Social Media
An Effective Evidentiary Tool

By Pamela W. Carter and Shelley K. Napolitano

Only the foolish or uninitiated could believe that Facebook is an online lockbox for your secrets.

—Judge Richard Walsh[1]

The ability to use information discovered from social media sites as evidence in litigation has not yet been fully tested in courtrooms. In that vein, attorneys must understand the evidentiary and ethical implications of seeking and discovering such evidence. Attorneys, especially litigators, need to become acquainted with the potential usefulness of social networking sites, as well as the potential hazards and limitations that such use can sometimes bring. In order to best serve one's clients, it is vital to be up to date on the practical and legal aspects of researching, collecting and authenticating information taken from social media sites, as well as the admissibility of such information in court. Specifically, Facebook, MySpace, LinkedIn, Twitter, Instagram and other social networking websites are becoming increasingly useful in the legal world. In fact, 72 percent of online adults in the United States use these or other social networking websites.[2] Since the beginning of the social media era in 2005, social media usage has increased by 800 percent.[3]

Now, information that was once only known by close family and friends is broadcasted widely over the Internet, which means that attorneys have a readily accessible pool of evidence to consider in preparation for litigation.

Successfully utilizing social media evidence requires reevaluating both the way evidence is obtained and the hurdles that must be overcome in order to ensure the evidence is admissible.

Accessing the Evidence

All evidence, including that gleaned through social media networks, is subject to the rules of admissibility. However, the pliable nature of social media data allows for the constant manipulation of information. Thus, it is essential to keep authentication considerations in mind while collecting and producing this type of evidence.

How an attorney will go about accessing the information on a user's page will depend upon whether the information is public or private. If the user's page is visible to the public, an attorney or his agent can access the page and print or save the information freely.[4]

However, not all information on a social network user's page is publicly available; rather, the amount of available information depends upon a user's privacy settings. For example, Facebook offers various privacy settings that, depending upon a user's selection, can (1) hide an entire profile so that only the user's name and a profile picture are visible, (2) display the entire profile to all Facebook users, or (3) limit the display of information to only those that the user has accepted as "friends."

But even if the user's page is made private and thus unavailable to the public, the attorney may nonetheless still be able to gain access. During this discovery process, it is important to remain cognizant of the rules of professionalism. One method that has been sanctioned by some courts is for the attorney or the attorney's agent to request "friendship" with that user by using his real name.[5] In this way, the user can make an educated decision to share his personal information with the attorney or agent by accepting the friend request and thereby providing access to the user's information.[6] This method is not necessarily foolproof, though, as it may violate or at least implicate ABA Rule 4.2, the no-contact rule.

Another method is to request the information on the page during the discovery process. Courts are less likely to view social media discovery requests as unwarranted "fishing expeditions" if they are limited to dates relevant to the events at issue in the case (for example, in an employment discrimination case, the dates of employment) or specific topics (such as "all photos of plaintiff engaging in activities outside the home" or "all communications referencing defendant").[7] If the opposing party refuses, the seeking attorney should file a motion to compel for discovery of the social networking page and/or communications made through the site.[8] As long as the request is reasonably designed to lead to discoverable information and not overly broad in time or scope, the request is likely to be granted.[9] However, it should be noted that because social network discovery is relatively new, the outcome depends largely on the judge.

As parties become more aware of the possibility of social media discovery, some individuals may be tempted to delete their Facebook page or Twitter account in an effort to avoid being forced to hand over the content. But as social media evidence has become more commonplace, attorneys have begun issuing preservation letters at the onset of litigation in order to prevent such deletion or modification of networking sites. With the existence of a preservation letter, it is possible to obtain sanctions if the evidence suddenly disappears. Similarly, some attorneys have begun requesting that judges order the parties to sign a consent form that can be forwarded to the networking site with the subpoena.

Attorneys should be aware of the federal Stored Communications Act (SCA).[10] The SCA regulates the dissemination of electronically stored information in civil matters and provides a cause of action for damages against anyone who discloses electronic information without authorization. Courts have interpreted this legislation to allow social networking and other websites to decline to give stored information without consent when faced with a civil subpoena. Generally, social networking sites will provide basic user information in response to a valid subpoena, but will not provide posts or other communications. Thus, it is less burdensome to access user information from the user than from the website provider.

