



# Arkansas Association of Defense Counsel

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April 11, 2016

## *A Practical Guide to Discovery in Modern Places: Social Media Discovery*

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Social media, such as Facebook, Snap Chat, Instagram, and YouTube Channels, has infiltrated all aspects of current culture. In 2014, the Pew Research Center released its survey on social media.<sup>1</sup> It found that over 71% of internet users are on Facebook. Even 56% of online adults 65 and older use Facebook. Thus, many Americans are using at least one form of social media, with some documenting even the mundane details of their lives (and dinners).

Litigation is not immune from the social media phenomenon. No longer can lawyers fail to mine the data left by the social media trail.<sup>2</sup> While the Arkansas appellate courts have not directly considered the discoverability of this data, it is likely that if relevant data is contained in social media, it would be discoverable.<sup>3</sup> For example, in the case of *Romano v. Steelcase, Inc.* the plaintiff claimed permanent injuries requiring her to give up many of her life activities and

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<sup>1</sup> <http://www.pewinternet.org/2015/01/09/social-media-update-2014/> (last visited March 17, 2016).

<sup>2</sup> See ABA Model Rule of Professional Conduct 1.1 Comment (clarifying that competent representation includes keeping current with “the benefits and risks associated with relevant technology.”)

<sup>3</sup> A good summary of the arguments for and against discoverability are outlined in Mallory Allen & Aaron Orhein, *Get Outta My Face[Book]: The Discoverability of Social Networking Data and the Passwords Needed to Access Them*, 8 WASH. J.L. TECH. & ARTS 137 (Fall 2012).

essentially rendering her bed ridden.<sup>4</sup> Yet, the defendants presented evidence from the public portions of the plaintiff’s Facebook and MySpace pages showing that subsequent to the incident, the plaintiff enjoyed an active lifestyle and had even traveled out of state to Florida and Pennsylvania.<sup>5</sup> Indeed, photographs on Facebook showed her outside her home “smiling happily.”<sup>6</sup> As a result, the court ordered the plaintiff to provide access to the private portions of her social media sites, as there was a “reasonable likelihood” of finding further evidence material and necessary to the defense.<sup>7</sup>

If discoverable, the question then becomes how best to discovery social media data? Most commentators have concluded that no special rule is needed to obtain social media discovery as the current methods are sufficient.<sup>8</sup> The purpose of this article is to illustrate the use of interrogatories and requests for production by providing sample discovery that could be modified for use in discovering the existence of social media.<sup>9</sup>

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<sup>4</sup> 907 N.Y.S.2d 650, 653–54 (N.Y. Sup. Ct. 2010).

<sup>5</sup> *Id.* at 653.

<sup>6</sup> *Id.* at 654.

<sup>7</sup> *Id.*

<sup>8</sup> See e.g., Steven S. Gensler, *The Intersection of Facebook and the Law: Symposium Article: Special Rules for Social Media Discovery?*, 65 ARK. L. REV. 7 (2012)

<sup>9</sup> Platforms such as Facebook and Twitter will assert protections from the Stored Communications Act which prevents an entity providing electronic communications services (“ECS”) or remote computing services (“RCS”) from knowingly divulging to any person or entity the contents of a communication. Social networking sites have been found to be protected by the Act; however, the production is not prevented if the user gives an authorization. See e.g.

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*Glazer v. Fireman's Fund Ins. Co.*, 2012 WL 1197167, \*3 (S.D.N.Y. 2012); *Viacom Int'l, Inc. v. YouTube, Inc.*, 253 F.R.D. 256, 264 (S.D.N.Y. 2008). Thus, an attorney may send a request for production with an authorization, but should also consider sending written discovery along with the authorization.

## Definitions<sup>10</sup>

ACCOUNT DATA OR ACCOUNT INFORMATION means all information maintained on a SOCIAL NETWORKING SERVICE, including but not limited, to profile information, about you information, e-mail, instant messages, blogs, images, recommendations, status updates, interest and activity information, videos, photographs, wall posts, comment posts.

BLOG means a website that contains an online personal journal or writings.

