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Navigate social media discovery

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Navigating social media discovery: Steps counsel can take to address mass deletion of social media history¹

By Hon. Helen C. Adams, Leslie C. Behaunek and Philip Favro

“How many Facebook friends do you have?”

You’ve probably heard this question before, usually followed by advice on how to get more social media followers. The whole point of social media seems focused on getting “more” of everything, from friends and connections to views, comments and other interactions.

But if you look closer, certain social media sites have begun emphasizing the converse: Less. Ubiquitous platforms like Instagram and Facebook have recently added features that enable users to eliminate posts, comments, likes and other interactions from their social media history. Ostensibly done to allow users to clean up their social media past for job applications, university admissions or the possibility of romance, new mass deletion features that certain social media providers now offer may have an impact on users who find themselves anticipating or actively involved in litigation. These features could allow users to eliminate aspects of or even their entire social media history with the touch of a screen.

All of this spotlights the need for counsel to undertake a reasonable inquiry into sources of relevant social media under a client’s possession, custody or control early in the litigation process. Issuing a general litigation hold and then asking the client to keep relevant communications likely won’t satisfy counsel’s duty of reasonable inquiry as it relates to social media. Depending on the issues in the litigation, lawyers should instead consider taking proactive and decisive steps to identify, collect and preserve relevant

social media content and other electronically stored information (“ESI”).

In this article, we provide guidance on the nature of those steps. We do so by first exploring the new deletion features found on Instagram and Facebook. We next examine cases that consider the application of the reasonable inquiry standard to social media. We conclude by delineating specific practices that can help counsel better address social media discovery issues.

Social media mass deletion tools

Instagram

That Meta social media platforms Instagram and Facebook now offer users mass deletion tools should not come as a surprise. Messaging applications like iMessage (Apple) and WhatsApp (Meta) have provided their users related functionality for many years.

Regarding the deletion features in question, Instagram recently provided users with the ability to delete media they posted in their respective feeds.

Users can do so by accessing the “Your Activity” option under the user’s account page. Once on the Your Activity page, users can then navigate to “Photos and Videos” and “view, archive or delete photos and videos [they’ve] shared.” Instagram permits users to select images and videos for deletion, with the additional option of allowing the user to filter media by date. Once images or videos are deleted, they are moved to a “Recently deleted” folder where they remain accessible and can be restored for 30 days, after which the content is permanently deleted. Users may also wish to delete “comments” and “likes.” To do so, they can navigate back to the Your Activity page, select the “Interactions” feature, and then follow the same process used to delete photos or videos.²

Facebook

Facebook made its mass deletion features available in the user interface in 2020. Those features enable users to delete some or all of their posts. Users



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can do so by accessing the “Activity Log” option under the account user’s “Settings & Privacy” feature. Users then navigate to “Your Posts” to determine whether they wish to delete selected or all posts. Once posts are deleted, they are moved to the “Trash” repository for 30 days. Before 30 days have lapsed, users can restore the posts to their history. After 30 days, “the content will be automatically deleted and can’t be restored.”³ Users also may choose to “Archive” posts. The Archive feature allows users to keep their posts while removing them from their public feed.⁴

In addition, users can remove other items from their Facebook history including comments, likes, reactions and so forth. While Facebook allows users to delete these interactions, they must do so on an item-by-item basis from their respective histories.

Other Providers

Not every social media provider offers mass deletion functionality. Twitter, for example, still requires users to delete one post at a time. Nevertheless, users can bypass this feature by using third party applications that can help expedite

deletion of their Twitter post history. Alternatively, users may delete their Twitter accounts and then begin a new account using their previous handle.⁵

Application of the reasonable inquiry standard to social media

The need for lawyers to make a reasonable inquiry into sources of relevant information has existed now for nearly 40 years.⁶ But in the age of social media, counsel must be prepared to take actionable and decisive steps to identify, collect and preserve relevant information. Recent decisions are replete with instances of counsel who failed to do so and whose clients were sanctioned for resulting data loss. *The Fast v. GoDaddy.com LLC*, 340 F.R.D. 326, 2022 WL 325708 (D. Ariz. Feb. 3, 2022) and *Doe v. Purdue University*, No. 2:17-CV-33-JPK, 2021 WL 2767405 (S.D. Ind. July 2, 2021) cases are particularly instructive on this issue.

