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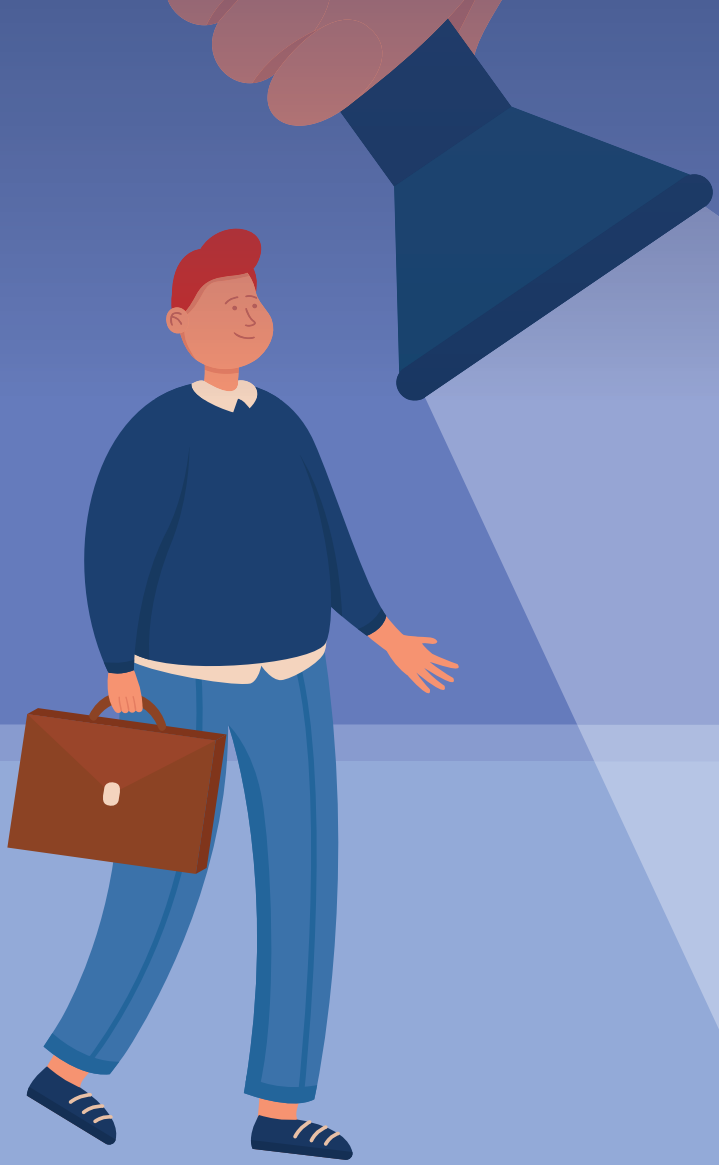

Toxic Torts and Environmental Law

Including . . .

What's Old May be New Again: Addressing Radioactive Toxic Tort Claims and Planning for the Next Frontier

Also in This Issue . . .

Modern Challenges of Social Media Discovery: Social Media Is Key in Litigation Involving Personal Injury

The Fifth Dimension: TPLF and Its Effect on the Judiciary

And More!

Modern Challenges of Social Media Discovery

Social Media Is Key in Litigation Involving Personal Injury

By Andrew Reissaus and Aleksandra Rybicki

It is no surprise that parties in litigation routinely seek production of social media material and that courts recognize its importance.

