Social Media Evidence

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RICHMOND, VIRGINIA

Laura Lee Miller

- Medical malpractice defense attorney practicing since 2015
- Double ‘Hoo
- Mom of three children born on May 15
- Married my high school sweetheart, a family law attorney who collects Star Wars Lego
- Spend too much of my disposable income on plants

Overview

- Update on social media sources and usage
- Acquiring social media evidence
- Stored Records Communication Act
- Using social media evidence
  - Authentication
  - Spoliation
  - Evidentiary hurdles
  - Ethical considerations
- Privacy
- Deepfakes
- Practical tips

A War Story or Two

5. As a direct and proximate result of Defendant's negligence, as aforesaid, Plaintiff sustained serious and permanent injuries, has suffered and will continue to suffer great pain of body and mind; has sustained permanent disability and deformity, and has incurred and will incur in the future, hospital, doctors, and related bills in an effort to be cured of said injuries.

The Discovery Response

ANSWER: Subject to, and without waiving, the foregoing, Plaintiff states as follows:

Plaintiff sustained numerous severe injuries in the November 27, 2016 collision. With respect to physical injuries, Plaintiff sustained several significant anterior wedge compression fractures to her spine, including T7 (with 25% height loss), T9 (20% height loss), T11 (15% height loss), as well as mild anterior wedging of the T12 and L1 vertebrae. Plaintiff was barely able to ambulate given the pain, and she was in a walker for several weeks and a back brace for several months following the collision. Plaintiff underwent two rounds of physical therapy as well as chiropractic care. Plaintiff nevertheless continues to suffer from ongoing chronic back pain from these

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served by email and first class mail, postage prepaid, on John R. Owen and Laura Lee Miller, Harman, Claytor, Corrigan & Wellman, P.O. Box 70280, Richmond, Virginia 23255, *counsel for Defendant*, this 25th day of June, 2020.

The Social Media

June 27, 2017 ·

July 1, 2018 ·

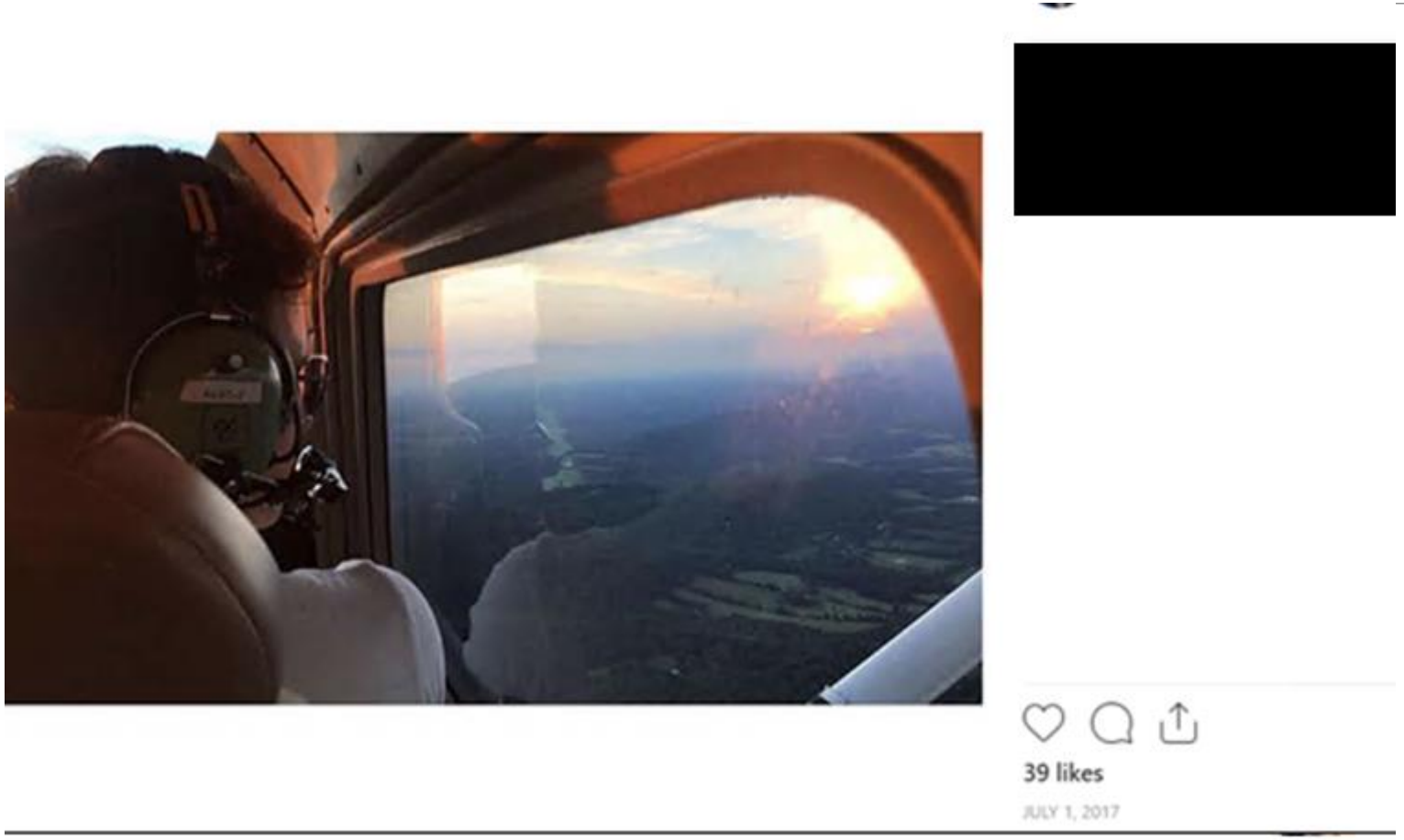
Outcome?

Favorable settlement.

One more

7. As a direct and proximate result of the Defendants' aforesaid negligence, Plaintiff [redacted] suffered injuries and damages, including, but not limited to: a traumatic brain injury causing, inter alia, cognitive deficits and post-traumatic headaches; a fractured left great toe; and neck, shoulder, and back injury; he has incurred and will continue to incur medical and hospital expenses in an effort to care for

Date of Injury – May 19, 2017



Date returned to flying – July 1, 2017

November 12, 2017

Outcome?

Favorable settlement.

Update on Social Media Use and Sources

delivered straight to your inbox.
SIGN UP NOW
CNBC

TECH

Facebook scrambles to escape stock's death spiral as users flee, sales drop

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Jonathan Vanian
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WATCH LIVE

The Atlantic

Sign In Subscribe

A gift that gets them talking. Give a year of stories to spark conversation, plus a free tote.*

TECHNOLOGY

The Age of Social Media Is Ending

It never should have begun.

By Ian Bogost

TECH

Social media is doomed to die

After seven years at Snapchat, I finally learned the truth about why our most important apps seem destined to disappoint us.

By **Ellis Hamburger**
Illustrations by Hugo Herrera for The Verge
Apr 18, 2023, 9:00 AM EDT | 94 Comments / 94 New

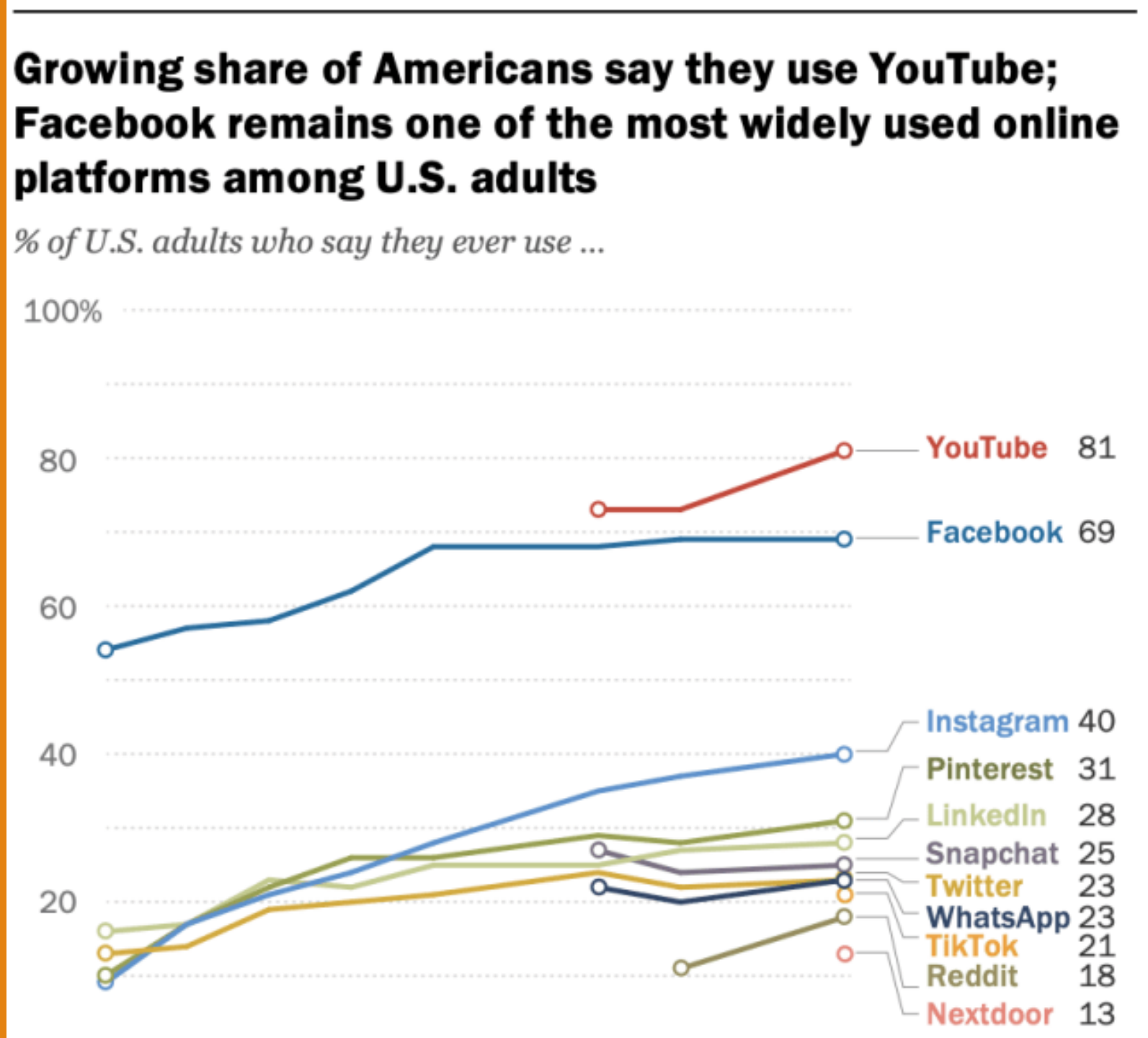
Where is everyone these days?

