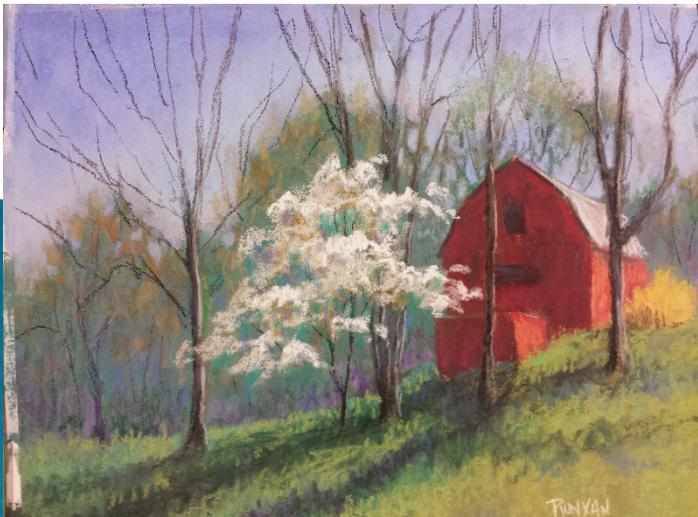


V: Social Media, The Internet and Electronically Stored Information Challenges

Sara Anne Hook, M.B.A., J.D. and Cori
Faklaris, M.S. student, Indiana University
NBI, September 29, 2015



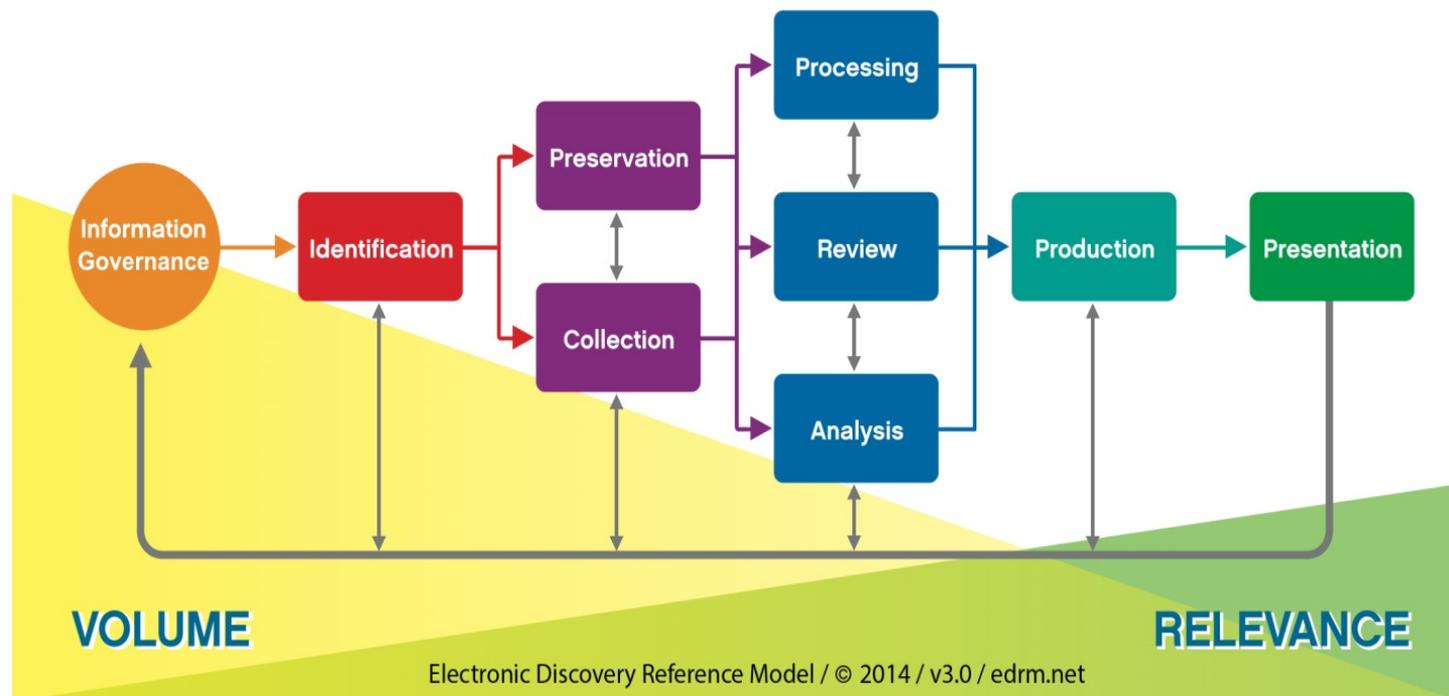
Introduction

- ▶ There are many issues with the electronic discovery issues with social media, particularly as new forms of communication technologies within the broad heading of social media are introduced.
- ▶ Among the issues, questions and challenges are:
 - Importance of social media as ESI
 - Forms and formats of social media
 - Generated and stored on a number of types of hardware, including mobile devices, especially in an age of BYOD (Bring Your Own Device)
 - Duty to preserve and sanctions for spoliation
 - Federal, state, international, constitutional and common law privacy protections
 - Social media and the U.S. Stored Communications Act
 - Social media and the U.S. National Labor Relations Act
 - Social media Terms of Service (which users never read)
 - Obtaining social media evidence: from users as opposed to social media providers/vendors
 - Evidentiary issues: authentication, relevance, over-broad requests

Introduction

- ▶ Whenever I have a question regarding electronic discovery, the first place I start is a review of the Electronic Discovery Reference Model (EDRM).
- ▶ By visualizing the steps in handling a piece of electronically–stored information (ESI) from the left–hand side of the model (which starts with proper information governance) to the presentation of the ESI in court, the EDRM also reminds me of the potential for ethical breaches at each step.

Electronic Discovery Reference Model



EDRM,

<http://www.edrm.net/resources/guides/edrm-framework-guides>

K&L Gates Electronic Discovery Law website

- ▶ Another excellent resource for cases, statutes, guidelines and other materials for electronic discovery is the K&L Gates Electronic Discovery Law website (<http://www.ediscoverylaw.com/>).
- ▶ The website contains a very helpful database of over 2000 cases that is searchable by keyword as well as having a number of pre-determined case attributes (<http://www.ediscoverylaw.com/e-discovery-case-database/>).
- ▶ Many of the cases have very short summaries that include the case citation, the nature of the case, the electronic data involved, the electronic discovery issue and searchable attributes.
- ▶ A number of the cases have more robust summaries that also may have links to additional materials.
- ▶ A quick search of the K&L Gates database for cases involving social media in civil litigation, including in personal injury, yields several interesting and helpful cases, including two cases that have become major cases in the world of electronic discovery, *McMillen v. Hummingbird Speedway, Inc.* and *Romano v. Steelcase, Inc.*



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E-DISCOVERY CASE DATABASE

Search more than 2000 cases collected from state and federal courts involving electronic discovery issues by keyword, or by any combination of 30 different case attributes, including on-site inspection, format of production, allegations of spoliation, or involving data that is “not reasonably accessible,” etc.

