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eDiscovery & Social Media

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Social media is not going anywhere, so we must learn to live with it and use it to our advantage and within the confines of the newly articulated and always changing rules. If ever a doubt, one can look to the Nielson Report ("What Americans Do Online: Social Media and Games Dominate Activity," Aug. 2, 2010) that states two-thirds of the internet population utilize social media sites. Internet users now spend more than 10% of their online time on social media sites, and usage is constantly increasing. With this rise in social media usage, the issues surrounding ediscovery in the realm of social media data is an important consideration of litigation.

The definition of legal discovery is locating all documents that are relevant to support the litigation. But how does ediscovery work when the content is not owned or controlled by the business? How does a business preserve data that is outside of its firewall? Finally, how does one seek relevant information held on social media sites?

Social media sites are not like email or word processing documents when it comes to preservation. These sites are operated outside of a business's firewall by a third party. Data is normally scattered on many sites and connected by many people or custodians. Finally, the retention policy or schedule of a business does not affect data located on social media sites. When a business maintains social media pages, it has a duty to preserve the data that may be relevant in anticipated or actual litigation.

Seeking information from social media sites can be difficult at best. Many times discovery of this data must be gained through consent or authorization of a third party, which only causes an extra, and often expensive, burden. Each third party is different in how it maintains the data, and each has the right to delete any content for violation of its terms of use policy, at any time. That deleted information could be relevant to litigation.

Unfortunately for businesses, the courts are only beginning to outline the duty of preservation and the right to discover the information from social media sites. The best line of defense for many businesses is to develop internal policies and training programs to educate all employees of the risks of using social media. In addition, new software now exists that can aid in preserving data.

Duty to Preserve

The 2006 Federal Rules of Civil Procedure amendments changed the discovery rules to allow a party to request "electronically stored information" within the “possession, custody, or control” of the responding party. A duty to preserve potentially relevant evidence exists when litigation is "reasonably anticipated." In addition, parties who fail to preserve electronically stored information (ESI) are subject to penalties. Social media data fits the definition of ESI; thus, businesses must deal with the issue of preserving and possibly producing social media data that falls under their data retention policy.

Due to the fact that social media sites are owned and controlled by third parties, vendors are beginning to develop technology to capture dynamic web pages for preservation. The first few companies in this market include Iterasi, Smarsh, Arkovi and LiveOffice. Additionally, Adobe may be used to capture web images in static format. These are but a few examples of new technologies that businesses are considering to meet their duty to preserve and produce ESI.

Recent Case Law

Additional issues remain - whether the information on social media sites is considered private, whether it is discoverable and whether it is admissible as evidence. Recent case law has addressed these as yet unanswered issues.

In *Guest v. Leis*, 255 F.3d 325 (6th Cir. 2001), the court held that there is a lack of expectation of privacy regarding public postings on social media sites. The user has the right to select privacy preferences on his social media sites. Certain settings allow the public to see limited information and authorized, connected individuals to have greater access. In addition, many social media site privacy policies specifically state that certain postings are subject to a weakened privacy expectation. Courts have generally held that when a user makes information available publically via their privacy settings, there is a lower expectation of privacy and, therefore, the information is discoverable.

Jumping ahead to the current year, we find *EEOC v. Simply Storage Mgmt., LLC*, No. 1:09-cv-1223-WTL-DML (S.D. Ind. May 11, 2010). In this case, the court compelled production of relevant content from social media sites. The court discussed discovery of social media site data as simply "requir[ing] the application of basic discovery principles in a novel context." The facts of *Simply Storage Mgmt*, involved the defendant seeking production of social media site profiles and communications from Facebook and MySpace. The court ordered the plaintiff to produce the content that was relevant to the case. The plaintiff argued that requiring such production would infringe on his privacy. However, the court held that the expectation of privacy is not a basis for shielding discovery. In addition, the court found that any privacy concern therein was lessened due to the fact the information had already been shared.