Platform	Number of Active Users as of October 2021
Facebook	2.895 billion
YouTube	2.291 billion
WhatsApp	2 billion
Instagram	1.393 billion
Facebook Messenger	1.300 billion
Weixin/WeChat	1.251 billion
TikTok	1 billion
Douyin	600 million
QQ	591 million
Sina Weibo	566 million
Telegram	550 million
Snapchat	538 million
Kuishou	506 million
Pinterest	454 million
Twitter	436 million
Reddit	430 million

Survey Says….

- In 2023, only 31% of US adults say that they “never” use social media
- 30% of US adults *regularly* get news on Facebook
- In 2020, 3% of people surveyed by Pew Research said they regularly get news from TikTok. In 2023, that number had more than quadrupled to 14%
- People in the US have an average of 7/1 social media accounts. Globally, it’s 8.4 accounts per person.
- 84% of people aged 18 to 29 use at least one social media platform, and 81% of people between the ages of 30 to 49 use at least one platform
  - Most surprising? 45% of those in the 65+ age group use at least one platform
  - 39% of US online users agree with the statement, “I am addicted to social media.”

Facebook and YouTube reign



Social media use varies, sometimes wildly, with age and demographics

% of U.S. adults in each demographic group who say they ever use ...

0% 20 40 60 80 100

	YouTube	Facebook	Instagram	Pinterest	LinkedIn	Snapchat	Twitter	WhatsApp	TikTok	Reddit	Nextdoor
Total	81	69	40	31	28	25	23	23	21	18	13
Men	82	61	36	16	31	22	25	26	17	23	10
Women	80	77	44	46	26	28	22	21	24	12	16
White	79	67	35	34	29	23	22	16	18	17	15
Black	84	74	49	35	27	26	29	23	30	17	10
Hispanic	85	72	52	18	19	31	23	46	31	14	8
Ages 18-29	95	70	71	32	30	65	42	24	48	36	5
30-49	91	77	48	34	36	24	27	30	22	22	17
50-64	83	73	29	38	33	12	18	23	14	10	16
65+	49	50	13	18	11	2	7	10	4	3	8
<$30K	75	70	35	21	12	25	12	23	22	10	6
$30K-$49,999	83	76	45	33	21	27	29	20	29	17	11
$50K-$74,999	79	61	39	29	21	29	22	19	20	20	12
$75K+	90	70	47	40	50	28	34	29	20	26	20
HS or less	70	64	30	22	10	21	14	20	21	9	4
Some college	86	71	44	36	28	32	26	16	24	20	12
College+	89	73	49	37	51	23	33	33	19	26	24
Urban	84	70	45	30	30	28	27	28	24	18	17
Suburban	81	70	41	32	33	25	23	23	20	21	14
Rural	74	67	25	34	15	18	18	9	16	10	2

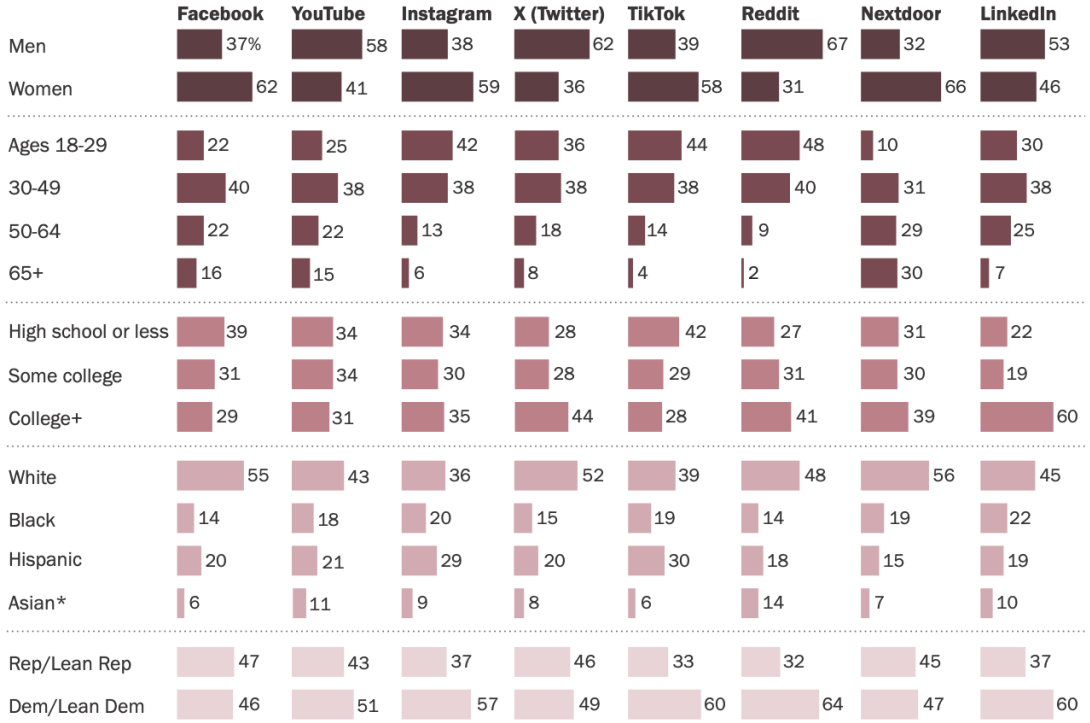
Note: White and Black adults include those who report being only one race and are not Hispanic. Hispanics are of any race. Not all numerical differences between groups shown are statistically significant (e.g., there are no statistically significant differences between the shares of White, Black or Hispanic Americans who say the use Facebook). Respondents who did not give an answer are not shown.

Source: Survey of U.S. adults conducted Jan. 25-Feb. 8, 2021.
"Social Media Use in 2021"

PEW RESEARCH CENTER

Demographic profiles and party identification of regular social media news consumers in the U.S.

*% of each social media site's **regular** news consumers who are ...*



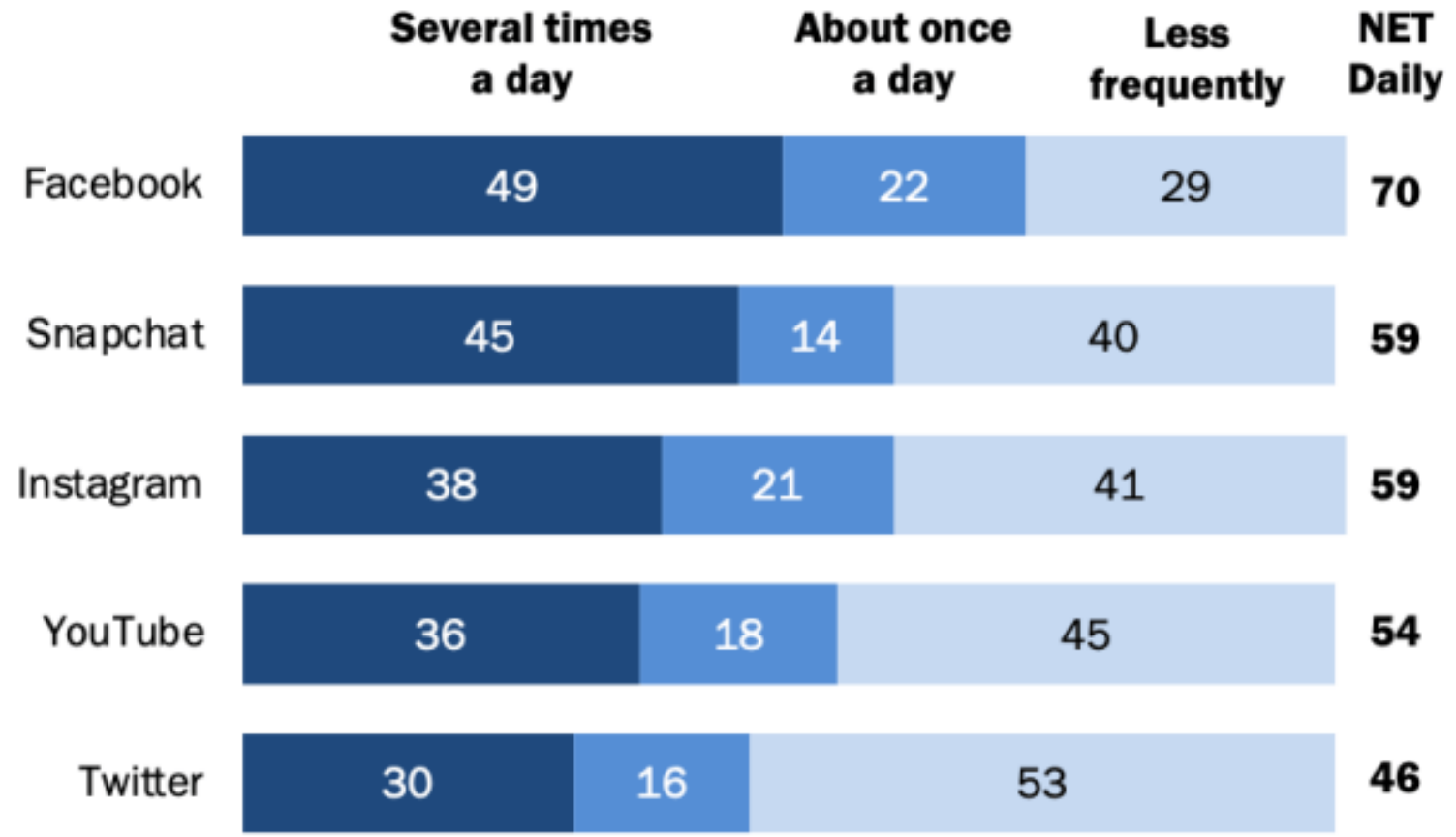
* Estimates for Asian adults are representative of English speakers only.
Note: Snapchat, Twitch and WhatsApp not shown due to small sample sizes. White, Black and Asian adults include those who report being only one race and are not Hispanic; Hispanic adults are of any race.
Source: Survey of U.S. adults conducted Sept. 25-Oct. 1, 2023.

