

# Finding the Dirt: A Basic Guide for Social Media Search in Litigation

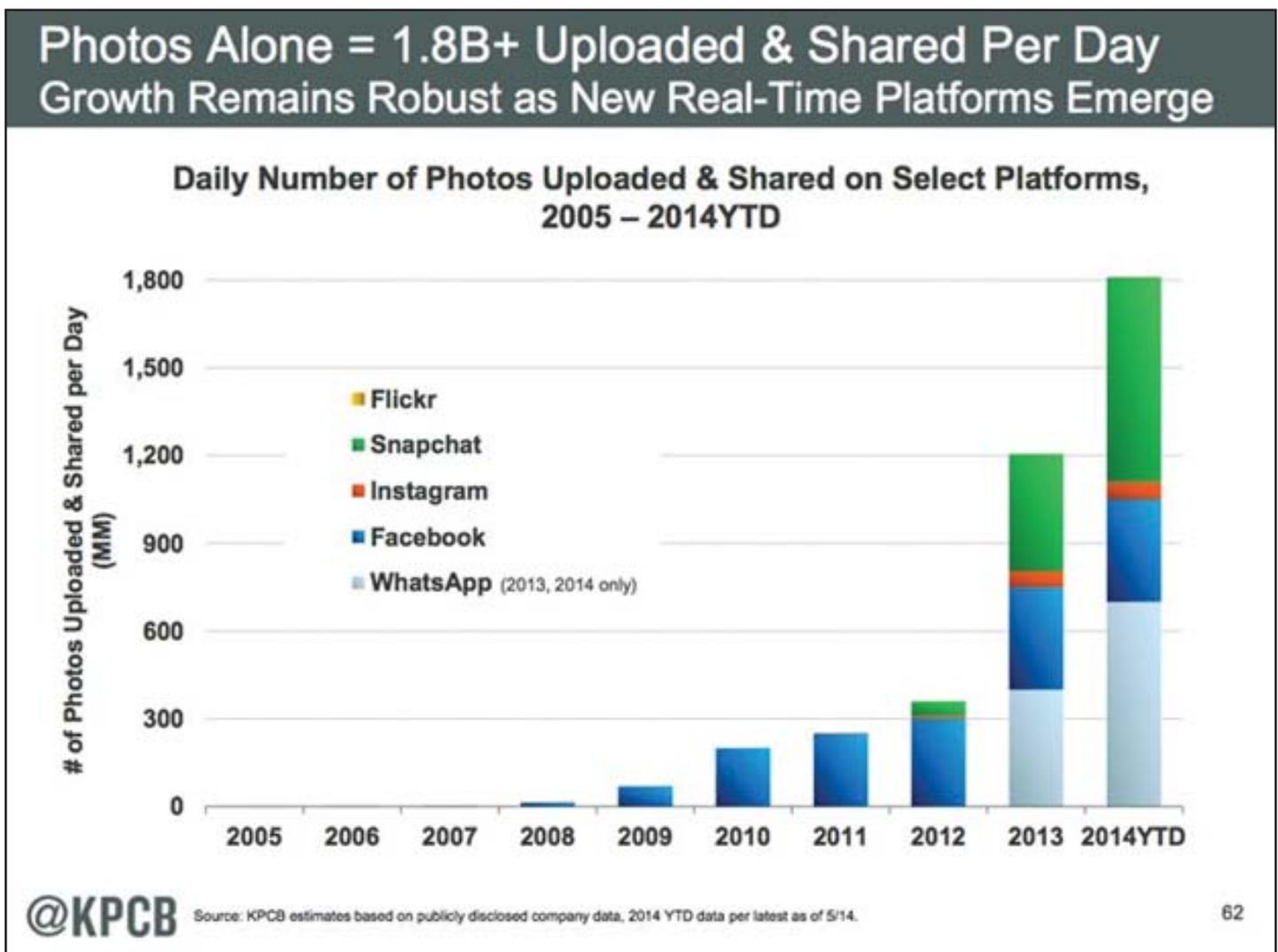
By Robert J. Connor, Jr.

## I. Introduction

It is no surprise social media has become a large part of our everyday lives. Websites like Facebook, Twitter, and YouTube dominate the online community. Facebook alone has over 1.32 billion daily users.<sup>1</sup> It is by far the most popular social media website, used by 79 percent of American adults. By comparison, Instagram is the second most popular with 32 percent. Even more staggering, in 2014 statistics from Kleiner Perkins Caufield & Byers

searches are becoming integral to the early investigation of nearly all cases, regardless of practice area: personal injury, criminal, family law, even collection matters.

This guide is meant to help those conducting searches locate, analyze, and preserve information in addition to helping those issuing assignments understand what is involved. All too often social media searches are viewed as “playing on Facebook” when a complete search entails a great deal more. This guide will not focus just on tradi-



showed more than 1.8 billion photographs alone were shared online *per day*.

