

The Intersection Between Litigation And Social Media

Magistrate Judge Craig B. Shaffer

ARMA/Denver

October 11, 2011

The Challenges of ESI

- unlike paper discovery, electronically stored information (ESI):
 - can be incredibly voluminous
 - significantly more complex on a technical level
 - more transitory or fragile
 - may last longer, perhaps indefinitely
 - poses challenges with access and retrieval

The Growth of Social Media

- as of 2011, there are approximately 131 million Facebook users in the United States between the ages of 18 and 64
- As of 2011, there are more than 500 million Facebook users world-wide, 50% of whom log onto Facebook on any given day
- in 2010, there were 70 million LinkedIn members
- in 2010, 47% of internet users between the ages of 50 and 64 used social networking sites

The Nature of Social Media

- sole purpose is to share information
- participants are both suppliers and users of content
- internet-based, which means a third-party provider may have actual possession of content
- personal and informal
- involves varied formats (e.g., text, graphic, audio, video)

The Use of Social Media

- part of a deliberate corporate strategy
- individual employees pursuing legitimate business goals
- personal use on company property and company time
- third parties commenting on a particular company, product, or service

The Benefits of Social Media

- increases the potential for collaboration and innovation, which in turn facilitates problem solving
- improves lines of communication and increases the potential for organizational success
- has the potential for increasing employee productivity by providing time-sensitive access to information

The Risks of Social Media

- in the absence of security controls, increased danger of disclosing or misusing confidential or personal data
- fragmented disclosure of information complicates the development of comprehensive organizational strategies
- increased likelihood that employees will engage in non-work activities at work
- increased liability for highly-regulated organizations
- creates a trail of information, documents and records that must be preserved for purposes of litigation

A Social Media Policy

- establish guidelines, boundaries consistent with organization goals (business use vs. personal use)
- address the organization's position regarding privacy
- establish mechanisms to monitor and enforce compliance
- provide for recurring updates to reflect evolving technology and patterns of use

The Impact on Privacy

- social media is designed to widely share information using technology accessible to all
- by its very nature, social media involves self-expression and information of a very personal nature
- how do we balance these competing elements
- the limited case law provides little guidance

Competing Judicial Views

- *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (N.J. 2010) – recognized a reasonable expectation of privacy in a private, pass-word protected e-mail account accessed on company computers
- *Holmes v. Petrovich Development Co., LLC*, 2011 Cal. App. LEXIS 33 (Cal. App. 2011) – holding that an employee had no expectation of privacy when sending e-mails on her employer's business e-mail system

Another Perspective

- *Leduc v. Roman*, 2009 CanLII 6838 (Ontario Superior Court of Justice, 2009) – rejected plaintiff’s claim of privacy by noting that the very purpose of Facebook is to “construct personal networks with which the Facebook user can share information about themselves and on which ‘friends’ can post information about or to the user”
- “to permit a party claiming substantial damages . . . to hide behind self-set privacy controls on a website . . . risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial”

Social Media and Litigation

- like all discovery, the threshold issue is relevance
- if the social media content is relevant to pending or reasonably foreseeable litigation, there is a duty to preserve if the content is in the responding party's "possession, custody or control"

“The Problem”

- while a user creates and then uploads the social media content, that material is typically stored and hosted by a third-party provider or located on an organization’s own internal servers . . . does the individual user have access or control once the content is posted?
- without access or control, there is no duty to preserve or produce

The Legal Analysis

- are there indicia of control on the part of the individual user?
- Facebook acknowledges that the user “owns all of the content and information” [they] post on Facebook” and “can control how it is shared”
 - but perhaps the individual user does not have complete control or access to all relevant information

The Challenge for an Organization

- does the organization have possession, custody or control of relevant social media content posted by an employee on an external site?
- the answer may depend upon the organization's own social media policy and the degree of control the policy creates – does the organization reserve the right to monitor an employee's private use of company computers?
- “control” over content vs. control over site

The Case Law

- *Helmert v. Butterball*, 2010 WL 2179180 (E.D. Ark. 2010) – the corporate defendant was required to produce material from personal e-mail accounts maintained by upper management employees; the court rejected defendant's cursory claim that it did not have possession or control

The Danger of Spoliation

- the potential for lost content means that organizations must be diligent in collecting and preserving social media content at the earliest stage of the discovery process
- conferring with counsel is critical; reach an agreement that defines the scope of the preservation obligation