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Context

- | | | |
|---|---|--|
| <input type="checkbox"/> TRO or Preliminary Injunction | <input type="checkbox"/> Motion for Preservation Order | <input type="checkbox"/> Early Conference or Discovery Plan |
| <input type="checkbox"/> Motion to Compel | <input type="checkbox"/> Motion for Protective Order | <input type="checkbox"/> Third-Party Discovery |
| <input type="checkbox"/> Motion for Sanctions | | |

Particular Issues

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| <input type="checkbox"/> Data Preservation | <input type="checkbox"/> Mirror Images | <input type="checkbox"/> Cost Shifting |
| <input type="checkbox"/> Records Retention Policy | <input type="checkbox"/> On-Site Inspection | <input type="checkbox"/> Spoliation |
| <input type="checkbox"/> Backup Media Recycling | <input type="checkbox"/> Keyword Searches | <input type="checkbox"/> Court-Appointed Expert |
| <input type="checkbox"/> Backup Tapes | <input type="checkbox"/> Format of Production | <input type="checkbox"/> Privilege or Work Product |
| <input type="checkbox"/> Deleted Data Recovery | <input type="checkbox"/> Metadata | <input type="checkbox"/> Lack of Cooperation or Inaccurate Representations |
| <input type="checkbox"/> Admissibility | <input type="checkbox"/> Adequacy of Search/Identification or Collection (added 03/13) | <input type="checkbox"/> Computer Assisted Review |

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| <input type="checkbox"/> Backup Media Recycling | <input type="checkbox"/> Keyword Searches | <input type="checkbox"/> Court-Appointed Expert |
| <input type="checkbox"/> Backup Tapes | <input type="checkbox"/> Format of Production | <input type="checkbox"/> Privilege or Work Product |
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| <input type="checkbox"/> Admissibility | <input type="checkbox"/> Adequacy of Search/Identification or Collection (added 03/13) | <input type="checkbox"/> Computer Assisted Review |

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| Case Citation: | Bass v. Miss Porter's School, 2009 WL 3724968 (D. Conn. Oct. 27, 2009) |
| Nature of Case: | Claims arising from alleged bullying and harassment of private school student |
| Electronic Data Involved: | Facebook |
| E-Discovery Issue: | Upon in camera review of all documents produced to plaintiff by Facebook pursuant to subpoena, and in response to plaintiff's objection to producing all such documents on the grounds that many were irrelevant and immaterial, court found "no meaningful distinction" between the pages produced and the pages withheld and stated that "Facebook usage depicts a snapshot of the user's relationship and state of mind at the time of the content's posting" and that "relevance is more in the eye of the beholder" such that production should not be limited to plaintiff's determination of what may be "reasonably calculated to lead to the discovery of admissible evidence" and ordered the production of all documents produced by Facebook to defendants, rather than the smaller subset previously provided |
| Case Summary: | Not Available |
| Attributes: | Motion to Compel; Third Party Discovery |
| Case Citation: | Crispin v. Christian Audigier, Inc., 717 F.Supp.2d 965 (C.D. Cal. 2010) |
| Nature of Case: | Breach of contract, copyright infringement, breach of covenant of good faith and fair dealing |
| Electronic Data Involved: | Messages from social networking sites |
| E-Discovery Issue: | Upon holding that the social networking sites at issue (Facebook, MySpace, Media Temple) were subject to the Stored Communications Act, court quashed subpoenas seeking private messages but, as to subpoenas seeking messages posted to plaintiff's Facebook wall and MySpace comments, remanded for further investigation of plaintiff's privacy settings as to those messages because the Stored Communications Act is not applicable to information readily available to the general public |
| Case Summary: | Available |
| Attributes: | Third Party Discovery |
| Case Citation: | Fawcett v. Altieri, ---N.Y.S.2d---, 2013 WL 150247 (N.Y. Sup. Ct. Jan. 11, 2013) |
| Nature of Case: | Personal injury |
| Electronic Data Involved: | Social network content (Facebook, MySpace, Friendster, Flickr, etc.) |
| E-Discovery Issue: | Court acknowledged the discoverability of social media content but reasoned that "[i]n order to obtain a closed or private social media account by a court order for the subscriber to execute an authorization for their release, the adversary must show with some credible facts that the adversary subscriber has posted information or |

Electronic Discovery Case Database

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Context

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| <input type="checkbox"/> Records Retention Policy | <input type="checkbox"/> On-Site Inspection | <input type="checkbox"/> Spoliation |
| <input type="checkbox"/> Backup Media Recycling | <input type="checkbox"/> Keyword Searches | <input type="checkbox"/> Court-Appointed Expert |
| <input type="checkbox"/> Backup Tapes | <input type="checkbox"/> Format of Production | <input type="checkbox"/> Privilege or Work Product |
| <input type="checkbox"/> Deleted Data Recovery | <input type="checkbox"/> Metadata | <input type="checkbox"/> Lack of Cooperation or Inaccurate Representations |
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| Case Citation: | Abcon Assocs., Inc. v. Haas & Najarian, No. CV 12-928(LDW)(AKT), 2014 WL 4981440 (E.D.N.Y. Oct. 6, 2014) |
| Nature of Case: | Breach of legal services agreement |
| Electronic Data Involved: | Documents concerning plaintiff's liabilities and financial condition |
| E-Discovery Issue: | Where there was no evidence that plaintiff ever instituted litigation hold, and documents were either discarded during plaintiff's office move or lost due to server failure and/or corruption, court found that a fair reading of the record overall indicated that plaintiff's failure to preserve was at most negligent and not in bad faith, and that no sanctions were warranted given that the alleged relevance of the missing documents appeared purely speculative and conclusory |
| Case Summary: | Not Available |
| Attributes: | Motion for Sanctions; <i>Data Preservation</i> ; Records Retention Policy; Spoliation |
| Case Citation: | Ades v. Omni Hotels Mgmt. Corp., No. 2:13-cv-02468-CAS(MANx), 2014 WL 4627271 (C.D. Cal. Sep. 8, 2014) |
| Nature of Case: | Putative class action alleging claims under the California Invasion of Privacy Act |
| Electronic Data Involved: | Audio recordings of telephone calls and related data |
| E-Discovery Issue: | Considering plaintiffs' motion for class certification, court discussed Omni's efforts to preserve call records and recordings and the apparently accidental loss of related call detail records and attendant search functionality; plaintiffs argued that any difficulties in identifying class members was due to Omni's destruction of data that could have been used to search call recordings, and that it would be unfair to allow such difficulties to prejudice class certification; court ultimately certified class and ruled that, to the extent Omni argued that "identifying class members" may be difficult, those concerns were more properly addressed after class certification |
| Case Summary: | Not Available |
| Attributes: | <i>Data Preservation</i> ; Records Retention Policy |

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In this case, the court addressed Defendants' claim that emails stored on backup tapes were not reasonably accessible because of undue burden and cost. Reasoning that "[a]t bottom there will be a burden or a cost, but not both," the court found that Defendants failed to show undue burden because of their stated intention to rely on a third party vendor, thus reducing the burden of in-house production by adding some cost and that, after disallowing consideration of the cost of document review and storage, the estimated \$136,000 for restoration was not sufficient to render the emails inaccessible. In so finding, the court reasoned that Defendants must bear some responsibility for the consequences of the decision to use an "archival/backup solution that did not maintain ESI in an indexed or otherwise searchable manner." The court also found good cause to compel production and that cost shifting was not warranted.