PEW RESEARCH CENTER

A part of daily life

Seven-in-ten Facebook users say they visit site daily

Among U.S. adults who say they use ___, % who use that site ...



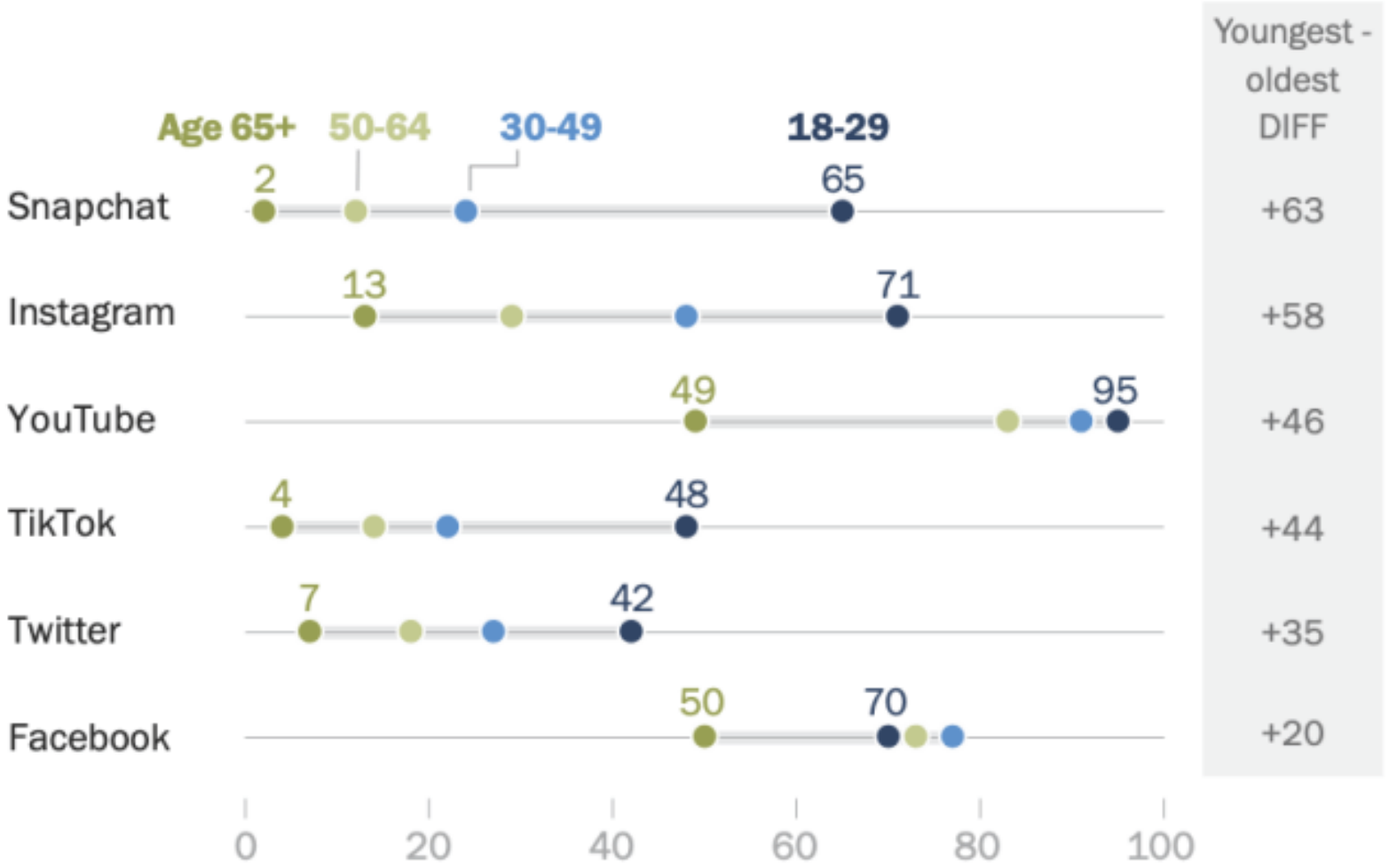
Note: Respondents who did not give an answer are not shown. "Less frequently" category includes users who visit these sites a few times a week, every few weeks or less often.
Source: Survey of U.S. adults conducted Jan. 25-Feb. 8, 2021.
"Social Media Use in 2021"

PEW RESEARCH CENTER

Where are the youths posting

Age gaps in Snapchat, Instagram use are particularly wide, less so for Facebook

% of U.S. adults in each age group who say they ever use ...



Note: All differences shown in DIFF column are statistically significant. The DIFF values shown are based on subtracting the rounded values in the chart. Respondents who did not