ELECTRONIC DEVICE means a device that accomplishes its purpose electronically and includes computers, iPhones, Blackberries, Droids, iPads, and other devices.

ELECTRONIC INFORMATION OR DATA means all written or numerical information or data that is inputted, processed, or contained in an electronic device for any purpose.

LOG IN AND PASSWORD means a sequence of characters, known only to authorized persons, which must be keyed in to gain access to a particular electronic device, computer, network, file, function, or other medium.

PODCAST or VODCAST means a type of digital media, whether it be audio radio, video, pdf, or ePUB files, downloaded through web syndication or streamed online to a computer or mobile device.

SOCIAL NETWORKING COMMUNICATION means any electronic communication that is transmitted via a social networking service. The communication may consist of e-mail, instant messaging, blogging, profiles, images, recommendations, information, notices, product or services sales information, dating and other social information, educational information, and other communications.

SOCIAL NETWORKING SERVICE (SNS) means an online service, platform, or site that focuses on building and reflecting social networks among people. A social network service may consist of a user profile, which is a representation of the user's interests and activities, and may provide a variety of services. The Web-based services allow individuals to construct a public or semipublic profile within a bounded system

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<sup>10</sup> Most definitions are adapted from Sharon Nelson, Bruce Olson, & John Simek, THE ELECTRONIC EVIDENCE AND DISCOVERY HANDBOOK: FORMS, CHECKLISTS AND GUIDELINES, ABA Law Practice Management Section (2006).

and provide listings of other users with whom they share a connection. These would be including ,but not limited to, Google+, Twitter, Facebook, My Space, Bebo, Tinder, Instagram, Snap Chat, Linked In, Meetup.com, or You Tube.

Interrogatory No. \_\_\_\_\_ : Identify each and every email address you have used from (date) to (date).

Request for Production No. \_\_\_\_\_ : Produce each and every email that you have sent or received which relate or refer to the allegations forming the basis of your Complaint, or which reflect, demonstrate, refer to, or relate to any mental or physical status or injury after (date) or relate to any application or inquiry into a job after (date).

Interrogatory No. \_\_\_\_\_ : Identify each and every Internet service provider you have had from (date) through the present.

Interrogatory No. \_\_\_\_\_ : Identify each and every instant message addressed, Internet identifiers, and any and all names that identify you when you are using the Internet from (date) through the present.

Interrogatory No. \_\_\_\_\_ : Identify each and every ELECTRONIC DEVICE you have used from (date) to (date) to transmit ELECTRONIC INFORMATION OR DATA.

### **Accounts with Job Hunting Websites**

Interrogatory No. \_\_\_\_\_ : Identify the user name, registration information, account detail, LOGIN information, or any other identifying information for any job board or job search websites for which you are (or were) registered or of which you are (or were) a member, including but not limited to Hot Jobs, Career Builder, Monster, job.com, or salesjobhunter.com, from (date) through the present date.

Interrogatory No. \_\_\_\_\_ : Please identify each job search conducted on the above-identified sites.

Request for Production No. \_\_\_\_\_ : For each job search website identified in response to the preceding interrogatories, please produce your ACCOUNT DATA for the period of (date) through the present.

Request for Production No. \_\_\_\_\_ : For each job search website identified in response to the preceding interrogatories, please produce your profile or user information for the period of (date) through the present.

### **Pod Casts and Blogs**

Interrogatory No. \_\_\_\_: Identify each and every PODCAST or VODCAST that you have recorded or broadcasted or published or uploaded (whether private or public) from the date of the event forming the basis of your Complaint.

Request for Production No. \_\_\_\_: Produce all PODCASTS or VODCASTS that:

1. refer or relate to the allegations set forth in the Complaint; or
2. refer or relate to any facts or defenses raised in the Answer; or
3. reveal, refer or relate to any emotion, feeling, or mental state; or
4. reveal, refers or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state; or
5. shows you participating in any physical activity or hobby.

Interrogatory No. \_\_\_\_: Please provide all user names and passwords for each blog account identified in the preceding interrogatory.