Read More

"A PROPER SEARCH FOR DISCOVERABLE DOCUMENTS REQUIRES CAREFUL PLANNING, OVERSIGHT, AND MONITORING BY THE PARTY'S COUNSEL."



Other Resources

- E-Discovery Case Database
State Court Rules
Local District Court Rules

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- Upcoming Events! - Federal Rule Changes Affecting E-Discovery Are Almost Here - Are You Ready This Time?
Court Compels Restoration and Production of Emails from Backup Tapes
"A proper search for discoverable documents requires careful planning, oversight, and monitoring by the party's counsel."
For Over-designation of "Highly Confidential" Documents, Court Orders Expedited Review, Attorney's Fees
"[R]equiring each agency and thousands of officials to institute a litigation hold every time a party contemplates or even commences litigation against another agency would paralyze the State."





Category: Federal Rules Amendments



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SUPREME COURT APPROVES PROPOSED AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE, SUBMITS PROPOSALS TO CONGRESS FOR APPROVAL

Today, April 29, 2015, Chief Justice John G. Roberts submitted the proposed amendments to the Federal Rules of Civil Procedure which “have been adopted by the Supreme Court of the United States” to Congress for final approval. Absent legislation to reject, modify or defer the rules, they will become effective December 1, 2015.

A copy of the Supreme Court’s submission to Congress is [available here](#).

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Current Listing of States That Have Enacted E-Discovery Rules

More and more states are adopting statutes and court rules addressing the discovery of electronically stored information. Here is a current list with links to the relevant provisions. Please note also that many judges have created their own forms or have crafted their own preferred protocols for e-discovery. These are generally available on the website of the individual judge and care should be taken to ensure you are aware of any such forms or guidelines in any court you may appear in.

Alabama

Rules of Civil Procedure

Rule 16 Pre-trial conferences; scheduling; management.

Rule 26 General provisions governing discovery.

Rule 33 Interrogatories to parties.

Rule 34 Production of documents and things and entry upon land for inspection and other purposes.

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Local Rules, Forms and Guidelines of United States District Courts Addressing E-Discovery Issues

Many United States District Courts now require compliance with special local rules, forms or guidelines addressing the discovery of electronically stored information. Below is a collection of those local rules, forms and guidelines, with links to the relevant materials. Please note also that many individual judges and magistrate judges have created their own forms or have crafted their own preferred protocols for e-discovery. These are generally available on the website of the individual judge or magistrate judge and care should be taken to ensure you are aware of any such forms or guidelines in any court you may appear in.

District of Alaska
Local Rules (Civil)

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More Cases from the K&L Gates Database

- ▶ *Patterson v. Turner Constr. Co.*, 931 N.Y.S.2d 311 (N.Y. App. Div. Oct. 27, 2011).
- ▶ *Richards v. Hertz Corp.*, ---N.Y.S.2d---, 2012 WL 5503841 (N.Y. App. Div. Nov. 14, 2012).
- ▶ *Thompson v. Autoliv ASP, Inc.*, No. 2:09-cv-01375-PMP-VCF, 2012 WL 2342928 (D. Nev. June 20, 2012).
- ▶ *Pereira v. City of New York*, No. 26927/11, 2013 WL 3497615 (N.Y. Sup. Ct. June 19, 2013).
- ▶ *Fawcett v. Altieri*, ---N.Y.S.2d---, 2013 WL 150247 (N.Y. Sup. Ct. Jan. 11, 2013).
- ▶ *Federico v. Lincoln Military Housing, LLC*, No. 2:12-cv-80, 2014 WL 7447937 (E.D. Va. Dec. 31, 2014).
- ▶ *Melissa "G" v. N. Babylon Union Free School Dist.*, No. 36209/2006, 2015 WL 1727598 (N.Y. App. Div. Mar. 18, 2015).
- ▶ *Nucci v. Target Corp.*, 162 So.3d 146 (Fla. Dist. Ct. App. 2015).

Kroll Ontrack

- ▶ A second excellent resource for materials on electronic discovery is the Kroll Ontrack (<http://www.krollontrack.com/>).
- ▶ This website includes blogs on electronic discovery and data recovery, white papers, case studies and industry news.
- ▶ It also offers a searchable database of electronic discovery cases that complements what is provided by K&L Gates and is searchable by keyword as well as by e-discovery-related topics and jurisdiction (<http://www.ediscovery.com/pulse/case-law/>).
- ▶ I find it comforting when both of these databases provide summaries of the same case, but also they may cover different cases, which broadens my collection of cases.



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“ It's quick and easy to get into and doesn't have a lot ”



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The screenshot shows a web browser window displaying the ediscovery.com website. The browser's address bar shows the URL <http://www.ediscovery.com/pulse/case-law/>. The website header includes the ediscovery.com logo, a phone number (800.347.6105), a 'Contact' link, and a location selector set to 'United States'. Navigation links for 'Solutions', 'Pulse', 'Resources', and 'Events' are visible, along with a 'Login' button.

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Defendant Entity Equivalent of Facebook into Evidence

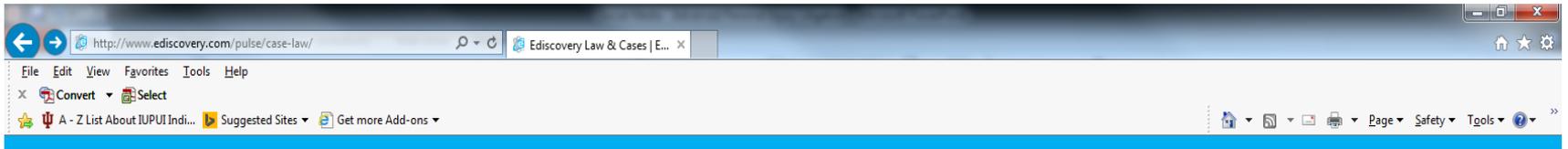
Defendant Ordered to Keep Discovery Promises despite Plaintiff's Inability to do the Same

Defendant Court Erroneously Admitted "Russian"

United States v. Vayner, 2014 WL 4942227 (2d Cir. Oct. 3, 2014).