Where are the youths posting

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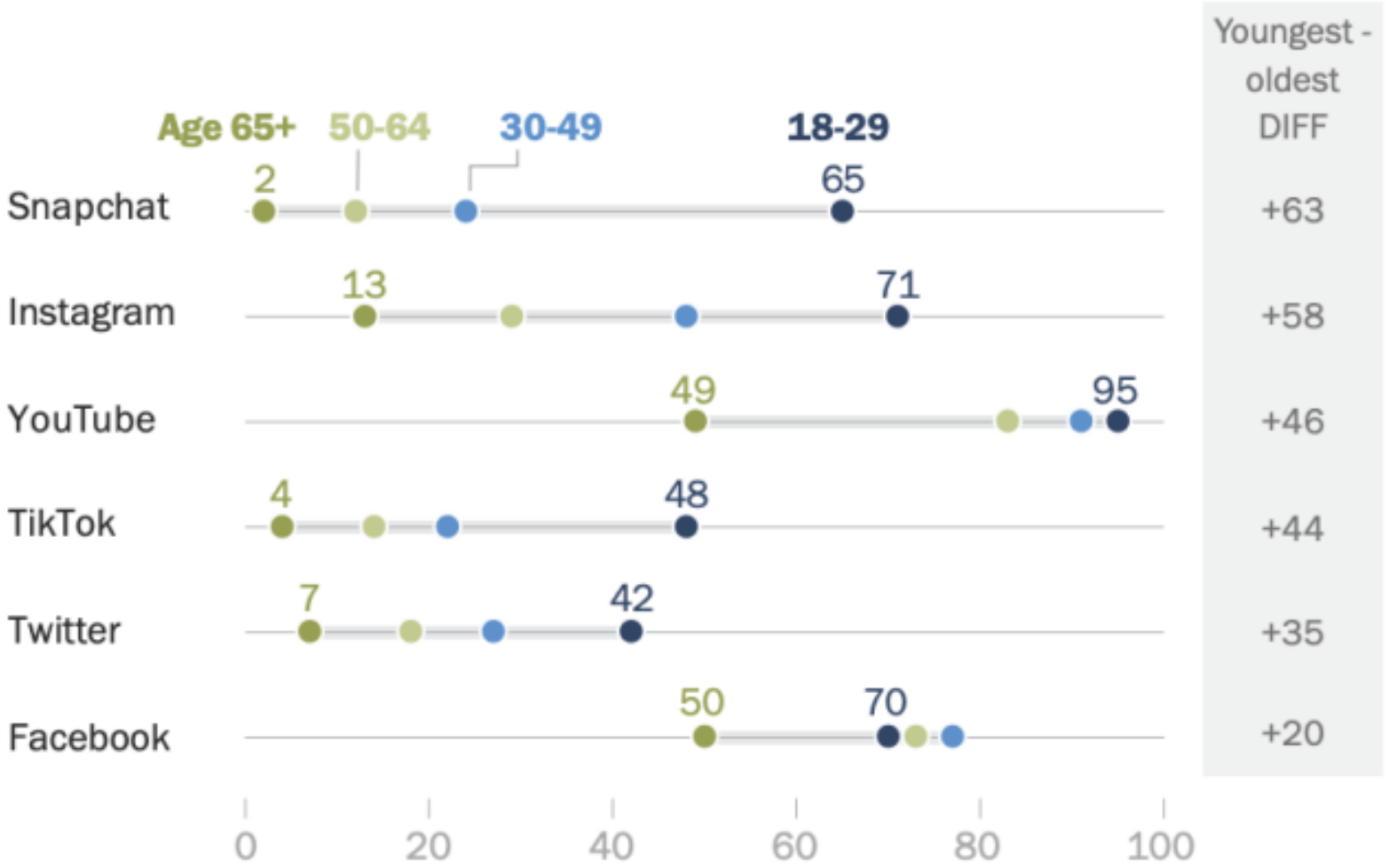
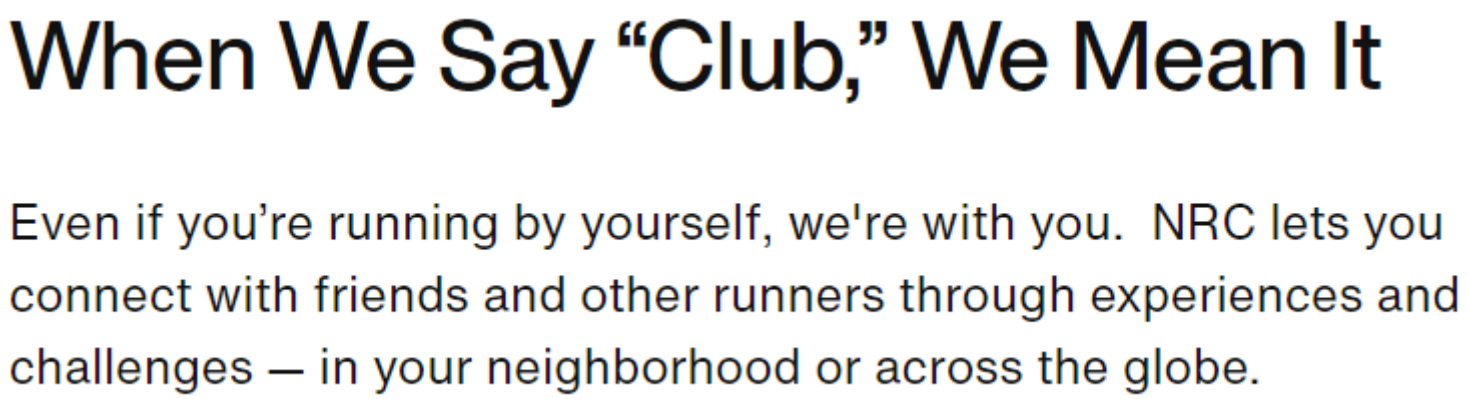


Note: All differences shown in DIFF column are statistically significant. The DIFF values shown are based on subtracting the rounded values in the chart. Respondents who did not

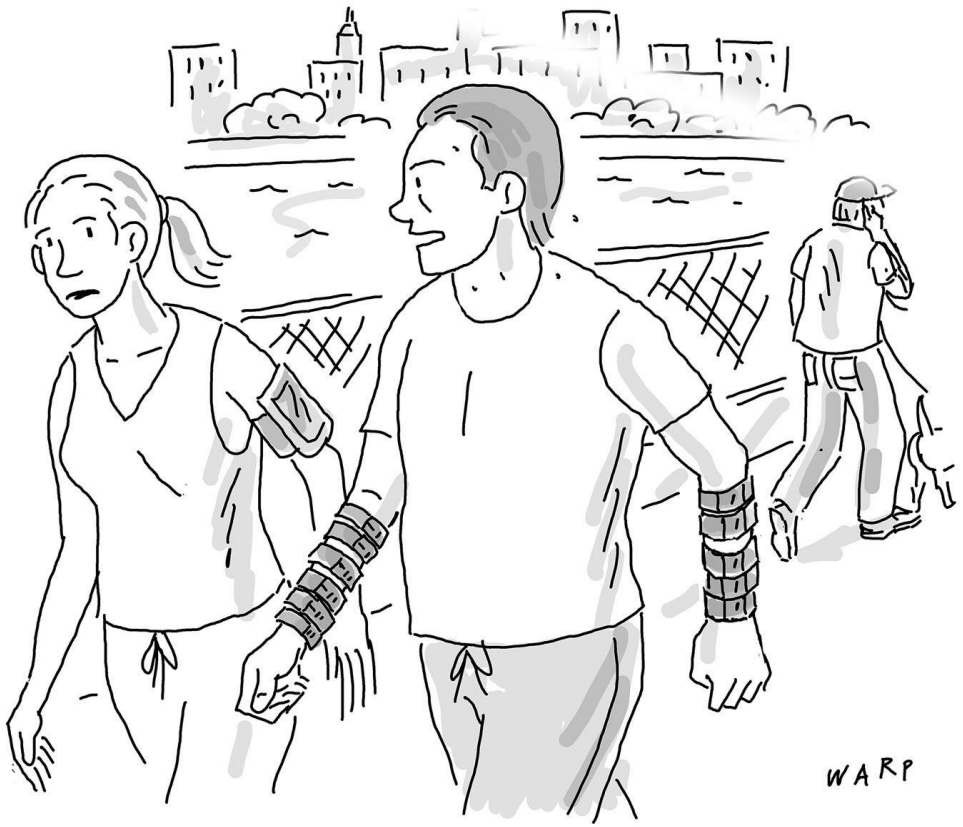
Expanding the definition

- Unconventional sources useful for litigants
- Nike Run Club
  - One of the top running apps in the world
  - Tracks your location, pace, distance, elevation, splits…



Expanding the definition

- Peloton
  - 3.03 million subscribers as of August 2023
  - Not just stationary cycling, though that might be useful too
  - Running, weight lifting, yoga
- Strava
  - Another running platform
  - Est. 95 million registered users
  - Tracks your run and gives users a Facebook-like social feed



Expanding the definition

- Wearable devices
  - Apple Watch
  - FitBits
  - Garmins
  - Wahoo bands

  - *Hinostroza v. Denny's Inc.* 2018 U.S. Dist. LEXIS 109602, at *11–12 (D. Nev. June 29, 2018).
    - A woman fell in a restaurant and allegedly sustained injuries resulting in a future back surgery
    - Defendant restaurant requested data from a fitness activity tracker
    - Plaintiff responded that she had nothing responsive in her custody or control
    - The Court ordered that she describe the search that she conducted for responsive documents

More on Wearables

- *Bartis v. Biomet, Inc*., 2021 WL 2092785 [E.D. Mo. May 24, 2021]
- Multiple plaintiffs claimed that they sustained injuries including permanent mobility issues as a result of the implantation of an artificial hip made by Biomet
- One plaintiff responded in discovery that he continuously wore a Fitbit to track his number of steps, heart rate, and sleep
- Defendants requested "all data from the Fitbit and any other wearable device or other fitness tracker."
- Plaintiff objected that the data was "unreliable" because he began wearing the Fitbit after the revision surgery removing the Biomet device
- The Court ordered Plaintiff to produce the data. The Court noted specifically that Plaintiff had provided inconsistent responses as to whether he experienced difficulty or pain when walking and jogging

More on Wearables

- HIPAA does not safeguard the information gathered by these devices as there is no “covered entity” under the statute handling that data
  - For now, a “covered entity” is 1) a health plan, 2) a healthcare clearinghouse, or 3) a healthcare provider that transmits protected health information electronically in transactions for which the Department of Health and Human Services has published standards
- The FDA largely does not regulate wearables
  - One notable exception
  - Apple has 510(k) clearance from the FDA for its irregular rhythm notification and ECG app
  - The watch itself, however, it not a medical device

Another Example

- A state court in Oregon granted a defendant's motion to compel discovery of the plaintiff's wearable technology information
- The request in that case was for production of: ""[a]ll documents, records, data, or information reflecting plaintiff's personal fitness, diet, or other lifestyle management. This includes, but is not limited to, data and information from hardware (including wearable technology), software, or personal computing/telecommunication e-applications, e-logs, and e-diaries"

But see…

- *Spoljaric v. Savarese*, 66 Misc. 3d 1220(A), 121 N.Y.S.3d 531 (N.Y. Sup. Ct. 2020)
- Plaintiff claimed to have sustained personal injuries in a motor vehicle accident
- Defendant issued discovery for authorizations for all data pertaining to plaintiff's Fitbit device
- Defendant moved to compel production when plaintiff refused
- Defendant argued that the basis for the request was that the plaintiff had lost fifty pounds since the accident, and defendant was entitled to see how plaintiff did this despite his claim of lasting injury
- In deposition, Plaintiff testified that he very rarely checked his Fitbit and mostly used it as a watch to tell time
- The court noted, "As diet, not just exercise, is a more important component of weight loss, this argument had little 'weight'" and characterized the request as a fishing expedition

—go make Daddy's Fitbit think he's exercising."

