybaked Ham Co., the court stated that:

> As a general matter, I view this content logically as though each class member had a file folder titled "Everything About Me," which they have voluntarily shared with others. If there are documents in this folder that contain information that is relevant or may lead to the discovery of admissible evidence relating to this lawsuit, the presumption is that it should be produced. The fact that it exists in cyberspace on

> an electronic device is a logistical and, perhaps, financial problem, but not a circumstance that removes the information from accessibility by a party opponent in litigation. E.E.O.C. v Original Honeybaked Ham Co. 2012 WL 5430974.

Additionally, in that case, the court determined that all login information would be provided to the Court for an in-camera review. The lack of consistency in what courts consider to be too broad leaves room for much speculation. The court in Farley v Callais & Sons attempted to set parameters by expressing their objections to overly broad discovery requests related to social media posts, but also providing guidelines. Specifically, they stated:

> Based on all the foregoing authority and the facts of this case, the Court finds the following categories of information discoverable from Farley's Facebook account, from March 24, 2014 (the date of accident) to the present:
> 1) postings by Farley that refer or relate to the accident in question;
> 2) postings that refer or relate to emotional distress that Farley alleges he suffered as a result of the accident and any treatment that he received therefor;
> 3) postings or photographs that refer or relate to alternative potential emotional stressors or that are inconsistent with the mental injuries he alleges here;
> 4) postings that refer or relate to physical injuries that Farley alleges he sustained as a result of the accident and any treatment that he received therefor;
> 5) postings that refer or relate to other, unrelated physical injuries suffered or sustained by Farley; and
> 6) postings or photograph that reflect physical capabilities that are inconsistent with the injuries that Farley allegedly suffered as a result of the accident.

The courts have been inconsistent as stated above. However, the courts, in their decisions related to the discoverability of social media, tend to apply one of the following approaches:

A. Limited Disclosure: Wherein the courts have allowed access to social media posts but limited only to relevant time frames.
B. Discoverability: Wherein the court determines if it is likely to lead to discoverable evidence.
C. In-camera review: Wherein the judge will access the social media platform in question and make a determination of what evidence is discoverable and what evidence is not.

In Louisiana, in Walmart, Inc. v. Ohler, the First Circuit Court of Appeal concluded that social media accounts are generally discoverable and remanded the case. The Court determined that the trial court was to conduct an in-camera review of the social media content and, by applying the pertinent Foley factors, determine whether any posts or information relate to the date of the accident.

By and large, the issue of discoverability will continue to evolve as more measures are placed to protect a user’s privacy while more and more, social media is viewed as a public forum and therefore access to it should be allowed.

## 5. Authentication

To introduce evidence, it must be first be authenticated. Authentication of social media posts and information can be complicated as there is no clear evidence that the information was created or written by the individual who owns the social media site.

Louisiana Code of Evidence Art. 901(a) states that "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

In State v Smith, the court stated that the "standard for proper authentication of social media evidence was whether sufficient evidence supported finding by reasonable jury that it was what the proponent claimed it to be." (State v. Smith, 192 So. 3d 836 (La. Ct. App. 4th Cir. 2016). In State v Jones, a witness testified that the Facebook messages being introduced into evidence were sent from the defendant's Facebook account to hers. The court determined that the witness "explained that she knew the defendant was the author of the messages because no one else knew his Facebook account password and because of the contents of the messages, which aligned with the state of their relationship and what the defendant told her in his motel room on the night of the incident. We find no error or abuse of discretion in the district court's ruling that the messages were admissible." State v. Jones, 2015-1931 La. App. 1 Cir. 6/29/16, 2016 WL 3569911 (La. Ct. App. 1st Cir. 2016). In State v Dillon, the court contrasted the decision in Jones by nature of the fact that the social media message in question was the subject of one interaction and therefore the witness would be unable to authenticate the sender from a single message. Specifically, the Court stated:

> In contrast to the evidence presented in Jones, we find the defendant did not present sufficient evidence to allow the trier of fact to conclude that Dustin Cothern sent the Facebook message. According to Withrow's testimony, she only received one communication allegedly from Cothern, and such communication was made in April 2014, nearly a year after the defendant's attempted molestation of H.V. As correctly noted by the State, the only showing made at trial "concerned [Withrow's] subjective perception of the origin of the message." The defendant provided no other evidence to indicate or substantiate the authenticity of the Facebook message. Accordingly, we find no error or abuse of discretion in the trial court's ruling that the message was inadmissible.

In United States v Browne, testimony by victims was used to authenticate the defendant as the sender of social media messages when their testimony was substantiated with other interactions with the defendant. Specifically, the court stated, "We hold today that it is no less proper to consider a wide range of evidence for the authentication of social media records than it is for more traditional documentary evidence." United States v. Browne, 65 V.I. 425, 834 F.3d 403, 101 Fed. R. Evid. Serv. 264 (3d Cir. 2016).

In State of Connecticut. Eleck, the court excluded evidence provided of Facebook messages allegedly posted by a State's witness. The witness admitted to being the owner of the profile, however denied writing such comments, stating that her account had been hacked.

In reviewing the evidence, the court determined that such evidence had to be excluded as it required proof of authorship (State of Connecticut vs. Eleck, 23 A.3d 818 (2011), 130 Conn.App. 632).

Current jurisprudence supports the authentication of social media messages and posts if they can be properly authenticated. Louisiana Code of Evidence Article 901 lists examples for which authentication can be established. Current jurisprudence has relied heavily on the testimony of individuals able to provide the extrinsic evidence required for such authentication. To properly authenticate, it seems that it is necessary that testimony come from individuals that have an established rapport with the individual. In instances where the witness providing testimony does not have a rapport and has had limited interaction, the court will determine that there is not a sufficient relationship for the witness to know who is writing that information.

## 6. Admissibility and Hearsay

Louisiana Code of Evidence Article 802 states: "Hearsay is not admissible except as otherwise provided by this Code or other legislation." Louisiana Code of Evidence Article 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted." Louisiana Code of Evidence Article 801(A) defines a statement as "(1) An oral or written assertion; or (2) Nonverbal conduct of a person, if it is intended by him as an assertion."

Although social media posts and messages may be considered hearsay, statements that are introduced to show that an utterance occurred or a conversation took place are admissible. In State v Green, where a defendant appealed the admission of screenshots of his Facebook account, the court stated, "the contested evidence was not introduced to show the truth of the communications, but to show that the communications took place. That the communications occurred is a necessary element of the crime of computer-aided solicitation of a minor." State v. Green, 164 So. 3d 331 (La. Ct. App. 2d Cir. 2015)

Current jurisprudence supports the assertion that, although social media can be inadmissible due to hearsay, it can also be admissible when such evidence is used appropriately. The basis seems to be in not only how the statement is used, but how it is introduced as evidence and what the statement is used to support.