



Panel 4: Addressing Privacy Issues in Social Media Discovery

The 13th Annual Sedona Conference Institute:
Protecting Privacy, Confidentiality, and Privilege in Civil Litigation
March 7–8, 2019
The Ballantyne Hotel & Lodge, Charlotte, NC

Dialogue leaders

- ❖ Hon. J. Michelle Childs
 - ❖ U.S. District Court, District of South Carolina, Columbia, SC
- ❖ Kimberly Duplechain
 - ❖ Littler Mendelson, P.C., Washington, DC
- ❖ Phil Favro
 - ❖ Driven, Inc., Alpine, UT
- ❖ Robert Keeling III
 - ❖ Sidley Austin LLP, Washington, DC



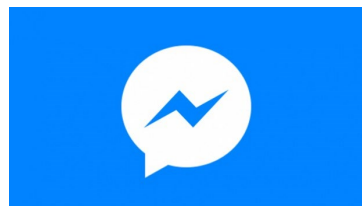
Materials

- ❖ “Required” reading
 - ❖ The Sedona Conference, *Primer on Social Media, Second Edition*, 20 SEDONA CONF. J. 1 (forthcoming 2019).
 - ❖ Supplemental resources
 - ❖ Philip Favro & Keith Call, *A New Frontier In eDiscovery Ethics: Self-Destructing Messaging Applications*, UTAH BAR JOURNAL (Mar/Apr 2018).
 - ❖ Robert Keeling *et al.*, *Neither Friend Nor Follower: Ethical Boundaries on the Lawyer’s Use of Social Media*, 24 CORNELL J. OF LAW AND PUBLIC POLICY 145 (2014).
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Traditional Social Media Platforms



Messaging Applications



Social Media Ethics Traps

- ❖ Staying Abreast of Technological Developments
 - ❖ Model Rule of Professional Conduct 1.1, Comment 8
 - ❖ “Friending” Adverse Parties, Witnesses, or Jurors
 - ❖ Model Rules of Professional Conduct 4.2, 8.4(c)
 - ❖ Preservation / Obstruction / Suppression of Evidence
 - ❖ Model Rule of Professional Conduct 3.4(a)
 - ❖ Preservation / Duty of Candor / Honesty
 - ❖ Model Rules of Professional Conduct 3.3(a)(1), 8.4(c)
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Scope of Discovery in Federal Court

“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”



FED. R. CIV. P. 26(b)(1)

Preservation Failures Lead to Sanctions

“I have the right to do whatever I want to do with my Facebook account, regardless of a lawsuit or not. If I wanted to—if I want to delete every single post on my Facebook page, I have the right to do so.”

Nutrition Distrib. LLC v. PEP Research, LLC,
16-cv-02328, 2018 WL 3769162 (S.D. Cal. Aug. 9, 2018),
aff'd in part 2018 WL 6323082 (S.D. Cal. Dec. 4, 2018).



Privacy as a Proportionality Factor

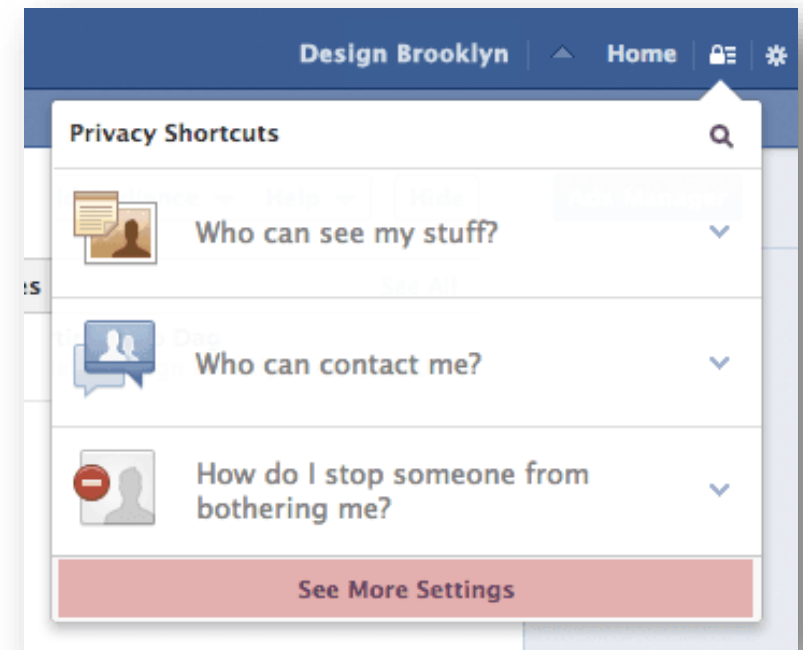
“Courts and commentators have recognized that privacy interests can be a consideration in evaluating proportionality, particularly in the context of a request to inspect personal electronic devices.”



Henson v. Turn, Inc., No. 15-cv-01497-JSW (LB),
2018 WL 5281629 (N.D. Cal. Oct. 22, 2018).

Impact of Social Media Privacy Settings

- ❖ Enabled privacy settings on social media accounts do not create a legal privilege or other barrier to obtaining discovery of relevant evidence.
- ❖ *Forman v. Henkin*, 30 N.Y.3d 656, 664 (2018).



Impact of Social Media Discovery on Third Parties



“While parties may pursue discovery of relevant social media content regarding third parties, they should consider managing the discovery to minimize potential embarrassment to third parties and protect against unnecessary disclosure of their sensitive personal information.”

The Sedona Conference, *Primer on Social Media, Second Edition*,
20 Sedona Conf. J. 1, 29-30 (forthcoming 2019).

Questions and comments?