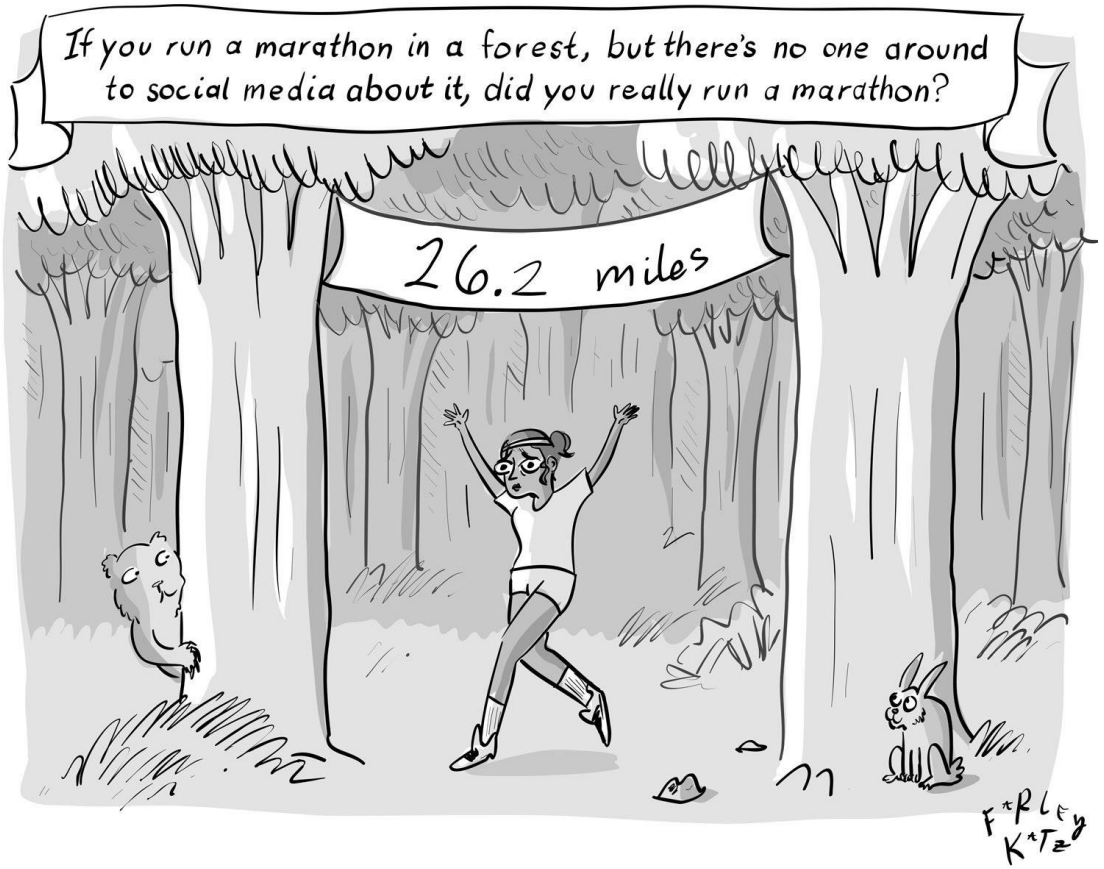
Consider Who Is Hearing Your Motion

Widenor v. Patiala Express Inc., No. SA-21-CV-00962-FB, 2022 WL 3142621, at *3 (W.D. Tex. Aug. 4, 2022)

- Defendant requested all fitness data, from any fitness tracker such as an Apple Watch, that Plaintiff had worn since the accident
- Plaintiff testified in his deposition that he owns and wears an Apple Watch and wore it during the relevant time period
- The Court took a skeptical approach and instructed the parties to confer as to what data Plaintiff had in his possession and whether it was in a form that could be produced to Defendant.
- "If not, Defendant should subpoena the records from Apple."

It’s one subpoena to Apple, Michael…

Acquiring Social Media Evidence



Timing

- Preservation letter
- Search early, search often
- Search targets:
  - The parties
  - Family members
  - Friends
  - *Public* groups that they are a part of
  - Party employers

Do-It-Yourself Sleuthing

- Search as many platforms as you can think of
- Get creative – don’t limit yourself to just their name

“Laura Lee Miller”

“Laura Lee Miller” Virginia

Harman Claytor Corrigan & Wellman, P.C.
https://www.hccw.com › attorney › laura-lee-miller

Laura Lee Miller

Laura Lee Miller ... Prior to joining Harman Claytor, Laura Lee practiced in a **D.C.** law firm for several years representing insurers in coverage issues and ...

Discovery Requests

- Duty to Preserve?
  - Maybe, but the litigation preservation letter is going to help you out
  - For your own clients, some social media accounts have made this process very simple

Request a download of your Facebook information from Accounts Center

1. Click on your profile picture in the top right, then click **Settings and privacy**.
2. Click **Settings**.
3. Click **Accounts Center**, then click **Your information and permissions**.
4. Click **Download your information**.
5. Click **Request a download**.
6. Select the profiles you'd like to download information from.
7. Click **Next**.
8. Select the information you want to download.
9. Once you've selected the information you want to download, choose your file options:
   - The date range
   - The notification email
   - The format of your download request.
   - The quality of photos, videos and other media.
10. Click **Submit request**.

Interrogatories

25. Please provide copies, print-outs, or reproductions of any and all social media pages for you and your family members, including but not limited to Facebook, Instagram, Snapchat, Twitter, from June 16, 2022 through the end of this litigation, which refer or relate in any way to the allegations in the Complaint, the Defendants, or your health and medical condition.

Plaintiff objects to this request because it is vague, overly broad, and unduly burdensome with respect to "refer or relate in any way to…your health and medical condition." Defendants do not have "a generalized right to rummage at will through information that plaintiff has limited from public view." *Tompkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012). This is particularly so where, as here, the defendants have not shown any factual predicate for doing so. Courts throughout the country have refused to compel discovery of "social media" where the defendant has failed to show a factual predicate. *See, e.g., Hoy v. Holmes*, 107 Schuylkill L. Rev. 19, 23 (2013) ("We agree that a factual predicate has to be shown by the party seeking discovery for non-public information posted on social media."); *Trail v. Lesko*, 2012 Pa. Dist. & Cnty. Dec. LEXIS 194 (Alleg. Co. 2012) (information contained in the publicly available portions of a user's profile should form a basis for further discovery); *Zimmerman v. Weis Markets, Inc.*, 2011 Pa. Dist. & Cnty. Dec. LEXIS 187, (Northumberland Co. 2011) ("[b]ased on a review of the publicly accessible portions of his Facebook and MySpace accounts, there is a reasonable

The Usual Response

likelihood of additional relevant and material information on the non-public portions of these sites."); *Brogan v. Rosenn, Jenkins & Greenwald, LLP*, 28 Pa. D. & C. 5th 553, 555 (C.P. 2013) ("social media discovery requests must be properly framed with reasonable particularity so that only relevant and non-privileged information is sought and produced."); *McMillen v. Hummingbird Speedway, Inc.*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Jefferson Co. 2010) (review of plaintiff's public Facebook page suggested private posts contained discoverable information); *Keller v. Nat'l Farmers Union Prop. & Cas.*, 2013 U.S. Dist. LEXIS 452 (D. Mont. Jan. 2, 2013) (holding defendant could not delve "carte blanche" into plaintiff's social media accounts without threshold showing that content undermined plaintiffs' claims in the case); *McCann v. Harleysville Ins. Co. of N.Y.*, 78 A.D.3d 1524, 1524 (N.Y. App. Div. 2010) (holding Facebook account outside scope of discovery where defendant failed to establish factual predicate "with respect to the relevancy of the evidence"); *Kregg v. Maldonado*, 98 A.D.3d 1289, 1290 (N.Y. App. Div. 2012) (denying discovery of Facebook account, holding "the proper means by which to obtain disclosure of any relevant information contained in the social media accounts is a narrowly-tailored discovery request seeking only that social-media-based information that relates to the claimed injuries arising from the accident."); *Higgins v. Koch Dev. Corp.*, 2013 U.S. Dist. LEXIS 94139, *9 (S.D. Ind. July 5, 2013) (granting discovery of Facebook account from date of injury until date of plaintiff's deposition specifically regarding the injuries incurred, "employment activities, outdoor activities, and enjoyment of life reasonably related to those injuries and their effects").

(deep breath)

This request appears to be nothing more than a fishing expedition over which this request casts too broad a net. "A request for discovery [of social networking site content] must still be tailored . . . so that it 'appears reasonably calculated to lead to the discovery of admissible evidence.'") *Mackelprang v. Fidelity Nat'l Title Agency of Nevada, Inc.*, 2007 U.S. Dist. LEXIS

2379, 2007 WL 119149 at *7 (D. Nev. Jan 9, 2007)("Ordering . . . release of all of the private email messages on Plaintiff's Myspace.com internet account would allow Defendants to cast too wide a net for any information that might be relevant and discoverable."). "'All encompassing' production requests do not meet Rule 34(b)(1)(A)'s reasonably particularity requirement, *In re Asbestos Products Liability Litigation* (No. VI), 256 F.R.D. at 157, and discovery rules do not allow a requesting party 'to engage in the proverbial fishing expedition, in the hope that there might be something of relevance in [the producing party's] Facebook account.'" *Tompkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012). "[T]he simple fact that a claimant has had social communication is not necessarily probative of the particular mental and emotional health issues in the case. Rather, it must be the substance of the communication that determines relevance." *EEOC v. Simply Storage Mgmt.*, 270 F.R.D. 430, 435 (S.D. Ind. 2010); *Holter v. Wells Fargo and Co.*, 281 F.R.D. 340, 344 (D. Minn. 2011). "To be sure, anything that a person says or does might in some theoretical sense be reflective of her emotional state. But that is hardly justification for requiring the production of every thought she may have reduced to writing, or, indeed, the deposition of everyone she may have talked to." *Rozell v. Ross-Holst*, 2006 U.S. Dist. LEXIS 2277, 2006 WL 163143 at *3-4 (S.D. N.Y. Jan. 20, 2006).