Almost 75 percent of Americans use social media and for many it is a regular feature of their daily lives. We rely on social media for many purposes—including business, socializing, shopping, and politics. This vast online community forum presents an array of shared messages, pictures, and video. Social media provides a unique portal into the user's mental and physical state through time, and that record is generally a contemporaneous one, especially given how many today use their phones to stay engaged. It is no surprise that parties in litigation routinely seek production of social media material and that courts recognize its importance. *E.g., Hinostroza v. Denny's Inc.*, No. 2:17-cv-02561-RFB-NJK, 2018 WL 3212014, at *6 (D. Nev. June 29, 2018) ("information from social media is relevant to claims of emotional distress because social media activity, to an extent, is reflective of an individual's contemporaneous emotions and mental state"); *Smith v. Pergola 36 LLC*, No. 1:22-cv-4052 (LJL), 2022 WL 17832506, at *3 (S.D.N.Y. Dec. 21, 2022) ("[I]t would be unfair to allow [a] plaintiff to make allegations of emotional distress... and then deny defendants access to circumstantial evidence that offers a reasonable prospect of corroborating or undermining her claims.") (alterations in original); *Crossman v. Carrington Mortg. Servs., LLC*, No. 3:19-cv-1081-J-39PDB, 2020 WL 2114639, at *1, 4 (M.D. Fla. May 4, 2020) (compelling plaintiff to produce entire social media accounts when she alleged emotional distress, mental anguish, and loss of enjoyment of life); *Torgersen v. Siemens Bldg. Tech., Inc.*, No. 19-cv-4975, 2021 WL 2072151, at *5 (N.D. Ill. May 24, 2021) ("without the deleted Facebook page, [defendants] will be unable to 'thoroughly investigate claims of nature and extent of [Plaintiff's] claimed injury, loss of normal life, and permanent disability.'"); *EEOC v. Simply Storage Mgmt.*, 270 F.R.D. 430, 435 (S.D. Ind. 2010) ("It is reasonable to expect severe emotional or mental injury to manifest itself in some [social networking site] content, and an examination of that content might reveal whether onset occurred, when, and the degree of distress.").

Defendants can use social media to investigate the extent of plaintiffs' alleged injuries, undermine plaintiffs' damages claims, and assess the credibility of plaintiffs' allegations. *See* Fed. R. Civ. P. 26(b)(1). In toxic tort cases, for instance, social media may contain evidence at odds with plaintiffs' exposure-related claims—such as the timing and extent of their alleged exposures—possible alternate causes of injury, plaintiffs' knowledge of potential claims for statute of limitations purposes, and information pertinent to assessing the impact of plaintiffs' alleged injuries on everyday life.

Initially there was strong opposition to requests for social media from individual plaintiffs because it was novel, not as widely used, and not as publicly shared. As social media has become more ubiquitous, arguments against its discoverability have become exposed as futile. Fortunately,

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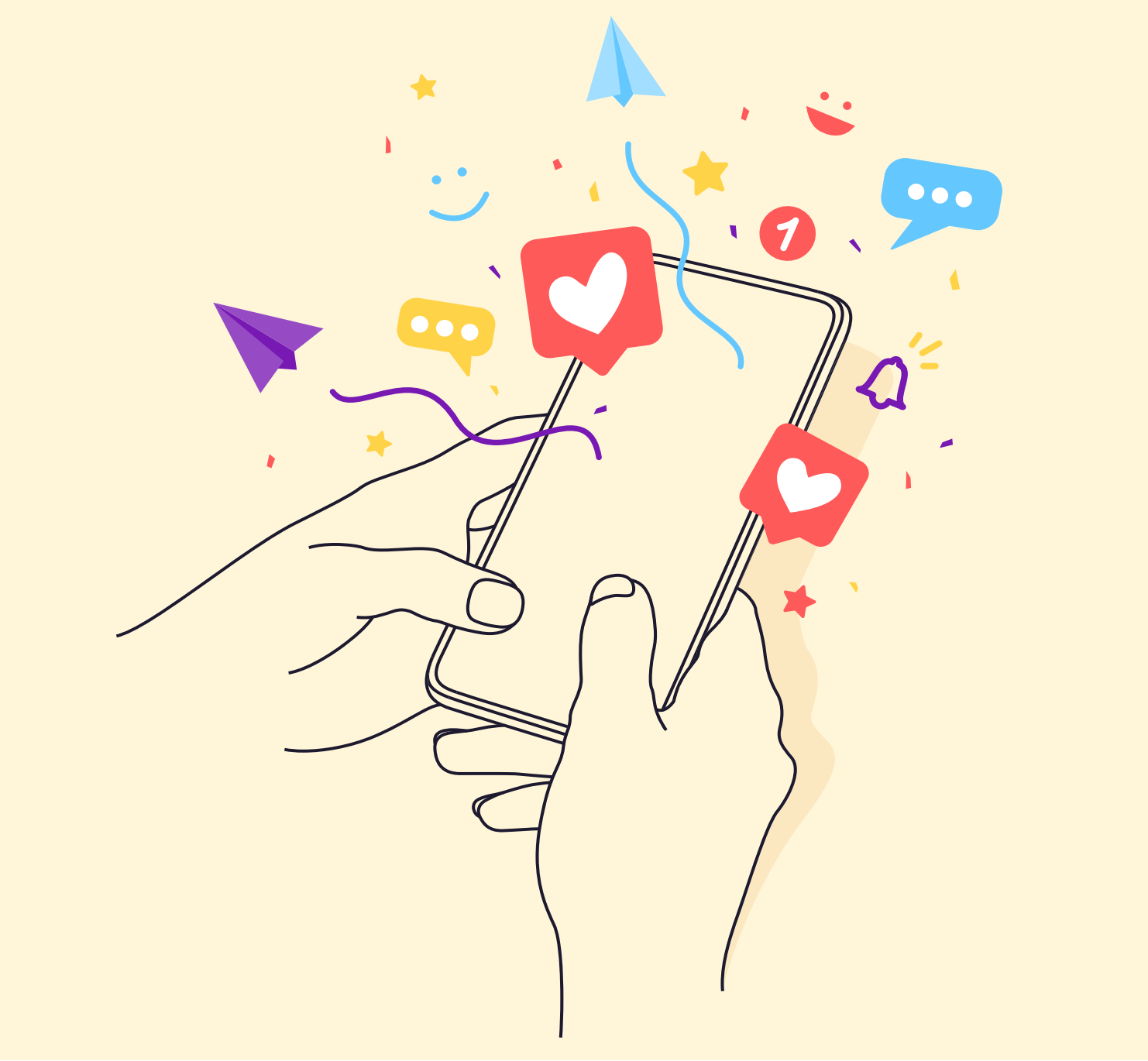