In *Fast*, the court expressed concern regarding the actions of the plaintiff’s lawyer during the discovery process given both the widespread and brazen nature of the plaintiff’s spoliation of relevant ESI. In connection with his sanctions order against the plaintiff, District Judge David Campbell observed that counsel “had an affirmative obligation to ensure that his client conducted diligent and thorough searches for discoverable material and that discovery responses were complete and correct when made.” Despite that obligation, the plaintiff deleted relevant social media, text messages and other ESI. The plaintiff acknowledged under oath that she deleted a Facebook post directly relevant to the claims and defenses, along with “anything out there” “like that”—including comments, posts and likes—from her Facebook accounts. All of this perhaps could have been obviated had counsel taken affirmative steps to identify, collect and preserve the plaintiff’s relevant social media history.

Similarly in *Purdue University*, the court criticized the plaintiff’s counsel for failing to undertake a reasonable inquiry into the technological features of Snapchat. In connection with its sanctions order against the plaintiff for deleting relevant videos and images from his Snapchat account, the court found that counsel should have investigated Snapchat’s potential for retaining videos and images once he received defendant’s discovery requests. Had he taken this step, counsel would have learned that Snapchat can retain media and may have

helped prevent his client’s spoliation.

In each of these cases, the failure of the lawyers to undertake a reasonable inquiry was a contributing factor that led to the imposition of sanctions against their clients. In *Fast*, it appears counsel was unaware of the need to collect the plaintiff’s relevant social media posts and thereby ensure that the information was properly preserved. In *Purdue University*, counsel took no action to understand the retention features associated with Snapchat, which led to counsel’s subsequent failure to collect and preserve his client’s relevant Snapchat videos and images. *Fast* and *Purdue University* teach that counsel should understand the retention features associated with social media technology and take appropriate steps to collect relevant information therefrom to properly preserve it for discovery purposes.


Courts have likewise applied this same rationale to instances where parties permanently delete their social media accounts. For example, in *Holloway v. County of Orange*, No. 19-cv-01514, 2021 WL 454239 (C.D. Cal. Jan. 20, 2021), aff’d, ECF No. 167 (C.D. Cal. Mar. 3, 2021), the court noted that counsel bears the initial obligation to advise the client regarding the nature and extent of its preservation obligations. That plaintiff’s counsel in *Holloway* may have neglected to satisfy this obligation is apparent from the court’s issuance of an adverse inference jury instruction against plaintiff after he acknowledged deleting his Facebook account to keep several posts critical of law enforcement from being seen by the jury.


Recommended practices for identifying, collecting and preserving relevant social media

In addition to learning key technology features affecting the retention of relevant social media, counsel may consider adopting some or all of the practices discussed below. While the suitability of these practices will depend on the nature and issues involved in a particular lawsuit, following these and other steps should help counsel reasonably identify, collect and preserve relevant social media.

1. **Issue a Litigation Hold.** Counsel should issue a litigation hold instruction to the client that reasonably identifies the nature of relevant information, which should be preserved for the lawsuit in question.

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2. **Relevant Source Checklist.** In connection with the litigation hold notice, counsel should share with the client—or key custodians for organizational clients—a relevant source checklist. Such a checklist will delineate in bullet format particular repositories of relevant information that may be in a custodian’s possession, custody or control. The checklist should include (among other things) examples of social media sites (Facebook, Instagram, Twitter, Pinterest, YouTube, etc.) to help custodians understand different types of discoverable social media.