Few courts have addressed the relationship between the SCA and social networking user posts, but recently the U.S. District Court for New Jersey released an in-depth opinion on the topic. In *Ehling v. Monmouth-Ocean Hosp. Service Corp.*,[11] a hospital employee printed Facebook posts from co-employee Ehling's Facebook page and gave the printouts to the director of administration, leading to a disciplinary action against Ehling. Ehling alleged a violation of the SCA. The district court, following the lead of California's *Crispin*,[12] held that Facebook wall posts are protected by the SCA. However, the court also held that because the wall posts were accessed by Ehling's "friend" — someone given access to the information by the user — the posts fell under the SCA's "authorized user exception." However, it should be noted that the authorized user exception does not apply in cases where the purported authorization is obtained by coercion or under pressure.

Form of the Evidence

Once the attorney has gained access to the information and found something useful, the next step is to know how to get the data into physical form. Web information can be printed, screen captured, saved to a data storage device, or produced by a third party. However, courts also have accepted social networking information as evidence in other different forms. Since this area is relatively new, there is no one, single established best form. Printouts are still the most frequently used form, likely because it is the easiest and most inexpensive to obtain. There are advantages to each of the above forms, so the decision rests with the attorney.

Printouts of social networking information have been accepted by some courts as long as the information was obtained without deceit (*i.e.*, "friending" the plaintiff-user under a false identification).[13] Further, while some courts allow printouts of online information introduced by parties to the case,[14] others require more for authentication.[15] Other courts have allowed printouts but also have required either testimony in court[16] or an affidavit by the person who located and printed the information (be it the attorney, a paralegal or a party to the suit).[17] In one case, the court allowed into evidence a printout that contained the URL address and date after the court verified that the URL produced the same content as the printout. In another case, social networking evidence was admitted and a jury decided whether that evidence was credible.[18] Overall, the best offering of printout evidence seems to be the printout that shows the URL address and the date, which is then accompanied by a declaration of the witness who discovered and printed the evidence.[19]

Screen capturing is taking a snapshot of the entire computer screen, including the task bar, and printing the captured view.[20] This method has not been discussed at length in jurisprudence, but may be helpful because it verifies the URL address and the time and date located on the task bar. Although the admissibility of a screen capture was not at issue, a U.S. District Court considered screen captures of a Facebook page in ruling on a motion for summary judgment in *Tabani v. IMS Associates, Ltd*.[21]

Information saved to an electronic data storage device, such as a CD-ROM or USB drive, will typically contain more information than a mere printout. An electronic data storage device also will save metadata.[22] Metadata is information about the creation of the file that shows when the data was saved and if it has been modified.[23] This is helpful because it proves when the data was saved and that the electronic form is true to the original data.[24]

An attorney can make a request to a third party, such as the Internet Archive[25] or an employee of a social networking site. The Internet Archive service shows what a website looked like on a certain date. In *Telewizja Polska*, this service was used to show a business' website on different dates over a period of time.[26] Archive printouts and the affidavit of an Internet Archive employee were deemed sufficient to meet authentication.[27] However, a subsequent case[28] in a different federal district court required that an Archive employee have personal knowledge of the contents of the site to make a declaration supporting archival evidence. Additionally, a Facebook or MySpace employee may be able to verify information on the network. In *State of Louisiana v. Trevon Wiley*, the U.S. 5th Circuit accepted testimony from a MySpace manager verifying that certain information, such as user name, location and initial IP address, was correctly stored in the MySpace system.[29]

Social Media as An Impeachment Tool

Social media is a particularly helpful tool to impeach a witness. Evidence drawn from various websites can often expose the truth of a matter.

Facebook and Twitter allow users to make a status update and tweet, respectively. In a Pennsylvania state court case, a stock car driver filed a personal injury suit to recover damages resulting from being rear-ended during a cool down lap.[30] The plaintiff alleged permanent impairment, loss and impairment of general health, strength and vitality, and the inability to enjoy certain pleasures of life; however, the public portions of his Facebook profile showed comments made about a recent fishing trip. This information was used at the trial of the case.