Regarding generally visible content on websites, blogs, and social media sites, such information may be obtained by the defendants without disclosure in discovery, and it is readily available to the defendants through other means.

Without waiving this objection, Plaintiff does not have any such documents in her possession, custody, or control.

Just as a reminder…

25. Please provide copies, print-outs, or reproductions of any and all social media pages for you and your family members, including but not limited to Facebook, Instagram, Snapchat, Twitter, from June 16, 2022 through the end of this litigation, which refer or relate in any way to the allegations in the Complaint, the Defendants, or your health and medical condition.

The Fishing Expedition

"Remember, if you catch a small one, you claim it was huge, and then you set about smearing any potential eyewitness."

Many Views

- In a personal injury case, “the fact that plaintiff had previously used Facebook to post pictures of herself or to send messages is insufficient to warrant discovery of this information.” *Kelly Forman v. Mark Henkin*, 2015 N.Y. App. LEXIS 8353 (Dec. 17, 2015).
  - Simply because the plaintiff’s Facebook postings “might reveal daily activities that contradict claims of disability” is “nothing more than a request to conduct a fishing expedition.”
- Other courts have taken a broader view
- In a slip and fall case, the plaintiff took down hundreds of photographs from his Facebook page following the deposition. *Nucci v. Target Corp*., 162 So.3d 136, 154 (Fla. 4th DCA 2015).
  - The appellate court upheld the trial court order requiring production of photographs from two years prior to the incident. Id. “We agree with those cases concluding that generally, the photographs posted on a social networking site are neither privileged nor protected by any right of privacy, regardless of any privacy settings that the user may have established.”

Rodriguez-Ruiz v. Microsoft Operations Puerto Rico, L.L.C., No. CV 18-1806 (PG), 2020 WL 1675708, at *1 (D.P.R. Mar. 5, 2020)

- Plaintiff alleged that he was wrongfully terminated by Microsoft in violation of the Americans with Disabilities Act. He alleged that he suffers from cerebral palsy, headaches, and back pain
- Microsoft sent requests for production for the Plaintiff's Facebook or social media profiles
- "Complete copy of your profile, including, without limitation, all messages, posts, status updates, comments on your wall or page, causes and/or groups to which you have joined, which are in your account and which were published or posted between January 2010 and the present, related or referring to any emotions, feelings, mental status, or mood status"
- "Copy of all communications from you, whether through private messages in your profile or messages on your wall or page, which may provide context to the communication mentioned in the previous sub-section."
- " Any and all photos taken and/or uploaded to your account between January 2010 and the present."
- Also requested the complete download of the Facebook account

Discoverable?

- Start with Rule 26(b)(1)
  - Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case ... Information within this scope of discovery need not be admissible in evidence to be discoverable
- "[i]nformation posted on a private individual's social media 'is generally not privileged, nor is it protected by common law or civil law notions of privacy"

Relevant?

- "Several courts have found that the contents of a plaintiff-employee's social media profile, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries during a relevant time period) are relevant and discoverable in employment cases which include claims of emotional distress, when they 'reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state.'"

So What's the Problem?

- "Though courts have concluded that information posted or published on a party's social media page may be relevant, courts generally do not "endorse an extremely broad request for all social media site content."
- "[A] party does not have 'a generalized right to rummage at will through information that [an opposing party] has limited from public view.' "
- The fact that a plaintiff's mental or emotional state is at issue does not "automatically justify sweeping discovery of social media content."
- "[P]osts specifically referencing the emotional distress plaintiff claims to have suffered or treatment plaintiff received in connection with the incidents alleged in [his] complaint and posts referencing an alternative potential source of cause of plaintiff's emotional distress are discoverable. ... In addition, posts regarding plaintiff's social activities may be relevant to plaintiff's claims of emotional distress and loss of enjoyment of life."

Who Gets to Figure Out What's What

- You!
- Or your opponent.
- The Court ordered Plaintiff's counsel to review all of Plaintiff's social media content from January 2010 through the present and produce any and all content referencing Plaintiff's emotions, feelings, mental status, or mood status, including any photographs which may have accompanied such posts or comments
- The court also ordered the same consideration of every uploaded photo
- The court noted that Microsoft could challenge the production if it believed the production fell short

Narrow Tailoring

- *Root v. Balfour Beatty Const. LLC*, 132 So. 3d 867 (Fla. 2d DCA 2014)
- Second District Court of Appeal considered the propriety of an order compelling the production of Facebook pages
- The trial court required the plaintiff, who was claiming loss of consortium following injury to her three-year-old son, to produce electronically stored information relating to her mental health, alcohol use, and relationships with friends and family members
- The appellate court considered whether the order was overly broad, and began by noting that "trial courts around the country have repeatedly determined that social media evidence is discoverable."

- As the plaintiff's claim was premised upon loss of consortium, the court stated that discovery should have been limited to evidence related to the impact of the child's injury upon his mother.
- The compelled production was irrelevant and the discovery order was quashed.
- The court did conclude with the following caveat: "Should further developments in the litigation suggest that the requested information may be discoverable, the trial court may have to review the material in camera and fashion appropriate limits and protections regarding the discovery."

Nucci v. Target Corp., 162 So. 3d 146 (Fla. 4th DCA 2015)

- Fourth District Court of Appeal conducted certiorari review of a lower court order compelling the discovery of photographs from a personal injury plaintiff's Facebook account
- Plaintiff claimed she slipped and fell on a foreign substance on the floor of a Target store
- Target sought production of photographs from the plaintiff's Facebook page, alleging that it was entitled to view her profile, as her lawsuit placed her physical and mental condition at issue

Nucci v. Target Corp., 162 So. 3d 146 (Fla. 4th DCA 2015)

- The plaintiff responded by asserting that disclosure violated her reasonable expectation of privacy and contended that Target's motion amounted to a fishing expedition
- Target narrowed down its requests, and the plaintiff raised objections, including relevance.
- The trial court ordered the plaintiff to provide copies or screenshots of all of the photographs associated with her social networking account for two years prior to the alleged fall.
- The appellate court rejected the privacy claims, finding that social networking site content is neither privileged nor protected and found that the discovery order was narrowly tailored in scope, thus, reasonably calculated to lead to admissible evidence relating to the plaintiff's physical condition

Can’t We Just Use Subpoenas?

- No.

Stored Communications Act (18 U.S.C. 121 §§ 2701-2713)

- Seeks to protect communications in storage while also meeting the government's legitimate law enforcement means
- Addresses voluntary and compelled disclosure of "stored wire and electronic communications and transactional records"
- Enacted October 21, 1986
- Limits the ability of the government to compel third-party Internet service providers (ISPs) to turn over content information and non-content information (such as logs and other back-end information).
- Also limits the ability of the ISPs themselves to reveal content information to non-government entities

Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965 (C.D. Cal. 2010)

- First federal district court to apply the Stored Communications Act to social media
- Plaintiff alleged that he granted the defendants an oral license to use his works of art in a limited manner in connection with making garments. Plaintiff alleged that the defendants agreed to use his logo on the apparel, but failed to do so. Plaintiff also alleged that at times they attributed the artwork to others, or at times to one of the defendants. He sued for breach of contract, copyright infringement, and other claims

Crispin

- In February 2010, defendants served subpoenas on Facebook, Myspace, and two other businesses.
- The subpoenas to the social media companies sought the plaintiff's basic subscriber information, along with all communications that referred or related to the defendants or the Ed Hardy brand.
- Defendants argued that the information was relevant in determining the nature and terms of the agreement, if any.
- Plaintiff moved to quash the subpoenas, arguing that the social media companies were prohibited from disclosing electronic communications as ISPs under 18 U.S.C. Section 2701
- Note, <u>the social media companies themselves never actually sought to quash the subpoenas</u>

Crispin's Holdings

- Initially, the trial court held that the social media companies were not electronic communications service providers and that the materials sought were not in electronic storage
- But, on motion to reconsider, things took a different turn
- The court noted that the Act defines an electronic communications service provider as "any service which provides to users thereof the ability to send or receive wire or electronic communications."
- An ECS provider cannot knowingly divulge the contents of a communication while in electronic storage by that service (see Section 2702(a)(1)(b))
- The court noted that that there is no provision in the statute for disclosure of communications to a third party by subpoena

Crispin's Holdings

- The court noted that an ECS provider includes "*any* service" which provides the ability to send or receive electronic communications
- One fact that the court took particular notice of is that the social media companies allowed for both private messages and wall postings that were not strictly public – the user can choose who can access the wall
- The court therefore held, for the first time, that Facebook and Myspace were ECS providers under the Stored Communications Act
- This doesn't end the inquiry – the court then had to determine if the information sought was in "electronic storage."
- The court held that the wall postings were "stored for backup purposes" under the statute
- Accordingly, **the court quashed the subpoenas as to private messages stored by Facebook and Myspace**
- As to the wall postings, the court concluded that it did not have enough evidence as to whether or not the "wall" was fully publicly accessible

SCA Disclosure Prohibitions

- The SCA disclosure prohibition framework rests on a few key distinctions:

1) Electronic communication services (“ECS”) vs. remote computing services (“RCS”)
2) Content vs. non-content
3) Governmental request v. non-governmental request

ECS vs. RCS

ECS providers include “any service which provides to users the ability to send or receive wire or electronic communications.” 18 U.S.C. Section 2510(15).