Keywords: social media, Facebook





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- 7th Circuit
- 8th Circuit
- 9th Circuit
- 10th Circuit
- 11th Circuit
- Court of International Trade
- DC Circuit
- Federal Circuit
- U.S. Court of Appeals for the Armed Forces
- U.S. Court of Federal Claims
- United States Air Force Court of Criminal Appeals
- U.S. Supreme Court
- U.S. Tax Court
- Alabama
- Alaska
- Arizona
- Arkansas
- California
- Colorado
- Connecticut
- Delaware
- Florida
- Georgia

Defendant Entitled to New Trial After
Equivalent of Facebook" into Evidence

United States v. Vayner, 2014 WL 4942227 (2d Cir)

Keywords: social media, Facebook

Defendant Ordered to Keep Discoverable
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Defendant Entitled to New Trial After Trial Court Erroneously Admitted "Russian Equivalent of Facebook" into Evidence

United States v. Vayner, 2014 WL 4942227 (2d Cir. Oct. 3, 2014).

Keywords: social media, Facebook

Defendant Ordered to Keep Discovery Promises despite Plaintiff's Inability to do the Same



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Search via keyword

[Court Rejects Privilege Request for Private Social Networking Site Communications](#)

McMillen v. Hummingbird Speedway, Inc., No. 113-2010 CD (C.P. Jefferson Sept. 9, 2010).

Keywords: Facebook, MySpace, social media, privilege

[Court Finds Company Acted Appropriately in Blocking Facebook Following Employee Complaint](#)





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Court Rejects Privilege Request for Private Social Networking Site Communications



Pennsylvania

McMillen v. Hummingbird Speedway, Inc., No. 113-2010 CD (C.P. Jefferson Sept. 9, 2010). In this personal injury litigation, the defendants sought production of the user names, log-in names and passwords granting access to the plaintiff's Facebook and MySpace accounts. Having found comments on the public portions of the plaintiff's social media sites indicated the plaintiff exaggerated his injuries, the defendants argued that private portions might similarly contain impeaching content. Objecting, the plaintiff contended that communications shared among private friends on social network sites are confidential and thus protected against disclosure. Equating the plaintiff's argument with a request for a new "social network site privilege," the court expressed concern that recognizing such a privilege would contravene the purpose and policy of Pennsylvania's broad discovery rules. Thus, finding no reasonable expectation of confidentiality given the clear language contained on both sites regarding the possibility of disclosure, no subjective or objective relational need for privilege outside of attorney-client communications and a failure to outweigh the interests of justice, the court ordered the plaintiff to preserve existing information and provide his Facebook and MySpace user names and passwords to the defendants' counsel.

Keywords: Facebook, MySpace, social media, privilege

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Cases from the Kroll Ontrack Database

- ▶ A quick search of the Kroll Ontrack database reveals three more recent cases on social media and personal injury with helpful summaries provided.
- ▶ *Zimmerman v. Weis Markets, Inc.*, No. CV-09-1535 (C.P. Northumberland May 19, 2011).
- ▶ *Offenback v. L.M. Bowman, Inc.*, 2011 WL 2491371 (M.D. Pa. June 22, 2011).
- ▶ *Gatto v. United Air Lines, Inc.*, 2013 WL 1285285 (D.N.J. Mar. 25, 2013).
- ▶ *Moore v. Miller*, 2013 WL 2456114 (D. Colo. June 6, 2013).

Other Cases from These Sources

- ▶ An additional search of both databases for social media cases in 2014–2015 resulted in several other interesting cases.
- ▶ These cases further illuminate a wide spectrum of issues with collecting, preserving and presenting this type of ESI as part of litigation.
 - *D.O.H. ex rel. Haddad v. Lake Cent. Sch. Corp.*, No. 2:11–CV–430, 2014 WL 174675 (N.D. Ind. Jan. 15, 2014).
 - *Painter v. Atwood*, No. 2:12–cv–01215–JCM–RJJ, 2014 WL 1089694 (D. Nev. Mar. 18, 2014).
 - *Smith v. Hillshire Brands*, No. 13–2605–CM, 2014 WL 2804188 (D. Kan. June 20, 2014).
 - *Ingrid & Isabel, LLC v. Baby Be Mine, LLC*, No. 13–cv–01806, 2014 WL 1338480 (N.D. Cal. Apr. 1, 2014).
 - *Stallings v. City of Johnston City*, 2014 WL 2061669 (S.D. Ill. May 19, 2014).
 - *D.O.H. v. Lake Cent. Sch. Corp.*, No. 2:11–cv–430, 2015 WL 736419 (N.D. Ind. Feb. 20, 2015).
 - *Caputi v. Topper Realty Corp.*, No. 14–cv–2634(JFB)(SIL), 2015 WL 893663 (E.D.N.Y. Feb. 25, 2015).
 - *In re Milo’s Kitchen Dog Treats Consol. Cases*, No. 12–1011, ---F.R.D.---, 2015 WL 1650963 (W.D. Pa. Apr. 14, 2015).

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Defendant Entitled to New Trial After Trial Court Erroneously Admitted “Russian Equivalent of Facebook” into Evidence  4

New York

United States v. Vayner, 2014 WL 4942227 (2d Cir. Oct. 3, 2014). In this criminal case, the defendant was convicted “on a single count of unlawful transfer of a false identification document.” The government relied primarily on the testimony of one witness, who testified that the defendant had created a forged birth certificate and sent the completed forgery via email. The government also produced evidence corroborating certain elements of that witness’ testimony. The evidence showed the path that the email took through several servers, but it did not show the IP address of the computer that sent the email, or any information about where the email was sent from beyond the state of New York. Before the trial concluded, the government sought to introduce a printout of a webpage from “the Russian equivalent of Facebook” allegedly featuring the defendant’s profile and email address. The defendant objected, arguing that the printout had not been properly authenticated. The trial court overruled the objection, and the jury found the defendant guilty. The Court of Appeals vacated the judgment and ordered a new trial, ruling that the trial court erroneously admitted the webpage without any evidence that the defendant had actually created the page himself. The court determined that the jury likely relied heavily on the webpage to link the defendant to the email address, since the other evidence provided was relatively weak. Because the webpage was the only strong piece of evidence admitted against the defendant, the Court of Appeals determined that the trial court’s erroneous ruling was not harmless and required a new trial.

Keywords: social media, Facebook

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Other Cases from These Sources

- ▶ It is interesting to review the nature of these cases, which illustrate how social media has permeated every facet of our work and daily lives.
- ▶ For example, these cases include breach of settlement, trademark infringement and unfair competition, sexual harassment, violations of Title VII and the Family Medical Leave Act, bullying and harassment and wrongful termination.
- ▶ Among the disputes and mistakes outlined in these cases are data preservation, lack of cooperation in the discovery process, inadequacy of search, identification or collection processes, motions to compel, motions for sanctions, adverse inference instructions and undue burden.
- ▶ Also of note is that many of the cases from 2014 concern text messages, indicating the continued evolution of the technology that people use to communicate with each other.
- ▶ Issues involving MySpace accounts have fallen off in favor of Twitter and, predominantly, Facebook.