The recent case of *Allied Concrete Co. v. Lester* demonstrates the importance of preserving social media evidence and the perils of advising clients involved in litigation to remove damaging posts from their social media pages.[31] Following a car accident involving an Allied Concrete truck, Lester sued Allied Concrete for compensatory damages for both his personal injuries and the wrongful death of his wife.[32] Allied Concrete sought discovery of Lester's Facebook page, which included photos of Lester holding a beer can while wearing a T-shirt printed with "I ♥ hot moms."[33] Lester's attorney, through his paralegal, promptly instructed Lester to "clean up" his Facebook page because "[we don't] want blow ups of other pics at trial." Lester then deleted a number of photos from his page.[34] Although the deleted photos were eventually produced and Lester ultimately prevailed at trial, the court ordered sanctions in the amount of $180,000 for Lester and $542,000 for his attorney. Also, Lester's attorney currently faces a disciplinary hearing related to his role in the cover-up. Just as you would not tell your client to shred relevant documents, Enron-style, it is also wise to advise your client not to get rid of social media posts.[35]

Admissibility of Social Media Evidence

While there are laws on the discovery of electronically stored information, no law has been created to separately address the admissibility of such information.[36] In order to fill this gap, courts have adapted the general admissibility rules to also cover the admission of electronically stored information. As a refresher, the admissibility of evidence centers around five tests: (1) relevance, (2) authentication, (3) hearsay, (4) original writing requirement, and (5) probative value outweighing prejudicial effect.

Determining whether evidence is relevant and passes the balancing test does not require a different analysis in the context of social media evidence. However, social media requires new considerations in the areas of authentication, hearsay and form.

Authenticating Evidence

The authentication standard for Louisiana courts and federal courts requires that evidence be "sufficient to support a finding that the matter in question is what its proponent claims."[37] Despite its seemingly simple wording, courts have struggled in consistently applying a uniform approach to this principle in the context of social media evidence. Some courts have taken an extreme view, opposing all Internet evidence as inherently unreliable.[38] Others have welcomed Internet printouts containing the URL address and date that can be verified by a "statement or affidavit from someone with knowledge."[39]

A recent decision of the U.S. 5th Circuit has addressed authentication of photographs uploaded to MySpace and Facebook. In *U.S. v. Winters*, the government relied on testimony from a witness that he discovered photographs on the defendant's MySpace and Facebook web pages and the defendant's admission that the web pages did belong to him.[40] However, the 5th Circuit determined on appeal that this was only enough to prove that the defendant displayed pictures of weapons, money and drugs, but not enough to prove that the defendant had actual possession of those items. The court noted that if the witness were able to testify that he had actually seen the defendant in possession of those items, then the pictures would have been properly authenticated.

Hearsay Rules

Evidence falling under the definition of hearsay[41] is inadmissible.[42] Generally, there are five questions that must be answered to determine whether evidence is admissible under the hearsay rules.

First, is the evidence a statement as defined by Rule 801(b)? Second, was the statement made by a "declarant," under Rule 801(b)? Third, is the statement of-

fered to prove the truth of the matter, as in Rule 801(c)? Fourth, is the statement excluded from the definition of hearsay in Rule 801(d)? Fifth, if the statement otherwise qualifies as hearsay, is it covered by one of the hearsay exceptions within Rules 803, 804 or 807?

Because hearsay is such a broad category, there are no general hearsay guidelines when it comes to electronically stored information. However, *Lorraine v. Markel Am. Ins. Co.* provides an incredibly thorough analysis of the various hearsay considerations in the context of electronically stored information and should be consulted for additional information.[43]

In order to qualify as a statement, there must be an assertion. One case held that the text and images that appeared on the defendant's web page did not qualify as a statement insofar as the text and images were asserted for the truth of the fact that they appeared on the website because, in effect, they were not asserting anything.[44]

Whether evidence is admissible depends largely on the purpose for which the statement is offered. For example, the U.S. 11th Circuit affirmed the admissibility of emails between a defendant and a third person when the emails were set forth to show that a series of communications between the two had taken place, and not that the statements made in the underlying conversations were true.[45]

Each hearsay exclusion and exception requires a different consideration. An admission of a party-opponent is one example of a hearsay exclusion and multiple courts have found that emails by a party-opponent qualify as such an admission. Along these lines, it is likely that evidence of a private message generated through a social networking site, if properly accessed, would similarly qualify as an admission of a party-opponent.[46] Additionally, the "present sense impression" exception may be a gold mine for attorneys because many social media users have constant access to their accounts on their cell phones. Many media sites display the time of day and allow the option of "checking-in," which pinpoints the location of a user at a particular time. These features allow attorneys to accurately determine whether a post, picture or other communication coincides with significant events at issue in the case.

