Social Media and E-Discovery: New Tools and New Challenges

By Nadine R. Weiskopf

LexisNexis®

According to a recent survey by Arbitron Inc., the percentage of Americans age 12 and older who have a profile on one or more social networking Web sites has reached almost half of the population in 2010, double the level from two years ago. Moreover, the volume of activity on social media platforms continues to soar—Nielsen reports that Internet users worldwide are now spending 22 percent of their time online by visiting social network and blogging sites, up from 17 percent in 2009 and just 6 percent as recently as 2008.*

For litigation professionals, the social media explosion is more than a cultural phenomenon; it is simultaneously creating unprecedented opportunities and challenges in the pursuit of electronic evidence. On the one hand, social media presents an exciting new tool in the arsenal of judges and lawyers seeking to acquire relevant electronic data. At the same time, the unique nature of social networking Web sites is frustrating the ability of lawyers and electronic discovery experts to gather information they know is crucial to their cases.

More Social Media Use Means More Electronic Evidence

There is a very simple principle fueling the increased attention from litigation professionals when it comes to social media and electronic discovery: any medium through which people interact and express themselves is a medium that may need to be reviewed for potentially relevant information in litigation discovery.

Just consider the staggering number of users of social media platforms. In July 2010, Facebook® announced that it had reached a new milestone of 500 million active users, a number that could double to a mind-boggling 1 billion users by the end of 2011. Twitter® is approaching the 200 million user mark and is facilitating 55 million "tweets" every single day, while the first breakthrough social networking site—MySpace®—has in excess of 65 million users. Of the top 20 most visited U.S. Web sites in 2010, eight of them are now social media sites.

What's more, social media is actually beginning to make inroads as a leading avenue for business communications. According to the technology research firm Gartner, over the next four years, social networking services are predicted to replace e-mail as the primary vehicle for interpersonal communications for 20 percent of business users.† The upshot of this trend is the erosion of the distinction between "e-mail communication" and "social media communication" that we have come to draw in recent years, creating a much wider universe of potentially relevant communications to survey during electronic discovery.

Social Media as an E-Discovery Tool

In recent years, we have seen courts become increasingly more comfortable with the use of technology in the courtroom, and that growing comfort level now extends to the electronic communication of information. After waiting for years for judges to systemically allow substitute service through e-mail, we already have two cases in foreign jurisdictions in which substitute service was allowed via social networking services.

The first known example took place in Australia in December 2008, when the Australian Capital Territory Supreme Court approved its use by MKM Capital to serve two defendants in a default loan case. MKM had attempted to serve the couple numerous times at their residence, by mail and by e-mail—in exasperation they sought permission from the Court for substitute service via Facebook direct message. The Court ruled for MKM and directed that the legal document be attached to the substitute notice sent to the borrower's Facebook mailbox.

* *Predicts 2010: Social Software is an Enterprise Reality*, Gartner Inc., December 2009
† *Social Networks/Blogs Now Account for One in Every Four and a Half Minutes Online*, Nielsenwire, June 2010

Then in October 2009, the UK High Court broke new ground when it ordered an injunction to be served via Twitter for the first time. In the case, the Court held that an anonymous Twitter user accused of impersonating a right-wing blogger should cease their activities and reveal their identity. Without any other way of contacting the individual in question, the judge agreed that the best way to serve the injunction was through a message on the popular micro-blogging service. This friendlier attitude of judges toward electronic communications is now extending to the actual chain of custody with the intake of evidence in litigation. Although the case examples are still few, one recent matter in Tennessee provides an interesting anecdotal glimpse into the future.

In *Barnes v. CUS Nashville*, the plaintiff filed a slip-and-fall case against the popular "Coyote Ugly" bar in Nashville, where she had fallen while climbing onto the bar. The defendant subpoenaed Facebook, seeking photos that the plaintiff had posted regarding the incident. The Court refused, denying a Motion to Compel under the Stored Communications Act (SCA), but then offered to actually create a Facebook page for the exclusive purposes of reviewing discovery data. On June 3, 2010, Judge Joe Brown issued the following order:

> In order to try to expedite further discovery regarding the photographs, their captions, and comments, the Magistrate Judge is willing to create a Facebook account. If Julie Knudsen and Michael Vann will accept the Magistrate Judge as a "friend" on Facebook for the sole purpose of reviewing photographs and related comments in camera, he will promptly review and disseminate any relevant information to the parties. The Magistrate Judge will then close this Facebook account.

Judge Brown's order clearly illustrates that social media communications has ushered in a new era in how we obtain evidence in litigation, but it also provides a glimpse into changing attitudes of the judiciary. We already know that judges are facing external pressure to use social media platforms in the way they conduct business, we may be learning that they are growing more comfortable with the use of social media in gathering electronic information.

Social Media as E-Discovery Challenge

At the same time that social media presents us with an exciting new tool in litigation and electronic discovery, it also creates a formidable challenge. Much has been written about the enormity of the information that resides on social networking services—and indeed that is an extraordinary universe of communications that e-discovery professionals are still learning how to most efficiently access—but I would like to focus on the challenges we face with navigating the legal issues involved.

Indeed, there are already two significant cases on the books that suggest different implications as relates to what kind of information sitting on social media platforms is "fair game" to electronic discovery.