Ephemeral, Transient Communication Systems

- ▶ So far, no cases of note have involved mobile messaging apps such as Snapchat, Instagram and WhatsApp, but given the rise in their popularity and the shift to Internet-connected smartphones, tablets and wearable mobile devices in general, these apps' appearance in e-discovery cases can't be far ahead.
- ▶ Legal scholars are already expressing concerns with the e-discovery issues with mobile messaging apps because of their informal and transient nature and as well as the promises made in their Terms of Service.
- ▶ For example, see:
 - Danielle Young, *Comment: Now You See It, Now You Don't... Or Do You? Snapchat's Deceptive Promotion of Vanishing Messages Violates Trade Commission Regulations*. 30 *J. Marshall Journal of Information Technology & Privacy L.* 827 (Sum. 2014).
 - Ryan G. Ganzenmuller, *Comment: Snap and Destroy: Preservation Issues for Ephemeral Communications*. 62 *Buffalo L. Rev.* 1239 (Dec. 2014).
 - *Understanding Mobile Apps*. U.S. Federal Trade Commission, <http://www.consumer.ftc.gov/articles/0018-understanding-mobile-apps> (last visited 9/23/15).

Other Resources

- ▶ Other resources are available to advise lawyers on the proper handling of social media as ESI throughout the electronic discovery process.
 - Anahit Tagvoryan and Joshua M. Briones. *Social Media as Evidence: Cases, Practice Pointers and Techniques*. Chicago: American Bar Association, 2013, ISBN: 978-1-61438-629-2).
 - *Social Media Evidence – How to Find It and How to Use It*, which was presented by the ABA Section of Litigation at the 2013 ABA Annual Meeting. This free resource includes sample interrogatories and document requests, advice for jury instructions (because the temptation for jury members to conduct their own investigations via Google and social media is an increasing problem in litigation), complaints, requests for discovery and other documents.
http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/aba-annual-2013/written_materials/15_1_social_media_evidence.authcheckdam.pdf (last visited 9/23/15).

Jurisdiction Over Websites

- ▶ As stated on page 8 of *Social Media Evidence – How to Find It and How to Use It*, “[a]lways check the Terms of Service for the social media website as they may have an impact on your approach to obtaining the information or even the target of your discovery demands.
- ▶ For example, Twitter’s Terms of Service clearly state that a Twitter user provides Twitter a license to distribute to anyone at any time whatever the user tweets.”
- ▶ This advice continues with a discussion of *People v. Harris*, ---N.Y.S.2d---, 2012 WL 1381238 (N.Y. Crim. Ct. Apr. 20, 2012).

Jurisdiction Over Websites

- ▶ In Socializing Over State Lines, Wasson reviews the “minimum contacts” standard for personal jurisdiction, which he notes the Internet has made the test more difficult to apply.
- ▶ He then describes three cases to illustrate that even relatively minor details can make a significant difference in whether a person will be subject to jurisdiction in a foreign state.
- ▶ He notes that social media cases do not always fit the mold of “old” Internet case law and risks when using Twitter to solicit business

Social Media – Complying with the Stored Communications Act

- ▶ One of the earliest cases to address the application of the Stored Communications Act to requests for ESI from social media was *Crispin v. Christian Audigier, Inc.* 717 F.Supp.2d 965 (C.D. Cal. 2010).
- ▶ More recent cases have been decided, including:
 - *Optiver Australia Pty, Ltd. & Anor v. Tibra Trading Pty. Ltd. & Ors*, No. C 12-80242 EJD (PSG), 2013 WL 256771 (N.D. Cal. Jan. 23, 2013).
 - *Doe v. City of San Diego*, No. 12-cv-0689-MMA (DHB), 2013 WL 2338713 (S.D. Cal. May 28, 2013).
 - *Ehling v. Monmouth-Ocean Hospital Service Corp.*, No. 2:11-CV-3305 (WMJ) (D.N.J. Aug. 20, 2013).
 - *Maremont v. Susan Fredman Design Group, Ltd.*, 2014 WL 812401 (N.D. Ill. March 3, 2014).
 - *Finkle v. Howard Cnty., Md.*, No. SAG-13-3236, 2014 WL 6835628, (D. Md. Dec. 2, 2014).
 - *Nucci v. Target Corp.*, 162 So.3d 146 (Fla. Dist. Ct. App. 2015).

Predictive Coding and Other Data Mining Procedures

- ▶ Not very long ago, the concept of using predictive coding and other technologies to assist with the electronic discovery process seemed revolutionary.
- ▶ In just a few short years, using technology for review of ESI is not only considered mainstream, but is almost expected.
- ▶ Two cases stand as the first cases where judges clearly approved the use of predictive coding procedures, *Da Silva Moore* (*Da Silva Moore v. Publicis Groupe & MSL Group*, No. 11 Civ. 1279, 2012 WL 607412 (ALC) (AJP) (S.D.N.Y. Feb. 24, 2012)) and *Global Aerospace v. Lindow Aviation* (*Global Aerospace, Inc. v. Lindow Aviation, L.P.*, No. CL 61040 (Vir. Cir. Ct. Apr. 23, 2012)).

Federal Rules of Civil Procedure (FRCP) – December 2015

- ▶ One important issue to be aware of is that amendments to the Federal Rules of Civil Procedure will likely become effective in December 2015, with the intent of further streamlining, encouraging collaboration and reducing delays in the discovery process as well as clarifying questions about the scope of discovery and the availability of sanctions.
 - Oliver H. (Scott) Barber III, Upcoming Changes to Federal Rules of Civil Procedure: Modernizing Scope of Discovery and Clarifying Consequences of Failure to Preserve. *Bar Briefs* (Louisville Bar Association), Sept. 2014.
 - Jordan D. Maglich, Major Changes Coming to Federal Rules of Civil Procedure. *The Federal Lawyer* 62 (Mar. 2015), at 36–38, 45.
 - James S. Kurz & Daniel D. Miller, A Real Safe Harbor: The Long-Awaited Proposed FRCP Rule 37(e), Its Workings, and Its Guidance for ESI Preservation. *The Federal Lawyer* 62 (Aug. 2015), at 62–66.)