Given the trend, the numbers are likely far higher today. Social media has become a dominant factor in how Americans view the world they live in. It has also, unsurprisingly, become a boon to the legal field. Social media

tional social media websites, but will attempt to provide a method for conducting a comprehensive online search.

For this reason, the fundamentals of social media search will be examined: the who, what, when, where, why, and how. While the focus of this article is social media searches in the context of litigation, this same

process can be applied to other scenarios such as vetting an employee, opposition research, or running background checks.

## II. Why Search at All?

The most important question is why look at social media at all? What is the value of analyzing a subject's online presence? Ask most attorneys about social media in their cases and there will invariably be at least a few stories. This can range from posts subverting the opposition's version of events to compromising comments damaging credibility, or photos undermining claims of injuries. This latter category tends to contain the most dramatic, useful, and entertaining stories.

This material is admissible through hearsay exceptions in most jurisdictions. It also tends to resonate with jurors who can easily be lost in a sea of expert opinions, legal rules, instructions, arguments, and contradictory testimony. Everyone can relate to a photo, video, or post from Facebook. Moreover, a dramatic confrontation over a Tweet may be the closest a trial comes to a *My Cousin Vinny* moment and capture the jury's attention.

## III. Whom to Search

The first question when contemplating social media searches is whom to search. This question is easily answered: Everyone! Every party, fact witness, investigator, and expert witness can and should be searched. Anyone in the case who could potentially give a deposition, sign an affidavit, or testify at trial should be researched.

Attorneys usually restrict searches to the opposition. This is a disservice to the case and the client. A lot of questions can be answered by social media. Are there relationships between witnesses? Could there be some underlying bias? Do the parties have a history? Is the key fact witness a known embellisher? Like every avenue of investigation, it is impossible to know what can be found online until the search is done.

Expert witnesses should not be forgotten. Social media searches can be a way to either verify or disprove claims made in a *curriculum vitae* (CV), or find information for a challenge on cross-examination. Online reviews of individual doctors, engineers, and other professionals may prove useful, or open additional avenues of investigation. The expert witness system is based largely on trusting a CV actually represents an expert's credentials. An old proverb holds true: Trust, but verify. The impact on a case if a search reveals the CV of the opposition's expert is incorrect or misleading could be enormous!

It is just as important to search your own client and witnesses in the case. Bear in mind, *praemonitus praemunitus*: forewarned is forearmed. If something is "floating" out there, which compromises your client, or your posi-

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tion, it's better to find it at the start and have time to formulate a plan of action than have an 11th hour surprise.

## IV. When to Search

Social media is a fluid platform. These sites are continually updating privacy and security settings giving users ever greater control over what the public can see. These security preferences can be changed repeatedly and instantaneously. This has an impact on when social media searches should be done.

An initial search should be done as soon as a party or witness's identity is known. The subject should not be given an opportunity to alter his privacy settings, or delete or edit any content. A party should not be expected to know, or follow, the rules regarding spoliation of evidence.

Due to the fact that the platform is so fluid, searches should be updated throughout the case. Privacy settings could be relaxed, old content restored, new information made available, or the "Holy Grail," relevant content removed prompting spoliation motions and sanctions. On Facebook and some other websites, posts are often marked as "Edited" when they are changed after the fact. This can be a useful tool as they also note when the edits were made.

Some major events prompting an updated search include: depositions; fact witness disclosure; expert witness disclosures; affidavits; and final trial preparation. Do not take a “one and done” policy for social media. The closer to trial, the more it will be on a subject’s mind, increasing the chances of a post or comment online. These updated searches do not need to be as exhaustive as the initial. A brief review of the known profiles should suffice.

## V. What to Search

Facebook, Twitter, Instagram, and LinkedIn are a good place to start, as they are the most popular social media websites. However, other platforms should not be forgotten. YouTube is often overlooked in social media searches. Websites like Tumblr, Redditt, Flickr, Four-Square, Pintrest, MySpace, and whatever other websites happen to be popular at the time, should be searched. The popularity of these sites can ebb and flow.

In addition, search engines like Google, Bing, and Yahoo should be used. It is important to use all three as each has a different algorithm which may yield different results.

GoFundMe can also be a treasure trove of information. It is not uncommon for friends, family, or an individual himself to create a GoFundMe page after an accident or illness. Reviewing the page can yield some useful information. Depending on your jurisdiction, the proceeds from the GoFundMe campaign itself could even be an offset for damages.