evolving precedent trends strongly in favor of discovery, especially where defendants help courts understand why the information is relevant to the particular issues, claims, and defenses in the specific case.

Strawman #1: Random memes are irrelevant, proving social media production poses a disproportionate burden.

Perhaps the most straightforward argument plaintiffs' counsel typically make—with a simple citation to Fed. R. Civ. P. 26(b)(1)—is that requests for social media are broadly irrelevant and that the defense cannot meet its burden to make a threshold showing of relevance and proportionality. In this vein, plaintiffs' counsel have colorfully argued that defendants claim entitlement to an "unfettered right to rummage through social media," *In re Cook Med., Inc., IVC Filters Mktg., Sales Pracs. & Prods. Liab. Litig.*, 1:14-ml-2570-RLY-TAB, 2017 WL 4099209, at *5 (S.D. Ind. Sept. 15, 2017), and want to "engage in the proverbial fishing expedition, in the hope that there might be something of relevance in [plaintiffs' accounts]." *Tompkins v. Detroit Metro.* Airport, 278 F.R.D. 387, 388 (E.D. Mich. 2012). More savvy plaintiffs' counsel may abandon pure relevance arguments and instead focus on proportionality, which is a tacit acknowledgment that defendants are winning the battle on the strawman argument of relevance.

Looking past such rhetorical flourishes, defendants should focus courts on the relevance of the social media discovery requested, both generally what the discovery *can* uncover and specifically how the discovery *will* assist in a particular case.

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At the outset of the case, defense counsel should build a record for why it is reasonable to expect relevant information to be in social media accounts. To most effectively target their requests for social media, defense counsel should probe the extent and nature of plaintiffs' social media use via standard discovery tools—e.g., interrogatories, requests for admission, and/or depositions—early in the litigation, as well as review public profiles, if available, to highlight examples for the court. When requesting social media discovery, defense counsel should consider reasonable scope limitations to preempt proportionality objections. Courts are far more likely to allow targeted requests. *E.g., Ye v. Cliff Veissman, Inc.*, No. 14-cv-01531, 2016 WL 950948, at *3 (N.D. Ill. Mar. 7, 2016) ("Courts are reluctant to compel all-encompassing social media requests unless they are limited in scope to content that is relevant to a claim or defense in the case.").

Limitations can include a relevant time period (*e.g.*, a number of years before the injury through the present), limitations on relevant subject matter (*e.g.*, posts and messages regarding physical health), and/or specific websites or platforms (*e.g.*, Facebook). *See e.g., Dewidar v. Nat'l R.R. Passenger Corp.*, No. 17cv62-CAB(RBB), 2018 WL 280023, at *5 (S.D. Cal. Jan. 3, 2018) (compelling social media discovery in a personal injury case consisting of "social media files and photographs taken [of] the trip that gave rise" to the action); *see also Robinson v. Jones Lang LaSalle Ams., Inc.*, No. 3:12-cv-00127-PK, 2012 WL 3763545, at *2 (D. Or. Aug. 29, 2012) (compelling social media discovery in employment discrimination case consisting of communications, "including profiles, postings, messages, status updates, [and] wall comments,... that reveal, refer or relate to... any significant emotion, feeling, or mental state allegedly caused by defendant's conduct; or... that could reasonably be expected to produce a significant emotion, feeling, or mental state allegedly caused by defendant's conduct").