Predictive Coding and Other Data Mining Procedures

- ▶ Advantages of predictive coding and other technologies in electronic discovery:
 - Voluminous amount of ESI in all formats from multiple parties, sources, devices, etc.
 - Costs
 - FRCP and other rules attempt to streamline the process and provide very short timeframes
 - Relevant ESI could be overlooked
 - Attorney–client privilege or attorney work–product could be waived
 - Spoliation
 - Sanctions

Predictive Coding and Other Data Mining Procedures

- ▶ Commentators have noted that in the future, failure to use predictive coding or other technology–assisted review may be grounds for disciplinary action, especially with Comment 8 ABA Model Rule 1.1 on Competence making it clear that competence includes the benefits and risks associated with relevant technology.
- ▶ Thus, it makes sense to understand the options for predictive coding and other technology–assisted review processes.
- ▶ This may be especially true when handling ESI from social media in a personal injury case, where the attorney is likely gleaning material in a variety of traditional (accident reports, medical records, witness testimony) and 21st century formats (Facebook, YouTube, Twitter, text messages, iPhones, etc.)
- ▶ Also, the massive amounts of ESI mean that we need to look at electronic discovery from the vantage point of data mining because this is all about “big data”.

Predictive Coding and Other Data Mining Procedures

- ▶ Fortunately, there are many excellent articles available that discuss the spectrum of predictive coding.
- ▶ In terms of predictive coding, an article in the April 2013 *ABA Journal* noted the following statistics:
 - 9% of cases studied discussed predictive coding or technology–assisted review
 - 14% discussed cost considerations
 - 16% addressed discoverability and admissibility
 - 29% addressed procedural issues
 - 32% addressed sanctions

Future Investments in Legal Technology/Legal Data Analytics

- ▶ Fortunately, new technology continues to be developed to assist with various steps in the e-discovery process, including for privilege log review. See recent article from *The Federal Lawyer*, August 2015.
- ▶ According to the June 2015 issue of *ABA Journal*, nearly 70% of legal technology professionals expect their organizations' investment in legal data analytics to increase over the next two years.
 - 64% report using it for e-discovery
 - 33% report using it for litigation management
 - 29% report using it for information governance

Predictive Coding and Other Data Mining Procedures

- ▶ Among the recent cases where the use of predictive coding was at issue, there is an interesting case from Indiana.
- ▶ The court addressed proportionality, given the substantial data universe of 2.5 million documents, and the costs for ordering predictive coding versus the likelihood that this search process would be superior to the approach already being used by the defendants (summary from the Kroll Ontrack database – but see also the longer summary available from the K&L Gates database).
 - *In re Biomet*, 2013 WL 1729682 (N.D. Ind. Apr. 18, 2013).

Predictive Coding and Other Data Mining Procedures

- ▶ Other 2014–2015 cases specifically addressing predictive coding were located through the K&L Gates database.
 - *Bridgestone Americas, Inc. v. Int. Bus. Machs. Corp.*, No. 3:13–1196 (M.D. Tenn. July 22, 2014)
 - *Dynamo Holdings Ltd. P’ship v. Comm’r of Internal Revenue*, Nos. 2685–11, 8393–12 (T.C. Sept. 17, 2014).
 - *EORHB, Inc. v. HOA Holdings, LLC*, No. 7409–VCL (Del. Ch. Oct. 15, 2012) and *EORHB, Inc. v. HOA Holdings, LLC*, No. 7409–VCL, 2013 WL 1960621 (Del. Ch. May 6, 2013).
 - *In re Bridgepoint Educ., Inc.*, No. 12cv1737 JM (JLB), 2014 WL 3867495 (S.D. Cal. Aug. 6, 2014).
 - *Progressive Cas. Ins. Co. v. Delaney*, No. 2:11–cv–00678–LRH–PAL, 2014 WL 2112927 (D. Nev. May 20, 2014).
 - *Rio Tinto PLC v. Vale S.A.*, —F.R.D.—, 2015 WL 872294 (S.D.N.Y. Mar. 2, 2015).

Admissibility/Authentication/Who Made That Post

- ▶ The admissibility of social media as evidence is well-established, provided that it meets the criteria required under the rules of evidence, such as relevance and probative value, and that it can overcome any exceptions or objections that might be raised by the opposing party.
- ▶ This is true even in criminal cases, which was demonstrated in Indiana in 2009 by the murder case of *Clark v. State* (*Clark v. State*, 915 N.E.2d 126 (2009)).
- ▶ The following are some 2014 cases, with summaries from the K&L Gates database:
 - *Chewing v. Commonwealth of Virginia*, No. 2204-12-4, 2014 WL 931053 (Va. Ct. App. Mar. 11, 2014).
 - *Commonwealth v. Gelfgatt*, 11 N.E.3d 605 (Mass. 2014).
 - *Donati v. State*, No. 1538, 2014 WL 351964 (Md. Ct. Spec. App. Jan. 29, 2014).
 - *United States v. Vayner*, ---F.3d---, No. 13-803-cr, 2014 WL 4942227 (2d Cir. Oct. 3, 2014).
 - *Commonwealth v. Mulgrave*, ---N.E.3d---, 2015 WL 4163492 (Mass. July 13, 2015).

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Defendant Entitled to New Trial After Trial Court Erroneously Admitted “Russian Equivalent of Facebook” into Evidence  4

New York

United States v. Vayner, 2014 WL 4942227 (2d Cir. Oct. 3, 2014). In this criminal case, the defendant was convicted “on a single count of unlawful transfer of a false identification document.” The government relied primarily on the testimony of one witness, who testified that the defendant had created a forged birth certificate and sent the completed forgery via email. The government also produced evidence corroborating certain elements of that witness’ testimony. The evidence showed the path that the email took through several servers, but it did not show the IP address of the computer that sent the email, or any information about where the email was sent from beyond the state of New York. Before the trial concluded, the government sought to introduce a printout of a webpage from “the Russian equivalent of Facebook” allegedly featuring the defendant’s profile and email address. The defendant objected, arguing that the printout had not been properly authenticated. The trial court overruled the objection, and the jury found the defendant guilty. The Court of Appeals vacated the judgment and ordered a new trial, ruling that the trial court erroneously admitted the webpage without any evidence that the defendant had actually created the page himself. The court determined that the jury likely relied heavily on the webpage to link the defendant to the email address, since the other evidence provided was relatively weak. Because the webpage was the only strong piece of evidence admitted against the defendant, the Court of Appeals determined that the trial court’s erroneous ruling was not harmless and required a new trial.

Keywords: social media, Facebook

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Admissibility/Authentication/Who Made That Post

- ▶ In their article, Holt and San Pedro provide a practical approach to using social media as evidence.
- ▶ After acknowledging the problems with trying to obtain social media information from Facebook, they recommend using the Wayback Machine (but note the requirements for authentication).
- ▶ They then turn their attention to the issues with presenting social media evidence, including authentication, especially because of concerns that the party or witness is not the same person who posted or transmitted the message.
- ▶ Their suggestions for authenticating social media content are personal knowledge (through the testimony of witnesses), distinctive characteristics (including appearance, contents, substance internal patterns, barcodes, serial numbers, or signatures), self-authenticating documents, expert witness testimony or Internet consultants.
- ▶ Other issues with the admissibility of social media as evidence discussed in the article are relevance, witness bias and hearsay.