Original Writing Requirement

Louisiana and federal courts require the original writing, recording or photograph "[t]o prove the content of a writing, recording, or photograph."[47] In an effort to make sense of quickly developing technologies, many courts consider a copy of the original as having the same force and effect as the original. Since a duplicate is any record created by means that accurately reproduces the original, it is not necessary to obtain an actual "original."[48]

Printouts can serve as an original document or the best evidence of computer-generated information, such as a website.[49] In fact, Federal Rule of Evidence article 1001 and Louisiana Code of Evidence article 1001 states that if "data [is] stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.'" One court even deemed a printout of an instant messaging conversation that was copied into a blank document to meet the original writing requirement.[50]

Expectation of Privacy

Social networking has prompted courts and legal scholars to consider the constitutional implications of electronically stored information as evidence, particularly under the Fourth Amendment. The central question is whether social media users have a reasonable expectation of privacy with regard to information submitted to social media websites.

Although users are depositing information into a public forum, many find comfort in social networking privacy settings. As such, users have begun asserting an expectation of privacy when their communications are so limited on social networking sites. For instance, private messaging occurs between two or more users and the settings can be adjusted such that profile information can only be shared with a limited group of users.

The SCA may suggest that users do, in fact, have a reasonable expectation of privacy when using privacy settings. In *Ehling*, the court held that Facebook wall posts were protected by the SCA when the user allowed only "friends" to view her wall posts.[51] However, the caveat is that Internet service providers cannot disseminate this information to others under the SCA. But, of course, this does not prevent authorized users from sharing this information.

It is possible that, over time, American courts may become less likely to find a reasonable expectation of privacy outside of the narrow protections of the SCA, but currently courts exhibit diverging views on the matter.[52] Generally, people have a reasonable expectation of privacy in the contents of their home computers. But this expectation is not absolute, and may no longer exist when a computer user transmits data over the Internet.[53] In *U.S. v. Meregildo*, a witness did not have a legitimate expectation of privacy as to his Facebook status posts, which were disseminated to his "friends," because these authorized users were able to view and disseminate that information freely, including sharing it with the government.[54] Conversely, another federal court found that a student did have a reasonable expectation of privacy with regard to private information posts and private messages between users.[55]

Conclusion

Social media evidence deserves the same attention and prudence by courts and lawmakers as other, more traditional forms of evidence. As the use of social media rapidly increases, courts will no doubt produce a greater body of case law that will direct attorneys as how to best use this type of evidence in the course of the litigation. While some courts treat online information differently, many have been quick to apply the traditional rules of evidence, limit overbroad discovery requests, and require production of all relevant materials, regardless of the litigator's attempt to control access to those materials.

Keeping abreast of the developments and techniques in the admissibility of electronically stored information will make the savvy attorney ready for any evidentiary burden in the social networking era. It is certain that social media evidence has become an important part of modern litigation, and lawyers should be proactive in addressing the novelty of this evidence, its relevance and its potential prejudice. It is best to remember that a tweet today may be used as evidence tomorrow.

FOOTNOTES

1. Largent v. Reed, 2011 WL 5632688, at *10 (Pa. Ct. Com. Pl. 2011).

2. Joanna Brenner and Aaron Smith, Pew Internet, "72% of Online Adults are Social Networking Site Users" (2013), available at *http://pewinternet.org/Reports/2013/social-networking-sites/Findings.aspx*.

3. Steve Olenski, "Social Media Usage Up 800% For U.S. Online Adults In Just 8 Years," Forbes.com (Sept. 6, 2013), *http://www.forbes.com/sites/steveolenski/2013/09/06/social-media-usage-up-800-for-us-online-adults-in-just-8-years/*.

4. Moreno v. Hanford Sentinel, Inc., 91 Cal. Rptr. 3d 858 (Cal. Ct. App. 2009).

5. Jaclyn S. Millner and Gregory M. Duhl, "Social Networking and Workers' Compensation Law at the Crossroads," 31 Pace L. Rev. 1, 30 (2011).

