

Linking In to a New Source of Evidence in Commercial Disputes

But beware; ease of accessibility begets risks of unreliability

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Litigators in the digital age must be armed to combat evidentiary issues surrounding information procured through the Internet. The peculiar characteristics of social and professional media render its admissibility challenging to the trial lawyer. Because the portal for social media is unguarded, subscribers to social networks can create profiles that contain inaccurate or false information. Proper authentication therefore requires that the proponent establish that the user is who the profile purports to be and that the same user authored the information accessed and proffered as evidence. As a result, authentication of social media information presents the newest layer of evidentiary challenges to admissibility.

Professional and social media networks are the modern day marketing machines for enterprises large and small. Professionals, individuals and businesses alike can measure marketability by the number of connections on LinkedIn, friends on Facebook and/or followers on Twitter. Subscribers can virtually market themselves with a keystroke, mouse-click or verbal command. Without leaving a desk, the subscriber can access a full network of professionals and seek advice, inquire about opportunities or comment on updates. Every share, “like” and comment is digitally recorded and accessible for later discovery. The nearly real-time transmission of posting renders comments and updates particularly useful for later evidential purposes. Website geolocation provides both the time and location of the communication or photograph. An overwhelming amount of information is available from a few words or pictures (and metadata). Ease of accessibility, however,

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begets risk of unreliability, as the sites are vulnerable to tampering and misuse.

Litigators must therefore remain mindful of these risks when gathering evidence from social and professional media platforms. Such evidence must be verified both as to the account user and authorship of transmission. While social and professional media sites take measures to ensure the data they host is accurate by enforcing user agreements and holding users accountable, such monitoring is not fool proof.

Recently, LinkedIn initiated an action in California federal court against a competing recruiting company for allegedly

creating hundreds of fake LinkedIn profiles identified by LinkedIn's security measures and technical safeguards. *LinkedIn Corp. v. Robocog Inc. d/b/a HiringSolved, and Shon Burton*, Case No.:C14-00068 (Cal. N. D. 2014). LinkedIn alleged that the competitor's practices jeopardized the integrity of LinkedIn's networks, whose users expected to connect with legitimate profiles. The safeguards referenced appear to primarily protect LinkedIn's recruiting business, and it remained unclear whether the safeguards were capable of locating and isolating a single phantom profile. As a result, user complaints remain the pri-

mary source to report and enforce the proper use of social media.

As society remains committed to virtual connections, emerging case law seeks to develop the protocol for authenticating and admitting social media evidence. See Loryn P. Riggola, "Social Media from Computer to Courtroom," The Metropolitan Corporate Counsel (March 14, 2013); see also ABA Rules of Professional Conduct Model Rule 1.1 (commenting on the evolving ethical implications for lawyers to understand technological advances).

Unlike sister social media sites, LinkedIn, the "world's largest professional network," seems to provide more structure and technological safeguards to prevent unauthorized access and data scraping. Although the number of Facebook users outpaces LinkedIn members, LinkedIn is designed to serve the domestic and international professional community. Reportedly, two new LinkedIn members are registered every second, and according to LinkedIn's "about us" section, it has "250 million members in over 200 countries and territories." The number of businesses with LinkedIn pages totals roughly 3 million.

Not surprisingly, litigators are starting to offer LinkedIn accounts and connections as evidence of business practices and operations, jurisdictional presence and potential violations of restrictive covenants by former employees. In this context, the judiciary has addressed the crucial concern of authenticity which warrants the consideration of every litigator.

Any person can create a LinkedIn account without independent verification of the imputed information. After the user registers an email account, selects a user name and password, a LinkedIn account is created. The user must agree to the terms of the user agreement, which contains provisions requiring accuracy, but these obligations are largely user-regulated. The network platform provides no verification of the accuracy of the content.

Courts therefore scrutinize the admission of social media evidence. Authentication is a precondition to admissibility of relevant nontestimonial evidence, and for social media courts often require information in addition to the proffered evidence when determining its sufficiency. To authenticate evidence, a proponent must "produce evidence sufficient to support a finding that the item is what the proponent claims it is." See Fed. R. Civ. P. 901; see also N.J. R. Evid. 901; *U.S. v. Sliker*, 751 F.2d 477 (2d Cir. 1984).