RCS providers offer “the provision to the public of computer storage services by means of an electronic communication.” 18 U.S.C. Section 2711(2).

ECS vs. RCS

Not mutually exclusive. A service provider can qualify as both an ECS and RCS

Each particular communication is measured to determine if a provider is acting as an ECS or RCS

Why the ECS v. RCS Distinction Matters

Both ECS and RCS are prohibited from disclosing content absent an applicable exception

The government can only obtain certain content (stored for less than 180 days) from ECS with a warrant

The government can obtain the same content from an RCS with a subpoena and notice to the user. 18 U.S.C. Section 2703(a)

Content vs. Non-Content

Content: includes any wire, oral, or electronic communication, including any information concerning the substance, purport, or meaning of that communication. 18 U.S.C. Section 2510(8)

Courts construe "content" broadly—for instance, a court recently held that Instagram Stories are "content." See, e.g., Facebook, Inc. v. Pepe, 2020 WL 1870591, at *4 (D.C. Jan. 14, 2020).

Non-content: Either 1) basic subscriber information; or 2) other non-content. BSI includes the identity of subscribers, their relationship to the provider, and basic connection records, as well as non-content that relates to a specific user. 18 U.S.C. Section 2703(c)(1)-(2)

Why the Content vs. Non-Content Distinction Matters

An ECS or RCS is prohibited from disclosing **content** unless an exception applies

An ECS or RCS may disclose non-content in many instances (except to the government)

Non-Governmental Disclosure vs. Governmental Disclosure

The SCA's bars on disclosure are not absolute – they are subject to exemptions and compelled disclosure frameworks, depending on whether the disclosure would be to a private entity or a government entity

Non-content -> can freely disclose to non-governmental entities. 18 U.S.C. Section 2702(c)(6)

Content may be disclosed only if one of the exceptions is met. *See*, e.g. *O'Grady v. Superior Court*, 139 Cal. App 4th 1423 (2006)

Consent Exception

Consent is the key exception to the SCA's prohibition against disclosing content communications by an ECS or RCS

This begs the question – what constitutes consent?

Lawful Consent Exception

Some courts have held that posts that are fully public on social media can fall under the lawful consent exception. *See, e.g.* Facebook v. Superior Court (Hunter), 4 Cal.5th 1245, 233 Cal.Rptr.3d 77, 417 P.3d 725

But, this exception has been interpreted to mean that any limitation in audience removes the post from this exception.

Facebook v. Superior Court (Hunter)

- Lee Sullivan and Derrick Hunter, charged with murder, weapons offences, and gang activity, sought private posts from victim's Facebook and Instagram accounts and from victim's then-girlfriend's Instagram and Twitter accounts.

- Defendants argued that posts accessible by a large group of users are considered public because the posters lose control over dissemination once the information is posted, and the poster can have no reasonable expectation of privacy

- The social media companies moved to quash

Facebook v. Superior Court (Hunter)

Court ruled that posts made public on social media can fall under the lawful consent exception. However, this exception does not extend to social media communications that were limited to even a large group of people.

Key inquiry is whether social media users took steps to limit access to the information in their posts. “Privacy protection provided by the SCA does not depend on the number of Facebook friends that a user has.”

Other Exceptions Permitting Disclosure

9 exceptions permitting disclosure of **content**

1) To the addressee or intended recipient of the communication

2) With lawful consent of the originator or an addressee or intended recipient

3) To a person authorized to forward such communication to its destination

4) As may be necessary to perform the service or to protect the rights or property of the provider of that service

18 U.S.C. Section 2702(b)

Notice the Word “May”

Can a provider be *compelled* to disclose if an exception applies?

When an exemption applies, the statute says that a provider “may” disclose content and non-content. 18 U.S.C. § 2702(b)–(c).

Providers in *Hunter* argued that where an exemption applies, the SCA affords provider discretion to decline to comply with a valid state subpoena.

Court ruled that providers <u>are</u> compelled to disclose information pursuant to a valid state subpoena, where the lawful consent excepted was satisfied.

Facebook Inc. v. Wint

- Appellee charged with murder in DC Superior Court
- Before trial, he filed an ex parte motion asking the trial court to authorize defense counsel to serve subpoenas on Facebook for records relating to certain accounts
  - Wint argued that the SCA would be unconstitutional if it precluded Facebook from complying with the subpoenas
- Facebook objected, arguing that the SCA prohibits it from disclosing such information
- The Court held that the SCA is not unconstitutional even when it prohibits providers from disclosing covered communications in response to criminal defendants' subpoenas

Takeaways

- For our purposes, the SCA applies to prohibit disclosure of communications that are not readily accessible to the general public
- Posts that are completely public can be disclosed under Section 2702(b)(3) with the user's consent to disclosure or if another exception applies
- You can send a subpoena for non-content information, including information that will help you tie a person to an account like their username
- Expect a motion to quash when you send a subpoena to a social media company and, if an exception applies, be ready to fight that

Getting the Evidence In

Relevance

Federal Rule of Evidence 402

- Relevant evidence is admissible unless otherwise provided
- Irrelevant evidence is not admissible

Federal Rule of Evidence 401(a)

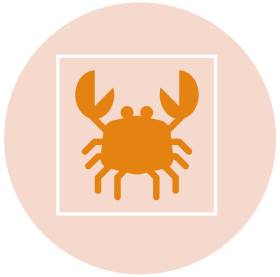
- Does the evidence have any tendency to make a fact more or less probable than it would be without the evidence?

Authentication

Federal Rule of Evidence 901(a)

- the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

Two Judicial Approaches to Authentication



The Maryland Approach

The Texas Approach

The Maryland Approach

Courts are skeptical of social media evidence, finding the odds too great that someone other than the alleged author was the actual creator

Proponent must:

1) Ask the purported creator if he or she created the profile or post,

2) Search the internet history or hard drive of the purported creator's computer to determine whether that computer was used to originate the profile/post, **or**

3) Obtain information directly from the social networking website that links the establishment of the profile to the person who allegedly created it and also links the posting sought to be introduced to the person who initiated it

Griffin v. State. 19 A.3d 415 (Md. App. 2011)

Defendant was charged with 2nd degree murder, first degree assault, and use of a handgun in the commission of a felony

The State offered printouts from a Myspace profile belonging to the defendant's girlfriend to demonstrate that the defendant had allegedly threatened one of the state's witnesses

- The page contained the statement "FREE BOOZY [the nickname for the defendant]!!!! JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!"
- The printout described details of the profile owner's life such as a birthday of October 2, 1983 and the location of Port Deposit. A photo of the defendant and his girlfriend was included

Griffin v. State. 19 A.3d 415 (Md. App. 2011)

- Rather than authenticating through the defendant, the State attempted to use the testimony of the lead investigator of the case, who had downloaded the information from Myspace
- The investigator testified that he knew it was the defendant's girlfriend's profile due to the photograph of defendant and her, a reference to their children, and her date of birth listed on the printout.
- Defense counsel objected that the state could not definitively establish a connection between the girlfriend and the social media page.
- The printouts were admitted into evidence, and the defendant appealed his conviction

Griffin v. State. 19 A.3d 415 (Md. App. 2011)

- The Maryland Court of Appeals stated that the potential for "fabricating or tampering with electronically stored information on a social networking site" posed "significant challenges" for authentication."
- The Court held that while circumstantial evidence can be offered for authentication, the birthday, mention of the location, reference to the defendant's nickname, and a photograph of the couple were not sufficiently distinctive characteristics to authenticate the printout
- The court specifically noted its concern that someone other than the alleged author may have accessed the account and posted the message in question

Another Maryland Approach Case

State v. Eleck, 23 A.3d 818, 819 (Conn. App. Ct. 2011)

- Defendant appealed a conviction for first degree assault
- This time, it was the defendant claiming that social media evidence had been improperly excluded
- Defendant had tried to offer printouts of Facebook messages allegedly received from a State witness who was at the party where the altercation occurred
- The State's witness admitted that the profile was hers, but claimed that her account had been hacked and she had not sent the messages at issue

State v. Eleck, 23 A.3d 818, 819 (Conn. App. Ct. 2011)

The appellate court affirmed the trial court's decision not to admit the evidence, holding that even unique usernames and passwords are not enough to eliminate the possibility of hackers.

The court reasoned that the messages themselves did not reflect distinct information that only the witness would have possessed regarding the defendant or the character of their relationship

The Texas Approach

More lenient in determining the amount of evidence that a reasonable juror would need to be persuaded that the alleged creator did in fact create the evidence

The burden shifts to the objecting party to demonstrate that the evidence was created or manipulated by a third party

Tienda v. State, 358 S.W.3d 633 (Tex. Crim. App. 2012)

After being convicted of murder, defendant appealed and claimed that the trial court should not have admitted evidence from several Myspace accounts that allegedly belonged to the defendant

The victim was traveling home from a nightclub when his car came under gunfire from a caravan of three or four cars on the same road. The defendant was a passenger in one of the caravan's cars

Each account was linked to emails addresses including the defendant's name or nickname, had a profile name matching either Tienda's name or nickname, listed the defendant's hometown as the location, and contained photographs of a person who resembled the defendant

The accounts had posts with statements including "You aint BLASTIN You aint Lastin" and "EVERYONE WUZ BUSTIN AND THEY ONLY TOLD ON ME."