Earlier this year, *Crispin v. Audigier* (C.D. Cal.) (May 26, 2010), brought us a new ruling regarding social media and the Stored Communications Act (SCA). In this case, the court was reluctant to allow discovery of private social media email communications. The case involved a copyright infringement claim. Audigier subpoenas the private social media messages of Crispin. A magistrate judge disagreed with Crispin's arguments that these communications fell under the SCA, preventing the provider of the messaging service from releasing private communications, because the social media sites messaging services are used solely for public display. However, the district court reversed the ruling, holding that Facebook and MySpace allow private message or e-mail services which are separate from the general public posting. This case held that the SCA protects Facebook and MySpace messages that aren’t publicly available. Therefore, these messages cannot be

subpoenaed in civil litigation. In addition, the court left the door open for further clarification, noting that “Facebook wall postings and the MySpace comments are not strictly ‘public,’ but are accessible only to those users plaintiff selects.”

On the other side of the country, we find a slightly different ruling with *Romano v. Steelcase Inc.*, 2010 WL 3703242 (N.Y. Sup. Ct. Sept. 21, 2010). The*Romano* court allowed discovery of an entire social media site with all current and deleted postings. The court ordered the plaintiff to provide the defendant with access to private postings from two social media sites. The court reasoned that information contradicting the plaintiff's claims was included on the public sections of the plaintiff's social media site and, therefore, it was reasonable to believe that the private sections might contain additional relevant information. The court even cited Facebook and MySpace policies, which warn users they should have "no expectation of privacy."

Even if one is able to surmount the difficult hurtle of obtaining data from a social media site, an equally daunting challenge remains – getting the data admitted. The main issue with admissibility is authenticity; spam, viruses, hackers and the like make social media sites susceptible to manipulation or fraud. For this reason, courts have consistently been cautious when admitting social media data. In some cases, judges have become online "friends" with a party in order to authenticate postings, photos, captions and comments. (*Barnes v. CUS Nashville, LLC*). Other courts have allowed printed copies with time date stamps to corroborate facts. (*Treat v. Tom Kelley Buick Pontiac GMC, Inc.*). Finally, some courts have used circumstantial evidence associated with the creation of the data (i.e. metadata and hash tags) to authenticate social media content. (*Lorraine v. Markel Am. Insur. Co.*). Admissability remains an area of concern as the use of social media data in discovery becomes the norm.

Discovery of Social Media Data

A lawyer must decide early on whether relevant information exists on social media sites. Within that evaluation, the costs to preserve, collect, review and produce the social media information should be considered.

Start discovery of social media by conducting large sweeping web searches for public social media sites of adverse parties or adverse witnesses. Many individuals do not lock profiles or use privacy settings; therefore, all postings, messages, comments, etc. are open to the public. Preserve the sites with date stamps.

If an individual's social media sites are set to private, and, therefore, not open to the public, what can a lawyer do? Many boards of ethics do not allow lawyers to "friend" anyone to gain access to private profiles of information (NY State Bar Association Ethics Opinion 843 (Sept. 10, 2010)). So, instead of friending an individual, use discovery requests. Start with a document request asking for all postings and messages that are related to and relevant in the litigation. One can also consider requesting an access wavier to social media sites that allow for complete access to the site. LinkedIn has a standard wavier located on its site. Finally, ask for all social media identifications used by the adverse party in an interrogatory. Regardless of what direction taken, social media should be a part of the ediscovery process.

Conclusion

In conclusion, a business should take inventory of what social media sites are being used within the

organization. Then, set policies to help educate all employees of the risks regarding social media usage. Finally, decide if backup software is needed to help with preservation and production of the business's own social media data. Regardless of retention schedule taken with social media, plan to always show the court that you've done your best, which is all that is expected.

For lawyers, be prepared to incorporate social media into an edisovery plan. Start early within the litigation. Draft standard document requests, waiver forms or interogatories around social media production. Finally, be aware of the changing legal landscape on privacy, discoverability and admissibility, as these areas will continue to change, more and more rapidly in the future.

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