6. Kathryn R. Brown, Note, "The Risks of Taking Facebook at Face Value: Why the Psychology of Social Networking Should Influence the Evidentiary Relevance of Facebook Photographs," 14 Vand. J. Ent. & Tech. L. 357, 381-82 (2012).

7. *See*, *e.g.,* Kear v. Kohl's Dep't Stores, Inc., 2013 WL 3088922, at *17-18 (D. Kan. 2013) (finding "Defendant has sufficiently limited the scope of this request by seeking limited access during the relevant time frame rather than seeking unfettered or unlimited access to Plaintiff's social media accounts") (citation omitted); EEOC v. Simply Storage Mgmt., L.L.C., 270 F.R.D. 430, 436 (S.D. Ind. 2010) (refusing access to entire account and instead ordering employees to produce postings that relate to "any emotion, feeling, or mental state").

8. Sam Glover, "Subpoena Facebook Information," Lawyerist.com, July 10, 2009 (explaining that Facebook requires a subpoena and additional user information to gain access to user content).

9. Ledbetter v. Wal-Mart Stores, Inc., 2009 WL 1067018, at *2 (D. Colo. 2009).

10. Stored Communications Act, 18 U.S.C. §§ 2701-2712 (2006).

11. Ehling v. Monmouth-Ocean Hosp. Serv. Corp., 11-CV-03305, 2013 WL 4436539 (D.N.J. Aug. 20, 2013).

12. Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965, 976 (C.D. Cal. 2010).

13. The Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, Formal Op. 2010-2 (2010), available at *http://www.nycbar.org/pdf/report/uploads/20071997-FormalOpinion2010-2.pdf* (discussing how to obtain evidence from social networking websites).

14. Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F.Supp.2d 1146 (C.D. Cal. 2002) (printouts are reasonably admissible because they show the dates and web addresses, are practical in form, and are supported by statements of the declaration of a party to the case); U.S. Equal Employment Opportunity Comm. v. E.I. DuPont de Nemours & Co., 2004 WL 2347559 (E.D. La. 2004) (allowing printout of a table on the U.S. Census Bureau's website); Jarritos, Inc. v. Los Jarritos, 2007 WL 1302506 (N.D. Cal. 2007), *rev'd and remanded sub nom.*, Jarritos, Inc. v. Reyes, 345 F. App'x. 215 (9 Cir. 2009) (website printout allowed when plaintiff's counsel made declaration that he typed in the URL address evident on the printout and then printed the site); Daimler-Benz Aktiengesellschaft v. Olson, 21 S.W.3d 707 (Tex. App. 2000) (admitting printouts when affiant gave personal knowledge that printouts were accurate copies of original); Jonathan L. Moore, "Time for an Upgrade: Amending the Federal Rules of Evidence to Address the Challenges of Electronically Stored Information in Civil Litigation," 50 Jurimetrics J. 147, 161 (2010) [hereinafter Moore].

15. In re Homestore.com, Inc. Sec. Litig., 347 F. Supp. 2d 769, 782-83 (C.D. Cal. 2004) (rejecting time stamp and URL on printout as sufficient authentication); Novak v. Tucows, Inc., 2007 WL 922306 (E.D.N.Y. 2007), *aff'd* 330 F. App'x. 204 (2 Cir. 2009) (excluding printouts of websites when declarant lacked personal knowledge to prove that website was what he claimed).

16. Saadi v. Maroun, 2009 WL 3736121 (M.D. Fla. 2009); TIP Systems, L.L.C. v. SBC Operations, Inc., 536 F. Supp. 2d 745 (S.D. Tex. 2008).

17. Kassouf v. White, 2000 WL 235770 (Ohio Ct. App. 2000).

18. U.S. v. Cole, 423 F. App'x 452 (5 Cir. 2011).

19. U.S. v. Standring, 04-CV-730, 2006 WL 689116, at *3 (S.D. Ohio 2006) (admitting printouts containing URL and date in conjunction with declaration by witness and excluding printouts without declaration).

20. Sue Chastain, "How to Capture a Screen Shot of your Desktop or the Active Window in Windows," About.com, *http://graphicssoft.about.com/cs/general/ht/winscreenshot.htm* (last visited Nov. 1, 2013).