Tienda v. State, 358 S.W.3d 633 (Tex. Crim. App. 2012)

The Court considered *Griffin* (the Maryland Approach case), but concluded that the evidence here had more indicia of authenticity as a whole

The Court deemed the evidence sufficient for a reasonable jury to believe the defendant created and maintained the pages

People v. Clevenstine, 891 N.Y.D.2d 511 (N.Y. App. Div. 2009)

Defendant was convicted on multiple sexual charges

The victims testified that the defendant had messaged them through social media sites

The legal compliance offer from Facebook testified that the messages originated from the purported accounts belonging to the defendant

The defendant's wife testified that she had seen the same sexually explicit messages on her husband's Myspace account on their home computer

The Court recognized the possibility that someone else had accessed the social media accounts, but said that the likelihood of such a scenario was a factual issue for the jury to consider

Rule 901(b)

For authenticating social media evidence, Rule 901(b)(1) and Rule 901(b)(4) are the most helpful.

Rule 901(b)(1) permits authentication through the "testimony [of a witness with knowledge] that [the evidence] is what it is claimed to be."

- For electronic evidence, the witness testifying may be the person who created the electronic document or maintains the evidence in its electronic form
- *See e.g. United States v. Barlow*, 568 F.3d 215, 220 (5th Cir. 2009) (holding that a chat log was properly authenticated by the testimony of a witness who participated in, and thus created, the chat).

Rule 901(b)

Recipients can also authenticate via testimony

Examples:

1) *Talada v. City of Martinez*, 656 F. Supp. 2d 1147, 1158 (N.D. Cal. 2009) (holding that emails received were properly authenticated when the recipient provided a declaration asserting that the emails were true and correct copies).

2) An instant message was properly authenticated when "[t]he accomplice witness . . . testified to defendant's [instant messenger] screen name. *People v. Pierre*, 838 N.Y.S.2d 546, 548-49 (2007). "[Another witness] testified that she sent an instant message to that same screen name, and received a reply, the content of which made no sense unless it was sent by defendant [and] there was no evidence that anyone had a motive, or opportunity, to impersonate defendant by using his screen name."

Rule 901(b)(4) – Circumstantial Evidence

Permits a party to authenticate evidence using circumstantial evidence with “the appearance, contents, substance, internal patterns, or other distinctive characteristics of the [evidence], taken together with all the circumstances

United States v. Vazquez-Soto, 939 F.3d 365, 372 (1st Cir. 2019)

- A USPS mail carrier with a history of back problems is found to be totally disabled and requiring retirement. For over a decade, Vazquez-Soto filed annual disability claims with supporting documents. In 2012, the USPS begins investigating him for possible fraud. Surveillance showed Vazquez-Soto carrying a large picture frame, riding a motorcycle and carrying a satchel, and generally walking around with ease.
- One of the investigating agents testified about photos he had downloaded from a Facebook page bearing the name of Vazquez-Soto's ex-wife Carmen Janica.
  - The photos showed Vazquez-Soto traveling in Colombia, standing in a group of motorcycle riders next to a bike, seated on a motorcycle, entering a paddle boat, and dancing
  - Janica did not testify at trial
- Defense counsel objected to the Facebook photos as not properly authenticated

United States v. Vazquez-Soto, 939 F.3d 365, 372 (1st Cir. 2019)

- The First Circuit held that the authentication was sufficient
- The account ownership is not relevant. It did not matter if it was actually Janica's page
- The authenticity of the photos themselves is what mattered
- The government's offer of testimony from the agent who downloaded the photos because he recognized Vazquez-Soto was enough for a reasonable fact-finder to conclude, along with their own examination of the photos compared to the man in the courtroom, that the photos showed Vazquez-Soto

Spoliation

Federal Rule of Civil Procedure 37(e)

- 2015 amendment: ESI must be preserved in the anticipation or conduct of litigation
- If it should have been preserved in the anticipation or conduct of litigation and is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced, the court can order measures no greater than necessary to cure the prejudice or, if the party acted with intent to deprive, may presume the evidence was unfavorable, give an adverse inference instruction, or dismiss the action or enter default judgment

Est. of Lester v. Allied Concrete Co., 736 S.E.2d 699 (2013), 285 Va. 295

- Lester was driving his wife to work when the driver of a loaded concrete truck lost control of his vehicle. The wife ultimately passed away.
- Lester filed suit against the driver and his employer
- Allied Concrete sent a discovery request for all pages of Lester's Facebook page. They attached to the discovery request a photo the attorney downloaded off of Lester's Facebook showing Lester, holding a beer can and wearing a shirt emblazoned with "I ♥ hot moms."
- The next morning, counsel for Lester instructed his paralegal by email to tell Lester to "clean up" his Facebook page because "[w]e don't want any blow-ups of this stuff at trial." Lester deactivated his Facebook page, and responded to the discovery by stating, "I do not have a Facebook page on the date this is signed, April 15, 2009"
- Long story short, the jury received an adverse inference instruction, and Lester's attorney was fined $542,000. Lester himself was sanctioned for $180,000.
  - Lester's attorney was suspended from practicing law for five years

How to Get This to Work For You?

- Litigation hold letters
- Do not instruct your client to “clean up” their social media
  - In fact, instruct them to back it up if you suspect that there is something important that needs to be saved
- Search early and often to know if things are being deleted

Evidentiary Hurdles

Once You've Got Relevant and Authenticated Evidence, Are You Done?

Of course not.

Are You Trying to Sneak In Character Evidence?

- Are you really trying to use it as **character evidence**?
  - Fed. Rule of Evid. Rule 404
  - Can get around it via a Rule 404(b) exception such as motive, intent, or identity
  - But even then, be wary of Rule 403's prohibition on unduly prejudicial evidence

Hearsay

Fed R. Evid. Rule 801(c)

- Photographs and silent video → generally not statements
- Avenues around videos with statements, photos with statements, or comments
  - Not offered for their truth (perhaps to establish notice or motive)
  - Admission by a party opponent
  - Present sense impression – especially for live streaming, live tweeting, Tik Tok, etc.
  - Excited utterance
  - Then-existing mental, emotional, or physical condition
  - Recorded recollection

Is the Best Evidence Rule A Problem?

- FRE 1001(d) was drafted to provide clarification for how ESI was to be treated under the Best Evidence Rule: “For electronically stored information, ‘original’ means any printout — or other output readable by sight — if it accurately reflects the information.”
- For most forms of ESI, including electronic documents, emails, digital photos, and video files, an exact copy of those items will suffice under the Best Evidence Rule
- *But see Edwards v. Junior State of America Foundation* (E.D. Texas April 23, 2021) – holding that screenshots of deleted Facebook pages were not sufficient under the Best Evidence Rule because they did not have metadata and full content that native files would have had

Ethical Considerations

ABA Model Rule 3.4

A "lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value."

Florida Bar Ethics Opinion 14-1 (June 25, 2015)

A lawyer may advise a client to use the highest level of privacy settings on the client's social media page.	A lawyer may also advise the client pre-litigation to remove relevant information from the client's social media page so long as the removal does not violate any substantive law regarding preservation and/or spoliation and the information is preserved.

ABA Model Rule 4.2

Attorneys and attorneys' agents are prohibited from requesting a connection to a represented party through social media networks. Accordingly, attorneys should avoid communicating with or contacting a represented party to access social media information.

Some social media platforms, such as LinkedIn, send an automatic message to accountholders informing them that their profile was viewed and by whom. Certain jurisdictions, such as New York, view such automatic messages as contacting the accountholder

ABA Model Rule 8.4

An attorney violates ethical obligations when using deceptive tactics to gain access to a private account. An attorney may request permission to review an unrepresented person's private social media information, but cannot engage in dishonest or deceptive conduct to do so.

Privacy Considerations

No Reasonable Expectation of Privacy

- On the internet, anyway.
- The Electronic Communications Privacy Act governs the interception of electronic communications, but it does not go so far as to give a privacy right in electronic communications…despite its title.
- *United States v. Meregildo*, 883 F. Supp. 2d 523 (S.D.N.Y. 2012)
  - The defendant's privacy settings allowed for a Facebook friend to see the messages that the defendant posted to his account
  - Therefore, no expectation of privacy in the posts
- Florida's courts have held that "Facebook itself does not guarantee privacy. By creating a Facebook account, a user acknowledges that her personal information would be shared with others. 'Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist.'" *Nucci v. Target Corp*., 162 So. 3d 146, 154 (Fla. 4th DCA 2015) (quoting Romano v. Steelcase, Inc., 30 Misc. 3d 426, 907 N.Y.S.2d 650, 656-7 (N.Y. Sup. Ct. 2010)).

Practical Tips

If you take nothing else…

- Send the preservation letter on Day 1
- Search yourself, early and often
  - Save as much as you can with as much indicia of reliability that you can grab, including the date of the post, the URL you accessed, the account name, account photos, what search terms brought you to the page etc.
- If you've got it, use it
  - Avoid trial fights over authentication by getting it authenticated in a deposition
- Subpoena social media companies for non-content information to help you connect the person to the account
  - But skip a subpoena for content
- Narrowly tailor your discovery requests