Strawman #2: Social media posts and messages are not public.

Some plaintiffs' counsel still make an emotional appeal that social media discovery violates privacy rights. The argument is that posts inherently contain private and sensitive information, such as intimate discussions and personal photographs, and the court should not compel a plaintiff to give anyone access. Courts have firmly held otherwise: "Social media content is neither privileged nor protected by any right of privacy." *Matter of the Complaint of Paradise Family, LLC*, No. 8:20-cv-2056-TPB-AAS, 2021 WL 2186459, at *2 (M.D. Fla. May 28, 2021) (quotation marks omitted); *see also, e.g., Torgersen*, 2021 WL 2072151; *Adkisson v. Jacobs Eng'g Grp., Inc.*, No. 3:13-CV-505-TAV-HBG, 2020 WL 6549386 (E.D. Tenn. Nov. 6, 2020). Any privilege is deemed waived when "plaintiff[s] put [their] physical and mental health squarely at issue in [their] complaint[s]." *Rosales v. Crawford & Co.*, 2021 WL 4429468, at *5 (E.D. Cal. Sept. 27, 2021).

Plaintiffs' counsel sometimes limit this argument to social media accounts that are designated "private," arguing that they should not be discoverable because they are not accessible to the general public. This argument also does not hold water: even "private" content is generally created with the express intent of sharing it with someone. Even if the content is not shared with others, if it is relevant to testing a plaintiff's claims or establishing a defendant's defenses, it is still discoverable—the same way that a personal diary documenting alleged physical injuries over time is. *See, e.g., Allen v. PPE Casino Resorts Maryland, LLC*, 543 F. Supp. 3d 91 (D. Md. 2021) ("Social media content, even where designated as 'non-public,' is neither privileged nor protected by any right of privacy"). Of course, protective or confidentiality orders are a routine staple in litigation, and any potential privacy concerns can be addressed by designation of the material as confidential. *See Connolly v. Alderman*, No. 2:17-cv-79, 2018 WL 4462368 (D. Vt. Sept. 18, 2018); *see also Crossman*, 2020 WL 2114639.

Strawman #3: Search terms are necessary to cull irrelevant material.

Plaintiffs' counsel often argue that search terms are needed to cull social media content and prevent production of prejudicial and irrelevant information. The argument is that social media is like company emails that are routinely subject to search terms to identify potentially relevant documents, and that search terms are an effective way to identify responsive content in large volumes of data, saving time and resources, and alleviating production burden. While courts have accepted this approach, especially when the parties agree to the search terms, there is no guarantee that plaintiffs will agree to terms sufficient to identify relevant posts.

Defense counsel should challenge plaintiffs' position that search term-based review is the methodology of choice for social media production for a number of reasons. Search terms cannot identify or locate images, photos, videos, and memes, which can be highly influential on a jury, especially when pictures or video provide direct evidence of a party's condition at a particular point in time. Search terms are also problematic in the context of colloquial messages that are inherent in social media. Finally, anticipating all the terms an individual might use to describe a topic is impossible and may lead to missing critical content—*e.g.*, searching for "illness" will

not find images or references to chicken pox, or a mention of a hospital visit.

Courts have recognized these flaws of applying search terms to social media content, *see, e.g., In re Tasigna (Nilotinib) Prods. Liab. Litig.*, No. 6:21-md-3006-RDB-DAB, 2023 WL 6064308, at *1 (M.D. Fla. Sept. 18, 2023) (recognizing that "search terms cannot be tailored sufficiently to capture responsive social media postings, particularly given the often casual nature of such discourse"), and have even ordered broad productions without the use of search terms. *Dickerson v. Barancik*, No. 8:18-cv-895-T-36JSS, 2019 WL 9903813, at *1 (M.D. Fla. Oct. 22, 2019); *In re: Cook Med., Inc.*, 2017 WL 4099209, at *4-5; *Crossman*, 2020 WL 2114639, at *1, 4).