## VI. How to Search

Often the only information available in the beginning is the subject’s name and address. An excellent place to start with this limited information is LexisNexis or West-Law. Both offer access to a variety of public records. Running these searches can result in useful information: date of birth, criminal history, prior lawsuits, e-mail addresses, phone numbers, past residences, and known associates.<sup>2</sup>

Next, Facebook should be searched. As mentioned above, Facebook is by far the largest social media platform; if the subject has any online presence, he or she will likely have a Facebook profile. While it is becoming more common for those under 25 not have a Facebook account and strictly use Twitter or Instagram, it is by no means a universal trend. Subsequently, other large platforms can be checked: Twitter, Instagram, and LinkedIn.

Searching the subject’s name alone is not enough. Full names used in pleadings or legal documents are rarely what people use for online profiles. A search should be done for the first name’s alternative variants and spellings. For example, William should also be searched as Will, Willie, Willy, Bill, Billy, Billie, etc.; and Elizabeth should also be searched as Liz, Lizzie, Bes, Bessie, Bess, Eliza, etc.

Going back to information from the public records, profiles can be looked up by email addresses. These often contain information like nicknames or birth years. For example, the email address is joeysmith92@gmail.com, may reveal that the user normally goes by Joey versus Joe or Joseph and that he was born in 1992. Additionally, 92 could indicate another important date, such as graduation or marriage. This can help narrow down results.

Another helpful tip is to search for a subject’s spouse, siblings, or children (if this information is available), then search the friends list for the subject. One profile may provide a link, handle, screen name, or profile name used on other sites. Keep a lookout for these.

Married women often add their maiden name on their profiles using either a “*nee*,” a hyphen, or parenthesis. This makes it easier to reconnect with childhood or pre-marriage friends. Use this to help in your search.

Some additional trends to consider: younger (usually more professional) individuals sometimes use a combination of their first and middle names for their social media profiles, omitting the last name. The purpose is usually to make social media searches (by, say, a potential employer) more difficult, or to maintain separate personal and professional online presences. Many married individuals, or long-term couples, have shared accounts. It may be worth searching different variations of John and Jane Smith, such as: John And Jane Smith; John-and-Jane Smith; JohnN’Jane; etc.

The subject may have more than one profile on a single platform. This could be for a variety of reasons: a personal page and a professional page; loss of login information, etc. If one profile is found it does not mean the search is over. Additional results should be reviewed so matching profiles are not missed. These older, sometimes forgotten, profiles can contain some surprising material.

After finding a profile, the next step is to verify it. The easiest method is by birth date. Look at posts for that date. Even if the site does not indicate it, or the subject does not announce it, there may be Happy Birthday messages from friends. If the profile indicates a different birthday, it can usually be eliminated.

Another way to verify is by examining the friends list and comparing it to the list of associates (children and spouses); location (city or address); employer; or by the content of the page itself (mentioning the current lawsuit, for example).

Once the subject’s page is reviewed, the search can branch out to family and friends. Viewing the pages of every friend or follower is not practical, of course, but the list can be narrowed by looking at the profile and seeing who likes, shares, and comments most often. While subjects may control what they post on their profiles, set

their own security settings, and manage tags, they cannot control friends' profiles. Family and friends are more apt to post embarrassing, or incriminating, statements, photos, or videos of an individual than he would be himself. So it can be worth the time to look at them as well.

Once the social media platforms have been searched, the next step is to search Google and other engines for more information on the subject. This should be done after the social media sites to increase the likelihood of having enough information to narrow results to relevant material.

Descriptors can be added in the search, such as the name of the streets the subject has lived on and the names of the cities/towns the subject has lived in to further narrow results. Each should be searched separately. If the earlier research uncovered a creative social media handle, screen name, or profile name, search these too. It is common for one name to be used across multiple social media platforms.

Boolean searches can be a useful tool. A Boolean search is a type of search allowing users to combine keywords with operators such as AND, NOT, and OR to produce more relevant results. Combine this with quotation marks, which can be used to find exact words or phrases. For example, John Smith in New York City returns 318,000,000 results on Google whereas "John Smith" AND "New York City" returned 1,030,000. The latter limits the search results to only those containing the two phrases.

It is important to be vigilant about published police radars, news articles, and obituaries. Police radars can be especially useful as they include all arrests regardless of whether the matter was later prosecuted. This can be useful when deciding whether to conduct a full criminal history on the subject.

## VII. What to Look For

Once a profile has been found and verified, it's important to look at everything available. One should resist the temptation to simply look at posts from the day of the incident, or browse for useful photos. There could be useful information hidden anywhere on the profile page. Many sites have a "biography" section; take a look at this in addition to what is posted or displayed on someone's wall or timeline.

One may be able to find information about the subject's financial situation. Parties in a lawsuit often plead poverty—something as small as a vacation photo or boasting of a new car is useful to contradict these claims. Relevant to collection matters, there may be clues or information about assets to seize.