21. Tabani v. IMS Associates, Ltd., 2013 WL 593140 (D. Nev. 2013).

22. See Moore, *supra* note 14.

23. *Id.*

24. *See* W. Lawrence Westcott II, "The Increasing Importance of Metadata in Electronic Discovery," 14 Rich J. L. & Tech. 10 (2008) (more information on metadata and its evidentiary use).

25. Internet Archive Wayback Machine, *http://archive.org/web/* (last visited Nov. 1, 2013).

26. Telewizja Polska USA, Inc. v. Echostar Satellite, 2004 WL 2367740 (N.D. Ill. 2004).

27. *Id.*

28. St. Luke's Cataract and Laser Institute, P.A. v. Sanderson, 2006 WL 1320242 (M.D. Fla. 2006).

29. State v. Wiley, 68 So.3d 583 (La. App. 5 Cir. 4/26/11).

30. McMillen v. Hummingbird Speedway, Inc., 2010 WL 4403285 (Pa. Ct. Com. Pl. Sept. 9, 2010).

31. 285 Va. 295 (Va. 2013).

32. *Id.* at 300-301.

33. *Id.* at 302.

34. *Id.* at 303.

35. Romano v. Steelcase, Inc., 907 N.Y.S. 2d 650, 652 (N.Y. Sup. Ct. 2010).

36. Jonathan L. Moore, "Time for an Upgrade: Amending the Federal Rules of Evidence to Address the Challenges of Electronically Stored Information in Civil Litigation," 50 Jurimetrics J. 147, 148 (2010).

37. Fed. R. Evid. art. 901 (West 2014); La. Code Evid. Ann. art. 901 (West 2014).

38. St. Clair v. Johnny's Oyster & Shrimp, Inc., 76 F.Supp.2d 773, 774 (S.D. Tex. 1999).

39. 34 A.L.R. 6th 253 (originally published in 2008); *see,* Nightlight Sys., Inc. v. Nitelites Franchise Sys., Inc., 2007 WL 4563875, at *6 (N.D. Ga. 2007); St. Luke's Cataract and Laser Institute, 2006 WL 1320242, at *2 (M.D. Fla. 2006).

40. United States v. Winters, 2013 WL 3089514 (5 Cir. 2013).

41. "Hearsay" is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered into evidence to prove the truth of the matter asserted. *See*, Fed. R. Evid. art. 801(c) (West 2014); *see also*, La. Code Evid. art 801(c) (West 2014).

42. Hearsay is not admissible except as otherwise provided. *See*, Fed. R. Evid. art. 802 (West 2014); *see also*, La. Code Evid. art. 802 (West 2014).

43. 241 F.R.D. 534, 562-63 (D. Md. 2007).

44. Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146 (C.D. Cal. 2002).

45. United States v. Siddiqui, 235 F.3d 1318 (11 Cir. 2000).

46. *Id.*; *see also*, United States v. Safavian, 435 F. Supp. 2d 36 (D.D.C. 2006).

47. Fed. R. Evid. art.1002 (West 2014); La. Code Evid. art. 1002 (West 2014).

48. Patrick Marshall, "What You Say on Facebook May Be Used Against You in A Court of Family Law: Analysis of This New Form of Electronic Evidence and Why It Should Be on Every Matrimonial Attorney's Radar," 63 Ala. L. Rev. 1115, 1131 (2012).

49. Lorraine v. Markel American Ins. Co., 241 F.R.D. 534, 577-78 (D. Md. 2007).

50. Laughner v. State, 769 N.E.2d 1147 (Ind. Ct. App. 2002), *abrogated by* Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007).

51. Ehling v. Monmouth-Ocean Hosp. Serv. Corp., 2013 WL 4436539 (D.N.J. 2013).

52. *See*, *e.g.*, United States v. Meregildo, 883 F. Supp. 2d 523, 525 (S.D.N.Y. 2012); United States v. Lifshitz, 369 F.3d 173, 190 (2 Cir. 2004).

53. *See* Lifshitz, 369 F.3d at 190; *see also*, Guest v. Leis, 255 F.3d 325, 333 (6 Cir. 2001).

54. United States v. Meregildo, 883 F. Supp. 2d 523, 525 (S.D.N.Y. 2012).

55. R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149, 894 F. Supp. 2d 1128, 1142 (D. Minn. 2012).

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