Courts are more comfortable requiring production of accounts without search term limitations when the request is narrowly tailored with the identification of time period and specific platform, *see, e.g., Dickerson*, 2019 WL 9903813, at *1 (ordering production of "all non-privileged content shared on [plaintiff's] Facebook account for the two years prior to the date of the accident to the present"), and when defense counsel have established a factual predicate for the request by identifying relevant information in plaintiff's social media use. *See Tuzzolino v. Consolidated Edison Co.*, No. 156755/2013, 2015 WL 2412374 (N.Y. May 21, 2015).

Strawman #4: Manual review (without guideposts) is workable.

Plaintiffs' counsel sometimes argue that manual review is an effective way to cull social media accounts that rectifies the shortcomings of search term application, as plaintiffs' counsel can review images, videos, and threads, as well as colloquial statements, for relevance. Plaintiffs' counsel emphasize that they are officers of the court who live up to their ethical duty to ensure that irrelevant and prejudicial information is not produced. The problem is that given the highly contextual nature of social media, absent clear guideposts to determine what is relevant and discoverable, courts (and defendants) can find themselves pulled into a whirlwind of serial motions practice to obtain the required discovery.

In response to these problems, some courts have ordered in-camera review to evaluate the relevance of questionable content. *Gordon v. T.G.R. Logistics, Inc.*, 321 F.R.D. 401, 4056 n.2 (D. Wyo. 2017) (instructing plaintiff "to err on the side of disclosure and if the Plaintiff is uncertain, the relevant documents shall be provided to the Court for in camera review"); *Bass ex rel. Bass v. Miss Porter's School*, 3:08cv1807 (JBA), 2009 WL 3724968, at *1 (D. Conn. 2009) (recognizing attempt at in camera inspection for relevance). Other courts have required production of a relevance log that adequately describes each withheld document or redaction, states the exemption claimed, and explains why each exemption applies. *Davis v. Disability Rights New Jersey*, Nos. A-0269-22, A-0270-22, 2023 N.J. Super. LEXIS 28 (N.J. Mar. 16, 2023); *see also D.O.H. ex rel. Haddad v. Lake Central School Corp.*, No. 2:11-CV-430, 2014 WL 174675 (N.D. Ind. Jan. 15, 2014) (requiring privilege log if any social media records withheld); *Sanchez v. Albertson's LLC*, No. 2:19-cv-02017-JAD-DJA, 2021 WL 3572679 (D. Nev. June 9, 2021) (requiring log of any redacted social media information).

Still, courts recognize the broad relevance of social media content and sometimes resort to unrestricted production of social media accounts. *See e.g., Bass ex rel. Bass*, 2009 WL 3724968, at *1 (ordering production of all Facebook materials following in camera inspection because "a number of [withheld] communications... are clearly relevant to this action"); *Glazer v. Fireman's Fund Ins. Co.*, No. 11 Civ. 4374(PGG)(FM), 2012 WL 1197167, at *3 (S.D.N.Y. Apr. 5, 2012) (ordering unrestricted social media production following court review, as "most, if not all, of them contain information that is relevant").

Defense counsel should be prepared for various production challenges.

The formation of comment threads and the ability to share links to other content are just some examples of the evolution in social media's technical capabilities. It is critical to stay up to date with developments in various social media platforms and to determine the most effective methods for searching and collecting on each platform. Sometimes a platform contains a tool or process designed for the specific purpose of collecting information from that specific platform. *See, e.g., Allen*, 543 F. Supp. 3d 91 (limiting social media production to five-year time frame relevant to specific emotion distress claims using download of information obtained by plaintiffs through their own social media providers).

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It is also important to be informed about the shortcomings of social media collection tools. For example, in *Christina Arlington Smith, et al., v. TikTok Inc., et al.*, Snap—the parent company of the social media platform Snapchat—had permanently deactivated and purged plaintiffs' accounts, allegedly leaving plaintiffs unable to use Snap's "Download My Data" tool and potentially affecting information relevant to the litigation. See Joint Status Conference Statement, *Christina Arlington Smith, et al., v. TikTok Inc., et al.*, 22STCV21355 (Cal. Super. Ct. L.A. Cnty. 2023).

To avoid relevancy, scope, and proportionality challenges by plaintiffs, it is best to identify early on all ways the requested information is relevant and offer specific parameters where possible for the requested information—*e.g.*, date ranges, whether to include comments and replies, how to review images or videos for relevance, whether the search includes only the party's posts and messages or also includes posts and messages by others on the party's account. This, along with the exploration of plaintiffs' social media presence via other discovery tools, will effectively arm defense counsel to obtain discovery needed to litigate and try their cases.