

## Can Clicking “Like” Make or Break a Lawsuit?

Virtually everyone uses social media to engage with family and friends, to follow politics and popular culture, and to conduct business. As social media use becomes increasingly engrained in American culture, businesses have unique opportunities to reach new markets or recruit new employees. These new opportunities to connect have altered not only how businesses operate, but also the way litigants seek and obtain information in commercial disputes.

The connections that businesses and individuals make through social media can also have an important impact in litigation. While posting photos, changing statuses, “liking” pages, and chatting online may seem normal and innocuous to the casual user, all of those clicks may be fair game in pre-trial discovery if a court determines they are relevant evidence, or likely to lead to relevant evidence. Just like any other discoverable information, marking social media “private” will not shield it from disclosure if it is relevant to a case.

As a result, discovery of social media is one of the newest additions to the e-discovery family, and businesses therefore need to evaluate how they interact on social media. The following are just a few examples of how social media discovery may be used in civil cases:

- Jurisdiction. Businesses today do not, of course, need to be located in a particular physical location to market or sell their products there. If a business uses social media to connect with consumers who live in other jurisdictions, it may risk opening itself up to lawsuits in places where it does not conduct business or have an intentional presence.
- Intellectual Property. Discovery of a business’s social media could determine whether its products infringe on another company’s intellectual property rights by comparing what appears in posted photos, consumer comments about the products, and the likelihood of consumer confusion about the competing products.
- Employment. From workplace injuries to alleged harassment or discrimination, discovery of social media can help or harm employers attempting to defend these suits. For example, social media can show the extent to which an employee’s life changed before or after an injury, as well as the extent or lack of harassment or discrimination.

Businesses must also be mindful that the duty to preserve electronically stored information which may be relevant to litigation includes social media.

For example, in *Congregation Rabbinical College of Tartikov, Inc. v. Vill. of Pomona*, Case No. 07-CV-6304 (S.D.N.Y. Sept. 29, 2015), a Village Trustee made, and subsequently deleted, a Facebook post that resulted in sanctions against the Village itself in an action brought against the Village, even though the post had been made on her personal Facebook page. The plaintiffs were affiliated with the Orthodox Jewish community and sought to challenge various zoning and environmental ordinances that affected the construction of a rabbinical college. The Village Trustee’s Facebook post noted her disapproval of the plaintiffs in the case, indirectly referencing their religious practices. The Trustee removed the post after she was scolded by the Mayor for the contents of the post, but the Mayor then commented about the post on his personal Facebook page. After learning of the posts, the plaintiffs sought discovery of them, but the posts could not be produced because they had been deleted. The court found the posts to be relevant and noted that Facebook

posts are regularly produced in litigation as evidence of a party's thoughts and actions. As a result of the posts' deletion, the court ruled that the jury would be instructed that it could infer that the content of the Trustee's post evidenced a discriminatory animus towards the plaintiffs, in which case the Village would be precluded from offering evidence to rebut the inference.

The case of *Allied Concrete Co. v. Lester*, 285 Va. 295 (2013), provides another lesson in the importance of preserving social media in litigation. The lawsuit arose out of the death of Jessica Lester and the injuries sustained by Isaiah Lester when a concrete truck operated by an employee of Allied Concrete crossed the center line and tipped over because of the employee's excessive speed. During pre-trial discovery, Allied Concrete requested the production of certain photographs posted on Mr. Lester's Facebook account. Thereafter, Mr. Lester's attorney suggested that he "clean up" his Facebook page in order to avoid certain photographs being "blown up" for use at trial. After receiving this instruction from his attorney, Mr. Lester deactivated his Facebook page and responded to the discovery request by stating that he had no Facebook page as of that date. In response to a motion to compel, Mr. Lester reactivated the page to permit his attorney to obtain potentially damaging photos, but then deleted the photos completely. As a result, the trial court instructed the jury that it should "presume" that the deleted photographs were harmful to his case. And although Mr. Lester was ultimately awarded damages in the case, the deletion of the Facebook photographs was not without consequence. The trial court imposed sanctions of over \$500,000 against Mr. Lester's attorney and required Mr. Lester to pay \$180,000 in attorneys' fees and expert costs incurred by Allied Concrete to address the spoliation of evidence.

The severe sanctions imposed in these cases demonstrate the importance of understanding the implications of social media posts (and their removal) when a business faces, or reasonably anticipates, litigation. To mitigate these difficulties, businesses should prepare and implement policies governing the use and preservation of social media by management, as well as employees.

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