*Upheld: McMillen v. Hummingbird Speedway, Inc., No. 113-2010 CD (Pa. CD 9/09/2010) but no objection to overly broad.*

Request for Production No. \_\_\_\_: For each PODCAST OR VODCAST identified in response to the preceding interrogatories, please produce your profile or user information for the period of (date) through the present.

Interrogatory No. \_\_\_\_: Identify each and every BLOG entry (by URL) that you have authored over the past five years before the event forming the basis of your Complaint.

Request for Production No. \_\_\_\_: Produce all BLOGS that:

1. refer or relate to the allegations set forth in the Complaint; or
2. refer or relate to any facts or defenses raised in the Answer; or
3. reveal, refer or relate to any emotion, feeling, or mental state; or
4. reveal, refers or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state; or
5. shows you participating in any physical activity or hobby.

Request for Production No. \_\_\_\_\_: For each BLOG identified in response to the preceding interrogatories, please produce your profile or user information for the period of (date) through the present.

### **Social Media**

Interrogatory No. \_\_\_\_\_: Identify each and every social media or SOCIAL NETWORKING SERVICE accounts that you have or have had from (date) to (date).

Interrogatory No. \_\_\_\_\_: Please provide all user names and passwords for each account identified in the preceding interrogatory.

*But see Malhoit v. Home Depot USA, Inc.*, 2012 WL 3939063 (C.D. Cal. Sept. 7, 2012) (rejecting these requests as overly broad and ambiguous).

Interrogatory No. \_\_\_\_\_: State whether during the period (date) through (date), you have posted to a SOCIAL NETWORKING SERVICE a communication or image or other SOCIAL NETWORKING COMMUNICATION concerning: (add in what you want to specifically ask about such as, engaging in physical activities, going to the gym, working in the garden, moving, your mental status (happy, sad, depressed, etc), golfing, carrying boxes or lifting during your recent move)

Interrogatory No. \_\_\_\_\_: Describe the substance of the image or communications referenced in the preceding interrogatory.

Request for Production No. \_\_\_\_\_: If the answer to the Interrogatory No. \_\_\_\_\_ is yes, then produce a download of the entire substance of the image or communication. Make sure to include all comments regarding the image or communication. For example, on Facebook, you can retrieve this by going to your Facebook account, clicking on “Account” in the upper right, choosing “Account Settings,” and then, toward the bottom of that page, there will be instructions on how to “Download your Information.” Follow those instructions and provide a copy of your Information. A description of how to retrieve this information can be located at [facebook.com/help/?page=18830](https://www.facebook.com/help/?page=18830).

Request for Production No. \_\_\_\_\_: Produce all photographs or videos of you appearing on any social media or SOCIAL NETWORKING SERVICES from (date) through (date). On Facebook, you can retrieve this by going to your Facebook account, clicking on “Account” in the upper right, choosing “Account Settings,” and then, toward the bottom of that page, there will be instructions on how to “Download your Information.” Follow those instructions and provide a copy of your Information. A description of how to retrieve this

information can be located at [facebook.com/help/?page=18830](https://www.facebook.com/help/?page=18830).

*But see Malhoit v. Home Depot USA, Inc.*, 2012 WL 3939063 (C.D. Cal. Sept. 7, 2012) (rejecting these requests as overly broad and ambiguous); *Tompkins v. Detroit Met. Airport*, 278 F.R.D. 387 (E.D. Mi. 2012) (rejecting these requests as overly broad and ambiguous).

Request for Production No. \_\_\_\_\_ :  
Produce all photographs or videos of you appearing on any social media or social networking accounts (including but not limited to Google+, Twitter, Facebook, My Space, Instagram, Linked In, or YouTube) that:

1. refer or relate to the allegations set forth in the Complaint; or
2. refer or relate to any facts or defenses raised in the Answer; or
3. reveal, refer or relate to any emotion, feeling, or mental state; or
4. reveal, refers or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state; or
5. shows you participating in any physical activity or hobby.

On Facebook, you can retrieve this by going to your Facebook account, clicking on “Account” in the upper right, choosing “Account Settings,” and then, toward the bottom of that page, there will be instructions on how to “Download your Information.” Follow those instructions and provide a copy of your Information. A description of how to retrieve this information can be located at [facebook.com/help/?page=18830](https://www.facebook.com/help/?page=18830).