In May 2010, the Central District of California issued an important ruling in *Crispin v. Audigier*, an intellectual property dispute. Audigier had manufactured garments containing the plaintiff's artwork. Crispin alleged, *inter alia*, that Audigier failed to include the proper Crispin logo and wrongly attributed his work to another artist. Audigier subpoenaed Facebook and other social networking services, seeking all communications between Crispin and a third party. The Court quashed the portions of the subpoenas that related to private messaging, finding that those postings on social media sites "can constitute ['electronic communications services']" under the SCA.

The SCA generally prohibits—subject to certain exceptions—a "person or entity providing an electronic communication service to the public" from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service." It further prohibits—again, subject to certain exceptions—a "person or entity providing remote computing service to the public" from "knowingly divulg[ing] to any person or entity the contents of any communication which is carried or maintained on that service."

However, the Court also found that portions of the subpoena regarding wall postings (public comments on social networking sites) and online bulletin board comments were remanded for further development. So in wrestling with the issue of whether a party can subpoena someone's Facebook page, the Court suggested a path forward in which private information on social media must remain private, but public information on social media is subject to electronic discovery.

Not so fast, it turns out. Electronic discovery professionals have been buzzing about the May 2010 decision in *EEOC v. Simply Storage Management*, a dispute involving two employees' sexual harassment claims. In that case, a federal court permitted the employer to obtain discovery of an employee's social networking activity that, through privacy settings, the employee had made "private" and not available to the general public. In other words, as part of discovery, an employer is free to request online profiles, postings, messages, photographs, videos, etc.

The upshot of this decision from the Southern District of Indiana implies that social networking content is not in fact shielded from electronic discovery merely because it is protected as private by the individual who posted the content. Indeed, the ruling specifically indicated that the producing party should err in favor of production if there is any doubt over the relevance of the information residing on social media platforms.

The authentication of social media also provides a unique evidentiary issue in electronic discovery. In a case of first impression, the Maryland Court of Appeals recently addressed this in the 2010 criminal trial of *Griffin v. State*. In the case, a printout of a murder defendant's alleged MySpace profile was submitted containing the phrase "FREE BOOZY!!!! JUST REMEMBER SNITCHES GET SNITCHES!! U KNOW WHO YOU ARE!!" (the defendant was alleged to have chased the deceased into a woman's bathroom of a bar, where he shot him seven times). The court allowed the MySpace page to be authenticated for admission into evidence through the testimony of the police officer who printed the page. The officer testified that account was maintained by the defendant's girlfriend, had a picture on it that appeared to be the defendant and his girlfriend, contained the defendant's nickname (Boozy), and the birth date for the account matched the defendant's girlfriend. The Court of Appeals noted that "both prosecutors and criminal defense attorneys are increasingly looking for potential evidence on the expanding array of Internet blogs, message boards, and chat rooms."

Are we headed for a judicial collision course with respect to the legal challenges presented by social media communications during electronic discovery? Regardless of the outcome of this complex issue, it's clear that we have our hands full with trying to sort out what content is fair game and what is not.

Conclusion

As the use of social networking services continues to accelerate, it's inevitable that litigation professionals will need to become better equipped when it comes to conducting electronic discovery in the social media. In general, there are two legal options for how to gather electronic information from a social networking site: (1) Obtain consent to produce the requested data; or (2) File a motion to compel with the court, demanding the production of data.

Also keep in mind that the major social networking services generally encourage litigants to resolve their discovery issues on their own and to issue their requests for account information directly to the opposing party in a dispute. Moreover, the site operators are quick to emphasize the seriousness of the SCA, which effectively prohibits them from disclosing the contents of an individual account to any non-governmental entity.

So, if a litigant believes that certain information from a social network is indispensable and is not within the possession of either party in the dispute, they must serve a subpoena on the service. This can be an expensive proposition, depending on the company involved. Facebook, for example, charges "a mandatory, non-refundable processing fee" of $500 per production request, an additional $100 fee for notarized declarations and an extra $200 fee for expedited responses.

The Supreme Court may have captured this rapidly emerging area of law best in its June 2010 decision in *City of Ontario v. Quon*, where a police sargent's Fourth Amendment rights were held not to have been violated when his supervisors read his personal text messages that were sent on his city-issued pager while he was at work. The Court made careful note in its ruling that "prudence counsels caution before the facts in this case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations of employees using employer-provided communication devices."

Writing for the Court, Justice Kennedy's opinion summarized where we stand today: "Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve."

About the author

Nadine Weiskopf is director of strategic planning for litigation software at LexisNexis, where she is responsible for developing and executing strategic plans for various service and software lines. Prior to joining LexisNexis in 2006, she was a litigator at Jeffer, Mangels, Butler & Marmaro, and other West Coast law firms. Weiskopf earned her law degree from the Seattle University School of Law and her undergraduate degree from the University of Washington. She can be contacted at **nadine.weiskopf@lexisnexis.com**.

LexisNexis® **http://www.lexisnexis.com** is a leading global provider of content-enabled workflow solutions designed specifically for professionals in the legal, risk management, corporate, government, law enforcement, accounting and academic markets. LexisNexis originally pioneered online information with its *Lexis*® and *Nexis*® services. A member of Reed Elsevier [NYSE: ENL; NYSE: RUK] **www.reedelsevier.com**, LexisNexis serves customers in more than 100 countries with 18,000 employees worldwide.