3. **Collection.** Once identified, counsel should take steps to collect relevant social media ESI from their clients. This is the key step to ensuring that such information is actually preserved. There are generally three collection options available to the client: (i) forensic collections; (ii) do-it-yourself collections; and (iii) screenshots. These options vary in expense and quality in terms of being able to preserve social media for discovery and use it as evidence at summary judgment or trial.

i. **Forensic Collections.** This option involves retaining a forensic expert to obtain a copy of the client’s social media account. With the user’s login credentials, a forensic expert can collect and thereby preserve the precise information housed in the client’s social media account. Using a forensic expert provides an air of neutrality and gravitas to a collection that courts and adversaries generally respect. While a forensic collection may range from several hundred to over a thousand dollars, it is likely the most trustworthy option for collecting and preserving relevant social media information.

ii. **DIY Collections.** A more affordable collection alternative is the do-it-yourself option, which involves using a social media platform’s download feature to obtain a copy of the client’s account information. There is no cost to using the download feature, which may allow the client to obtain either all or selected information from the account. Despite the

cost savings, some counsels are reluctant to rely on this option as it requires the client—who may be an interested witness—to properly handle the collection of the social media.⁷

iii. **Screenshots.** Counsel could consider having the client take screenshots of relevant social media content.⁸ Screenshots, however, do not contain metadata, may not reflect interactions with others and have been rejected by courts when questions arise regarding the validity of the screenshots at issue.⁹

Every case is different, and some cases will involve more social media evidence than others. The discussion and suggestions stated herein are meant to serve as a resource for counsel and assist parties in avoiding the pitfalls that can arise in this ever-changing technological era.

¹ This article was a collaboration between Philip Favro of Innovative Driven, Leslie C. Behaunek, Chair of the Iowa State Bar Association Federal Practice Committee and Chief United States Magistrate Judge Helen C. Adams (SDIA).

² *Editing and Deleting Your Posts*, INSTAGRAM HELP CENTER, <https://help.instagram.com/997924900322403>. There are different rules that apply to the deletion of “stories” (may be accessible for only 24 hours after deletion) and “messages” (“Keep in mind that deleted messages on Instagram cannot be restored.”).

³ *How do I use Manage Activity in activity log to archive or delete certain content of mine on Facebook?*, FACEBOOK, <https://www.facebook.com/help/3094200253964092>.

⁴ *Id.*; See *Fast v. GoDaddy.com LLC*, 340 F.R.D. 326, 2022 WL 325708, *6 (D. Ariz. Feb. 3, 2022) (“If Plaintiff was concerned about incorrect information, she could have archived the inaccurate posts. Doing so would have removed them from public view while preserving them for production in this lawsuit.”).

⁵ Dalvin Brown, *How to Delete Your Old Posts on Instagram, Facebook and Twitter*, WALL STREET JOURNAL (Feb. 20, 2022), <https://www.wsj.com/articles/how-to-delete-your-old-posts-on-instagram-facebook-and-twitter-11645283997>.

⁶ See FED. R. CIV. P. 26(g), 1983 committee note; see also IOWA R. CIV. P. 1.503(6) (patterned on Fed. R. Civ. P. 26(g)).

⁷ See *Torgersen v. Siemens Bldg. Tech., Inc.*, No. 19-cv-4975, 2021 WL 2072151 (N.D. Ill. May 24, 2021) (imposing sanctions on plaintiff after plaintiff failed to properly follow counsel’s instructions to preserve relevant information from his Facebook account).

⁸ In an abundance of caution, counsel may want to secure screenshots at the outset as well as engage a third-party forensics expert in the DIY collection process to ensure there is a back-up option if the DIY collection process is unsuccessful.

⁹ *Id.*; see *Edwards v. Junior State of Am. Found.*, No. 4:19-CV-140-SDJ, 2021 WL 1600282 (E.D. Tex. Apr. 23, 2021) (rejecting screenshots of Facebook Messenger messages and finding they violated the Original Documents Rule).



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