Request for Production No. \_\_\_\_\_ : All online profiles, postings, messages (including, without limitations, tweets, replies, retweets, direct messages, status updates, wall comments, groups joined, activity streams, and blog entries), photographs, videos, and online communications that:

1. refer or relate to the allegations set forth in the Complaint; or
2. refer or relate to any facts or defenses raised in the Answer; or
3. reveal, refer or relate to any emotion, feeling, or mental state; or
4. reveal, refers or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state.

On Facebook, you can retrieve this by going to your Facebook account, clicking on “Account” in the upper right, choosing



“Account Settings,” and then, toward the bottom of that page, there will be instructions on how to “Download your Information.” Follow those instructions and provide a copy of your Information. A description of how to retrieve this information can be located at [facebook.com/help/?page=18830](https://www.facebook.com/help/?page=18830).

*See EEOC v. Simply Storage Mgmt., LLC, 270 FRD 430, 432 (S.D. In. 2010) (ordering such discovery); But see Malhoit v. Home Depot USA, Inc., 2012 WL 3939063 (C.D. Cal. Sept. 7, 2012) (rejecting these requests as overly broad and ambiguous).*

Request for Production No. \_\_\_\_\_: For any Facebook account, produce a copy of all of your account information from (date)\_\_\_\_\_ to present (including your profile, check ins, photographs, videos, wall postings, messages). You can retrieve this by going to your Facebook account, clicking on “Account” in the upper right, choosing “Account Settings,” and then, toward the bottom of that page, there will be instructions on how to “Download your Information.” Follow those instructions and provide a copy of your Information. A description of how to retrieve this information can be located at [facebook.com/help/?page=18830](https://www.facebook.com/help/?page=18830).

*See Held v. Ferrellgas, Inc., Cause No. 2:10-cv-2393 (D.Kan) (compelling the discovery); Gatto v. United Air Lines, Inc., 2013 WL 1285285 (D.N.J. 2013)(ordering*

*this method of discovery); But see Malhoit v. Home Depot USA, Inc., 2012 WL 3939063 (C.D. Cal. Sept. 7, 2012) (rejecting these requests as overly broad and ambiguous).*

Request for Production No. \_\_\_\_\_: For any social media or networking accounts identified in Interrogatory No. \_\_\_\_\_, produce a copy of all of your account information (including your profile, photographs, videos, check ins, wall postings, messages) from (date) to the present.

Interrogatory No. \_\_\_\_\_: State whether during the period (date) through (date), you deleted, took down, untagged, or attempted to delete, take down, or untag, any communication or image or other social networking communication.

Interrogatory No. \_\_\_\_\_: Describe the substance of the image or communications referenced in the preceding interrogatory, date at which it was posted, and the date at which time it was deleted, took down, untagged, or the date at which you attempted to delete, take down, or untag.

Request for Production No. \_\_\_\_\_: If the answer to the Interrogatory No. \_\_\_\_\_ is yes, then produce a download of the entire substance of the image or communication. Make sure to include all comments regarding the image or communication. For

example, on Facebook, you can retrieve this by going to your Facebook account, clicking on “Account” in the upper right, choosing “Account Settings,” and then, toward the bottom of that page, there will be instructions on how to “Download your Information.” Follow those instructions and provide a copy of your Information. A description of how to retrieve this information can be located at [facebook.com/help/?page=18830](https://www.facebook.com/help/?page=18830). If you cannot produce, state if the reason is because

of your actions in attempting to delete, take down, or untag.

Request for Production No.\_\_\_\_\_: All electronic or other communications, correspondence, memos, messages, e-mail, notes, reports, or other written or electronic or social networking communications concerning the allegations made in your complaint or pertain to plaintiff and/or plaintiff’s activities during the period (date) to (date). This includes any postings to any and all social networking services.

<http://www.arkansasdefensecounsel.net/application.php>

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**The thanks of the AADC go out to Jamie Huffman Jones of Friday, Eldredge & Clark for writing this article.**



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