Admissibility/Authentication/Who Made That Post

- ▶ In terms of the authentication of social media content, Whaley provides the following comments:
 - If a party has obtained social media content and needs to get it into evidence, authenticating that evidence may become an issue.
 - One approach is to preserve and print a static image from a social media account – that can easily be done with a party’s public social media posts, for example.
 - But the personal testimony of an authenticating witness, like the person who collected and printed the image, will probably be necessary.
 - And with some kinds of content, like video or audio materials, special software and the assistance of a forensic computer consultant may be needed.

Admissibility/Authentication/Who Made That Post

- ▶ Seibert and Seibert also discuss the need to authenticate information from social media.
- ▶ Among the rules that are most likely to apply to social networking sites are:
 - Rule 901(b)(1): Testimony of a Witness with Knowledge
 - Rule 901(b)(3): Comparison by Trier or Expert Witness
 - Rule 901(b)(4): Distinctive Characteristics and the Like
 - Rule 901(b)(7): Public Records or Reports
 - Rule 901(b)(9): Process or System

Federal Rules of Evidence

- ▶ **Rule 901. Authenticating or Identifying Evidence**
- ▶ **(a) In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
- ▶ **(b) Examples.** The following are examples only — not a complete list — of evidence that satisfies the requirement:
 - **(1) *Testimony of a Witness with Knowledge.*** Testimony that an item is what it is claimed to be.
 - **(3) *Comparison by an Expert Witness or the Trier of Fact.*** A comparison with an authenticated specimen by an expert witness or the trier of fact.
 - **(4) *Distinctive Characteristics and the Like.*** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
 - **(7) *Evidence About Public Records.*** Evidence that:
 - **(A)** a document was recorded or filed in a public office as authorized by law; or
 - **(B)** a purported public record or statement is from the office where items of this kind are kept.
 - **(9) *Evidence About a Process or System.*** Evidence describing a process or system and showing that it produces an accurate result.

Admissibility/Authentication/Who Made That Post

- ▶ In their practice pointers, the authors state that “[t]he potential for fabricating or tampering with electronically stored information on social networking sites poses significant challenges from the standpoint of printouts of the site. The current trend is to require more evidence than just a distinctive profile page to authenticate a specific posting or message on the social networking site.”
- ▶ The authors suggest that some or even all of the following forms of authentication should be used for social media sites:
 - Testimony from the creator of the profile and relevant postings
 - Testimony from the person who received the message
 - Testimony about the distinctive aspects in the messages revealing the identity of the sender
 - Testimony regarding the account holder’s exclusive access to the account
 - Testimony from the social networking website connecting the post to the person who created it (*Id.* at 35)

Admissibility/Authentication/Who Made That Post

- ▶ Article by Pete Brown, Six Easy Ways to Tell If That Viral Story is a Hoax, in *The Conversation*, Sept. 18, 2015.
 - Reverse image search
 - YouTube DataViewer
 - Jeffrey's Exif Viewer
 - FotoForensics
 - WolframAlpha
 - Online maps

Obtaining Posted Content

- ▶ Many resources provide practical information on social media as evidence, including how to request and preserve it, the duty to preserve, the consequences of failing to preserve and warning clients not to delete, preservation in a BYOD (Bring Your Own Device) world and methods of access to social media.
- ▶ In terms of obtaining posted content, DiBianca identifies several methods in her article and discusses the advantages and difficulties with each method:
 - direct access to social media accounts (*see Gatto v. United Air Lines, Inc.*)
 - *in camera* review (*see Offenback v. L.M. Bowman, Inc.*)
 - attorney's eyes only (*see Thompson v. Autoliv ASP, Inc.*)
 - third-party subpoenas (but beware of issues with the Stored Communications Act, *see Crispin v. Christian Audigier, Inc.*, 717 F.Supp.2d 965 (C.D. Cal. 2010)).

Obtaining Posted Content

- ▶ Likewise, *Social Media Evidence – How to Find It and How to Use It* offers the following principles and trends for involving the discovery of social media evidence:
 - Discovery requests/subpoenas for social media evidence should be drawn narrowly.
 - Tie your discovery requests to information already in hand that shows the request is seeking evidence that likely exists and, therefore, not a fishing expedition.
 - Compulsion efforts are better targeted at the users of the social media, not at the social media providers.
 - If you have evidence that the producing party has improperly withheld evidence, go to the court for sanctions and/or for more social media discovery.
 - Consider who “owns” the social media link. You may have more than one potential discovery target.
 - *In camera* review by the court may be needed.
 - If the request is too broad, the court may limit it or deny it altogether.

Obtaining Posted Content

- ▶ In terms of obtaining posted content, we can look at the summaries of some cases from the K&L Gates database related to motions to compel technology-enabled content from a variety of sources (email, text messages, social media such as Facebook, Flickr, Twitter, etc.)
 - INDIANA CASE: *D.O.H. ex rel. Haddad v. Lake Cent. Sch. Corp.*, No. 2:11-CV-430, 2014 WL 174675 (N.D. Ind. Jan. 15, 2014).
 - *Fawcett v. Altieri*, ---N.Y.S.2d---, 2013 WL 150247 (N.Y. Sup. Ct. Jan. 11, 2013).
 - *Giacchetto v. Patchogue-Medford Union Free School Dist.*, No. CV 11-6323(ADS)(AKT), 2013 WL 2897054 (E.D.N.Y. May 6, 2013).
 - *In re Christus Health S.E. Texas*, 399 S.W.3d 343 (Tex. Ct. App. 2013).
 - *Johnson v. PPI Tech. Servs., L.P.*, No. 11-2773, 2013 WL 4508128 (E.D. La. Aug. 22, 2013).

Obtaining Posted Content

- *Keller v. Nat'l Farmers Union Prop. & Cas. Co.*, No. CV 12-72-m-DLC-JCL, 2013 WL 27731 (D. Mont. Jan. 2, 2013).
- *Finkle v. Howard Cnty., Md.*, No. SAG-13-3236, 2014 WL 6835628, (D. Md. Dec. 2, 2014).
- *Palma v. Metro PCS Wireless, Inc.*, 18 F.Supp.3d 1346 (M.D. Fla. 2014).
- *Caputi v. Topper Realty Corp.*, No. 14-cv-2634(JFB)(SIL), 2015 WL 893663 (E.D.N.Y. Feb. 25, 2015).
- *Nucci v. Target Corp.*, 162 So.3d 146 (Fla. Dist. Ct. App. 2015). See summary above.
- *Melissa "G" v. N. Babylon Union Free School Dist.*, No. 36209/2006, 2015 WL 1727598 (N.Y. App. Div. Mar. 18, 2015).

