



Is Social Media an Elephant in the Room?

Attorneys must recognize social media outlets as sources of information

Our profession faces several rapidly-evolving discovery challenges. Recently, some foolishly tried to ignore email, but that strategy failed. Some were oblivious to the ESI stored on mobile devices such as smart phones and tablets until they realized that those were a treasure trove of possibly relevant information. For instance, with the parties' consent, I recently reviewed the contents of an older smart phone with a limited memory yet found it contained about 18,000 text messages and 24,000 photographs. Not all the contents of these mobile devices are necessarily discoverable, much less relevant, but we can never eliminate the possibility that some can have a meaningful impact on our clients' claims and defenses.

Today we have to consider also the possibility that various storehouses of social media contain information of similar magnitude and possible relevance. Americans younger than 40 are frequent users of social media applications such as Twitter, Facebook, and Instagram. They create vast amounts of information meriting examination. Preserving that information may be our clients' responsibility, but collecting and reviewing it will be ours. And the tasks will not get easier. Facebook maintains over 300 petabytes of data about its one billion daily users, and that storehouse grows by over 600 terabytes of information daily. If you recall that one gigabyte might contain 50,000 pages, you can math it out yourself.

Pew reports that nearly two-thirds of American adults use the various social networking sites. That figure is up from 7% in 2005 and suggests the need for careful attention to these sources of discoverable information, particularly in personal injury, employment, and family law cases. For instance, recent reports suggest that Facebook evidence is being used in two-thirds of family law cases.

You will not be surprised that 90% of young adults use social media, but you might not have guessed that 35% of those over 65 also do. There are no significant usage differences between men and women or among racial and ethnic subgroups. We can no longer ignore the discovery material available from social media sites.

Perhaps 70% of online adults use Facebook, and 70% of them

do so daily. So let's take Facebook as an example. In a recent case, a party's Facebook account contained almost 3,000 photographs. The Facebook Help Center lists about 70 categories of information it stores including messages, chat logs, photos, the metadata of photos, various postings, friends, followers, removed friends, etc. Much of that information can be downloaded in an easily-obtained report. Besides that report, Facebook also maintains an "Activity Log" for every user, dating from the account's establishment. It contains even more information, basically a complete history of the user's activity on Facebook from posts to comments, to apps used, to anything ever searched for or viewed. Though that information cannot be downloaded directly, a party may be required to preserve it and can be required to produce it in response to an appropriate.

We can't fail to consider these sources of information. There are alternatives to Facebook and alternative messaging systems. Twitter may also be a fertile source of information. A recent report stated that Twitter was logging approximately 40 million tweets per day, many of which might be available to discovery.

Similar to other sources of stored data, the information on social media sites is not diminishing but increasing at an alarming rate. We can't ignore it, but we are challenged to deal with it. Early cases allowed some parties direct access to the internet accounts of their opponents. However, later cases seldom permit unfettered access. Either a user will directly obtain, review, and produce that party's information, or the parties will stipulate to the appointment of an intermediary who can review the downloaded information. Chronological boundaries can limit the information to review and produce, and privileged and privacy reviews are also possible. Attempting to obtain that evidence directly from the media site is not a viable alternative. That course will probably not be available because the media giants will seek the protections afforded them by the Stored Communications Act, 18 U.S.C. § 2701 et seq.

This is a brave new world, and we must deal with its realities. I said in an earlier article that discovery was not getting easier, and social media bears that out.

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