Burgeoning case law offers some guidance on authenticating social media evidence as courts adapt to the evolving methods of communication and society's craving for instant connection. See Honorable Paul W. Grimm, Lisa Yurwit Buegstrom, Melissa M. O'Toole-Loureiro, "Authentication of Social Media Evidence," 36 Am. J. Trial Advoc. 433 (Spring 2013) (stating, for example, "Existing Case Law (Clear as Mud)"). While a proponent must identify the account owner, proving only that a message originated from a particular profile, without more, is likely insufficient evidence of authorship. 36 Am. J. Trial Advoc. 433, 448. Because the portal of social media can be trespassed and misused, the information accessed can be unreliable.

Authenticity of social and professional media thus requires more than the profile information itself. For example, LinkedIn profiles were held to be "far too conclusory" to establish a corporate presence for jurisdictional purposes. *Ambriz Trading Corp. v. URALSIB Financial Corp.*, 2011 WL 5844115 (S.D.N.Y. 2011). Likewise, courts have noted that the location indicator assigned by LinkedIn is not dispositive of a user's contacts for jurisdictional purposes. *Safety Software Ltd. v. Rivo Software*, 2012 WL 1267889 (S.D.N.Y. 2012); see also *Ambriz*. Similarly, in a restrictive covenant case, the court commented that a request of the competitor to join the former employee's LinkedIn account was noteworthy but not "dispositive" of a violation by the former employee. *General Patent Corp. v. Wi-Lan*, 2011 WL 5865194, *6 (S.D.N.Y. 2011).

In addition, in the case of *Management Data Systems v. Generis Knowledge Management*, 2014 WL 1418460 (D.N.J. 2014), the court found cryptic comments on LinkedIn insufficient to establish a prima facie claim that a company's reputation was damaged. Finally, a New Jersey court held that a LinkedIn profile cannot replace a curriculum vitae for a potential expert at trial, because the information contained therein is not verified. See *Singh v. Bank of America*, 2011 WL 2314762, *3, 5 (N.J. App. Div. 2011) (affirming that the LinkedIn website print-out was insufficient evidence of a potential expert's education and expertise, and nothing in the record independently verified the LinkedIn profile's accuracy). Accordingly, although scant, the case law makes clear that LinkedIn profiles alone are likely insufficient to establish a particular point of contention.

Virtual connections increase exponentially as checking LinkedIn, Facebook and Twitter is a constant daily activity for most. For commer-

cial disputes, the content generated by the niche market of LinkedIn members offers a new and valuable opportunity to obtain evidentiary data. Conceptually, LinkedIn is the amalgamation of all other social media sites with a professional business focus. The ability to data-mine LinkedIn is expansive. LinkedIn incorporates profiles like Facebook, but also includes the functional equivalent of email through LinkedIn Messages. LinkedIn also enables users to mimic Twitter tweets by updating statuses, and incorporates message boards by enabling a response to the communications or articles posted by others. All of these functions equate to potential sources of evidence for lawyers.

Decisional law makes clear, however, that profiles and postings, without more, are likely insufficient to prove a point of contention. As a result, a prudent approach is to assemble evidence to authenticate both the origin of the user profile and the information proffered as early as possible in discovery. A proper foundation of accuracy will enable admissibility with fewer challenges. Authentication of evidence is facilitated, for example, by a party's admission that she is the account owner and that the information on LinkedIn is indeed accurate. Admissions are considerably easier than obtaining the information directly from the network provider.

Subpoenaing professional and social media sites is cumbersome as these networks will likely seek protections under the Stored Communications Act, which does not exempt civil subpoenas from the prohibition of disclosing certain content. 18 U.S.C. §2701, et. seq.; see also Loryn P. Riggola, "E-Discovery Takes a Turn-Charting the Course to Discovery From Social Networks," The Metropolitan Corporate Counsel (Jan. 31, 2011). Absent admissions, circumstantial evidence can be used to establish authenticity. The available probative evidence from LinkedIn is overwhelming and a worthy component of any case preparation by a skilled litigator. Effectively strategizing a tailored discovery approach acknowledging these steps toward admissibility will reward litigators with important social/professional media evidence.

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