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## e-Discovery Challenges of Social Media




By Jaclyn Jaeger — June 15, 2010

As if complying with current e-discovery rules is not challenging enough, social networking Websites such as Facebook and Twitter are creating new headaches for corporate compliance and legal departments.




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“The old ways of addressing electronic discovery and preservation don’t necessarily work when it comes to social media,” says Timothy Gordon, a partner with law firm Holland & Hart. “You have to think about it in a new way.”

During a June 8 Webcast on the e-discovery implications of social media, Kathy Owen, a partner at the law firm DLA Piper, agreed. “While the nature of social networking data is very similar to the other types of ESI [electronically stored information] that we deal with on a daily basis, the actual practicalities of how you gather that data, preserve that data, produce that data are very different,” she said.



Gordon

One of the most fundamental challenges legal departments face is simply finding and gathering all the data that needs to be found during discovery. With traditional data—Word documents, spreadsheets, e-mail messages—pinpointing where information exists and how to retrieve it is “pretty easy,” and many companies now have the know-how to do that, Gordon says.

In contrast, information posted on social networking sites is not physically stored on the user’s computer, or even on the company’s servers. In fact, it may not even be on the social media sites’ own servers, but rather in “the cloud” of leased data storage capacity—making the retrieval of such data a practical impossibility, experts say. So when data on a social media site ends up relevant to e-discovery, it often must be obtained through a third party, “which is an extra step and burden,” Owen said.

Neither is it certain who actually owns data on social media sites, presenting another headache for companies that may have a litigation hold in place. Social networking sites have the right to delete content as they please if they find it to be objectionable, regardless of any duty to preserve what a company may have in place. “That can cause problems, as well,” Gordon says.

In theory, a litigant could try the old-fashioned route of taking a screen-shot to capture images of content on the social media site, Gordon says. But those images are static, while the content itself might be updated or changed all the time. “You can’t necessarily take that content and put it in another system in a way that it looks and works the same way that it does when you’re on Facebook,” he says.

“Because each of these social networking sites is different, there’s really no one-size-fits-all solution to preservation, collection, or review,” Gordon says. “They’re all different, and they all have to be addressed in different ways.”

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—*Timothy Gordon,*  
*Partner,*  
*Holland & Hart*

On a practical level, then, when a company does get notice of potential litigation, it should both preserve any relevant records within the organization, and also tell employees to preserve any related information outside the business that they might know about as well, says Kathryn Ossian, principal of the law firm Miller Canfield. “If you can show the court that you’ve done your best, that’s really all you can be expected to do,” she says.



Owen

DLA Piper recommends that companies instruct their employees in a written statement not to use social networking sites to communicate information relating to the litigation hold, Owen said. If an employee does discover any communication via text messaging or social networking sites regarding the hold, he or she should be advised to speak with the appropriate legal contact in the company, she said.

The litigation hold shouldn't be limited to employees, either; vendors, suppliers, and any other entities that might be holding relevant information should also be included, Ossian says.

### Recent Case Law

Neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure specifically address social networking sites "as a unique form of evidence," Owen said. The Rules of Civil Procedure were amended in 2006 to address electronically stored information, and "it sounds like social networking pages would fit into that category," she continued. But without regulations specific to social media (which had hardly started when the e-discovery rules debuted in 2006), courts are stuck applying existing e-discovery regulations to social media cases as best they can.

### SOCIAL NETWORKING LAW

**The following information on social networking and case law is excerpted from DLA Piper Webcast slides:**

#### So how are lawyers using social networking web sites as evidence?

- To investigate lay and expert witnesses
- To prepare for depositions
- To vet prospective jurors
- To investigate opposing counsel and judges
- To tailor closing arguments and trial strategy

#### How the Rules and Case Law Address Social Networking Sites

- The Federal Rules of Evidence, the Federal Rules of Civil Procedure, and the applicable state rules do not specifically address social networking Websites as a unique form of evidence.
- Among a handful of recent cases that have addressed social networking Websites, there is no consensus as to the admissibility or discoverability of such web sites.

#### Recent cases:

*State v. Carroll*, No. 07CA14, 2007 WL 2696883 (Ohio Ct. App. Sept. 11, 2007) Court admitted information from and testimony about a MySpace page, where the victim told the defendant, and also posted, her age.

*In re T.T.*, 228 S.W.3d 312 (Tex. App.—Houston [14th Dist.] 2007) In terminating the defendant's parental rights, the court allowed the introduction of content from the defendant's MySpace page, which stated that he was single and did not want children.

#### But ...

*Crispin v. Audigier*, No. 2:09-cv-09509 (C.D. Cal. May 26, 2010) A district judge reversed a magistrate judge's ruling

that the fashion house Christian Audigier Inc. can subpoena Facebook and MySpace communications of an artist who sued the designer for copyright infringement on grounds that messages on the social networking sites are protected information under the Stored Communications Act.

## Source

 [DLA Piper Webinar: e-Discovery Implications of Social Networking \(June 8, 2010\).](#)

Owen cited a recent case, *Crispin v. Audigier*, where a California district judge ruled in May that Facebook and MySpace messages that aren't publicly available are protected information under the Stored Communications Act, and therefore can't be subpoenaed for use in civil litigation.

The case involved claims brought by an artist, Buckley Crispin, who sued clothing maker Christian Audigier for copyright infringement, alleging that Audigier used his artistic material outside the scope of a license agreement. Audigier issued a subpoena to Facebook, MySpace, and two other third parties seeking communications by Crispin about Audigier.

Crispin's lawyers argued that such communications fell under the Stored Communications Act (SCA), which prevents providers of communication services from divulging private communications to certain entities and individuals. At first a magistrate judge disagreed, finding that because the Websites' messaging services are used solely for public display, they did not fall under SCA protections.

But the district court reversed that ruling, finding that the magistrate judge "apparently misconstrued ... the nature of the services the third-party companies provided." Sites like Facebook and MySpace provide private messaging or e-mail services, the court said, which *do* constitute electronic communication services protected under SCA. Moreover, the court said, "Facebook wall postings and the MySpace comments are not strictly 'public,' but are accessible only to those users plaintiff selects."

Another recent case testing the waters of social media, *TEKsystems v. Hammernick*, relates to a non-competition lawsuit filed March 16 in a U.S. District Court in Minnesota by TEKsystems, an IT services firm. In its complaint, TEKsystems alleges that three former employees and one of their new employers—a competitor of the company—breached non-compete, non-disclosure, and non-solicit agreements by contacting at least 20 of TEKsystem's contract employees.

What's interesting about the case: TEKsystems says it intends to prove the breach using evidence from one of its former employee's LinkedIn accounts. Specifically, TEKsystems claims the employee contacted 16 contract employees using her LinkedIn connections and sent them messages inviting them to visit her in her new workplace. That raises the specter of employees now being able to upload client lists freely, and the employer's inherent loss of control over those contacts.

What happens next with the TEKsystems case, and all the other litigation unfolding in a social media world, is still largely a guessing game. "The answers don't quite exist yet," says Gordon.

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