Social Media Preservation

- ▶ Two of my favorite authors are Sharon Nelson and John Simek, who have been on the cutting edge of security, digital forensics, electronic discovery and legal technology for many years through their company, Sensei Enterprises.
- ▶ One suggestion is that all lawyers register for Sensei's free article distribution service.
- ▶ A recent article by Nelson and Simek covers the preservation and harvesting of social media evidence as well as authentication, which is available from the Sensei Enterprises website.
- ▶ In this article, they discuss the benefits and risks of outsourcing the preservation process versus trying to handle it in-house, with special concerns raised about the danger of spoliation which often results in significant sanctions.
- ▶ They also provide practical suggestions for how to harvest the information without going through the social media vendor, who are only allowed to provide basic subscriber information, but not content, because of the Stored Communications Act.



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ABOUT SENSEI

Sensei Enterprises, Inc. is a nationally-known [digital forensics](#), [information technology](#) and [information security](#) woman-owned small business, founded in 1997 by [Sharon Nelson](#), a practicing attorney and [John Simek](#), vice president. Sensei provides information technology to hundreds of businesses locally in the DC Metro area. Sensei provides digital forensics and information security services nationwide.

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ABOUT SENSEI

Sensei Enterprises, Inc. is a nationally-known digital forensics, information technology and information security woman-owned small business, founded in 1997 by Sharon Nelson, a practicing attorney and John Simek, vice president. Sensei provides information technology to hundreds of businesses locally in the DC Metro area. Sensei provides digital forensics and information security services nationwide.

HOW MAY WE HELP YOU?

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DIGITAL FORENSICS



Capturing, assessing, investigating, and analyzing digital evidence requires specialized knowledge, skills and abilities – making digital forensics an art, as much as it is a science. Computers, mobile phones and other data storage devices can hold a wealth of electronically stored information that, in order to discover, requires a level

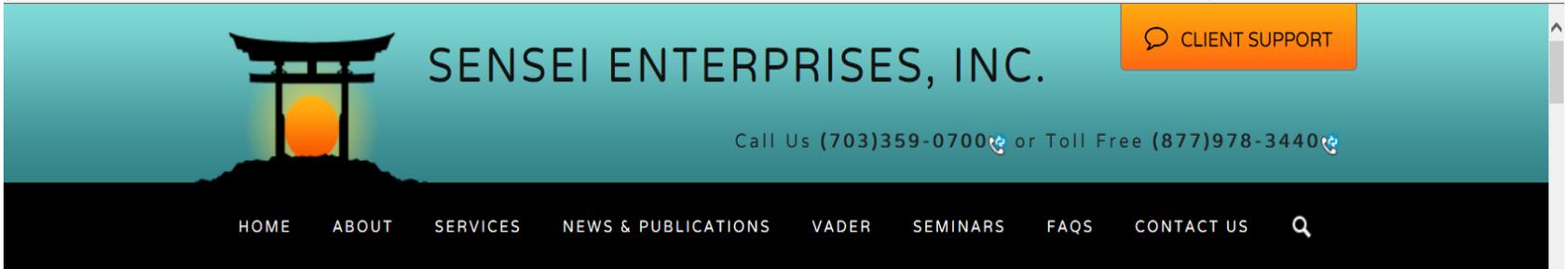
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November 30, 2014

15 TIPS FOR SAFE SHOPPING ONLINE

Excerpt: Did you know that cyberthieves also have Black Friday and Cyber Monday sales – of stolen credentials, including IDs, passwords, e-mails, credit card info, addresses, etc.? Your information IS their product so be wary of making it easy for them to engage in identity theft.

[Read the entire article here.](#)

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November 20, 2014

ENCRYPTION: ITS TIME HAS COME

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First Name

Last Name

E-mail Address *

Service of Interest *

How May We Help You? *

Social Media Preservation

- ▶ In terms of the preservation of social media content, Whaley provides the following suggestions:
 - One significant aspect of electronic data is that it frequently changes, and that is especially true of social media content. Therefore, at the beginning of a case it may be particularly important to try to preserve the status of another party's social media information. You can do this with a preservation notice to that party, or if you think additional measures are needed, consider a preservation request to the service provider or even a "preservation subpoena" and motion filed with a court. (*Id.*)
- ▶ An especially helpful resource is provided by Ball, which discusses the importance of a comprehensive preservation letter that covers all types of ESI, including how to handle back-up tapes, drive cloning and imaging and metadata.
- ▶ The Appendix to his article is an exemplar of a preservation demand letter to an opposing party.

Social Media Preservation

- ▶ The duty to preserve ESI in all formats is covered by the Federal Rules of Civil Procedure as well as a whole chain of cases, starting with the *Zubulake v. UBS Warburg* decisions from the early 2000s.
- ▶ This duty extends to social media of kinds. An important point to keep in mind is that this ESI may reside on a wide variety of devices and may also be found on personal devices with the increasing number of companies that are using a BYOD (Bring Your Own Device) strategy as a way to manage their technology.

Social Media Preservation

- ▶ Some recent cases located through the K&L Gates database, along with their summaries, include:
 - *Ogden v. All-State Career School*, No. 2:13cv406, 2014 WL 1646934 (W.D. Pa. Apr. 23, 2014).
 - *Painter v. Atwood*, No. 2:12-cv-01215-JCM-RJJ, 2014 WL 1089694 (D. Nev. Mar. 18, 2014).
 - *Petition of John W. Danforth Group, Inc*, No. 13-MC033S, 2013 WL 3324017 (W.D.N.Y. July 1, 2013).

Hearsay and Electronically Stored Information

- ▶ As stated on page 21 of *Social Media Evidence – How to Find It and How to Use It*:
 - Of course, hearsay objections may arise when using electronic evidence. See Miles v. Raycom Media, Inc., 2010 WL 4791764 *3 n.1 (S.D.Miss. Nov. 18, 2010), (unsworn statements made on Facebook page by nonparties were inadmissible under FRE 801). You may have multiple layers of hearsay involved and have to rely upon several hearsay exceptions. Judge Grimm provides an extensive discussion in Lorraine of hearsay in the context of electronically stored information. The procedural posture may affect how the court treats the information. In granting defendant's motion for summary judgment in Witt v. Franklin County Board of Education, 2011 WL 3438090 *2-4 (E.D.Pa. Aug. 4, 2013), the court considered three Facebook messages from nonparties offered by plaintiff because plaintiff could have reduced them to admissible form at trial by calling the witnesses.

Hearsay and Electronically Stored Information

- ▶ *See also*, from the K&L Gates database:
 - *Chewning v. Commonwealth of Virginia*, No. 2204-12-4, 2014 WL 931053 (Va. Ct. App. Mar. 11, 2014)

The Author Acknowledges

- ▶ **The author gratefully acknowledges the efforts of K&L Gates and Kroll Ontrack to provide databases of cases with case summaries. These databases are easy to search and their case summaries have been used extensively throughout these materials.
- ▶ Also please visit the Sensei Enterprises, Inc., website and register for the free articles from Nelson and Simek.



Any Questions?

Thank you for attending today's NBI seminar!