Of course, one of the primary objectives of a social media search is to find information regarding the present case. However, this is not the only objective. It is equally

important to look for information regarding credibility. Photographs<sup>3</sup> or videos of the subject consuming excessive amounts of alcohol or illicit drugs and engaging in other illegal activity are always useful. Additionally, stories regarding cheating, lying, or scheming are important to note as they could undermine credibility.

Social media is also useful in getting to know the subject as an individual. It can help a person find out the subject's likes and dislikes. This can be important information for depositions or courtroom testimony. It might show an individual to be hot-tempered or impetuous regarding certain topics. This could be used to your advantage at trial if the right questions are asked.<sup>4</sup>

Alternatively, asking about a favored sports team or movie can set a person at ease, and loosen tongues. As with many things in litigation, the usefulness of this information depends on the style of the questioning attorney. Either way, the more information gathered about the subject the better. Some may seem irrelevant now, but one can never know what direction a case may take.

## VIII. How to Save What You Find

Just as important as finding information is saving it. Simply "screen-shooting" or copying the relevant information is not enough. It is important to save a complete copy of the profile so the information is available for later use.<sup>5</sup> If a spoliation motion is necessary, it is useful to have a full copy of the profile.

An easy method is to utilize the "print as PDF" function on most web browsers. This process not only saves a complete color copy, but also automatically hyperlinks to any additional content. To do this, scroll to the bottom of the profile. Next, make sure to expand all comment sections, "see more" links, replies, and/or re-Tweets so all of the content is visible. Then print the page as a PDF in the browser's options menu. Now the entire profile can be printed or viewed whenever required.

## IX. Ethical Issues

In most jurisdictions, attorneys have a duty to avoid unauthorized contact or deceptive tactics when dealing with litigants or third parties. Many state Bar associations have applied this to social media. An attorney can examine what is publicly available but cannot send friend requests to circumvent privacy settings, or ask anyone employed by their firm or office to do so.

An attorney (or his office) should not contact a party to the current suit through private messaging, comments, or any other method of communication available on social media. If the subject is not a party in the current action, some jurisdictions may allow communication if you do not engage in deceptive tactics and identify yourself as an attorney.<sup>6</sup>

Attorneys also have a duty to mitigate the loss, destruction, or spoliation of evidence. Attorneys cannot instruct or advise anyone to delete or alter information from social media. In fact, attorneys should advise their clients to do the opposite and let them know they should not alter or delete any social media information. In some jurisdictions, attorneys may be able to advise an individual to alter the security and/or privacy settings on their accounts to make finding information more difficult for the opposition. Attorneys should consult the state Bar association rules, ethics opinions, and relevant case law in their respective jurisdiction before doing so. Clients should be counseled to avoid social media, or carefully consider what they post or share during the case.

The best practice is to simply observe what is publicly available and make no contact. If useful information is there, or suspected, discovery requests and motions to compel can be used to access what is hidden behind privacy and security settings.

## X. Conclusion

The process outlined above is intensive and will require time to complete thoroughly. As noted, you do not know what you can find until you look. Participants on social media measure success in likes, shares, re-tweets, and comments. These seemingly innocuous pleasures can reveal a lot in litigation.

In the modern litigation landscape, a case can be won or lost on the internet. Attorneys should use every resource in their arsenal to secure a favorable outcome for their client. Social media should not be overlooked. A thoroughly executed social media search should be a fundamental part of any case preparation and analysis and could very well put your case on the path to victory.

## Endnotes

1. <https://www.wordstream.com/blog/ws/2017/11/07/facebook-statistics>.
2. You may need to check your office's subscription to these databases to determine what fees are applicable.
3. One note regarding videos and photos: these could have been taken days or even years before they were posted. When examining them, read the descriptions and any comments to pin down when they were taken.
4. On the other hand, if you know this information about your own witness prior to depositions or trial testimony, you can more effectively prepare.
5. This is useful to determine what, if any, information was altered or removed.
6. For more information, consult your State Bar Association rules, opinions, and relevant case law. An overview of ethical issues regarding social media search is available in *Social Media Snooping and Its Ethical Bounds* by Agnieszka McPeak, available at [http://arizonastatelawjournal.org/wp-content/uploads/2015/01/McPeak\\_Final.pdf](http://arizonastatelawjournal.org/wp-content/uploads/2015/01/McPeak_Final.pdf).

# Do You Have A Story To Share...

- Have you worked on or do you know of a special Pro Bono project?
- Has a pro bono case made a difference in the lives of others?
- Has an individual attorney or firm gone above and beyond to provide pro bono assistance?

We invite you to submit articles showcasing excellence in pro bono service for upcoming editions of the Pro Bono Newsletter. For more information, go to [www.nysba.org/probono](http://www.nysba.org/probono).

