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SOCIAL DISCOVERY:

WHAT LEGAL PROFESSIONALS NEED TO KNOW

Corporate counsel and law firms are becoming increasingly aware of the treasure-trove of potential evidence available through social discovery. Gleaning information from Facebook timelines and Twitter feeds is the modern-day equivalent of hiring a private investigator to "tail" a target.

Legal professionals need to be aware of the importance of social media discovery and work accordingly.

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Digital Age Discovery

The clear benefits to streamlining the discovery process through virtual records and digital storage have given rise to the e-discovery industry. With the increase in electronic data storage, the sheer volume of data collection has increased exponentially. Software tools have been developed to assist with sorting, storing, retrieving, and analyzing data for relevance. However, the main focus has been in mining emails, and only recently has there been a shift toward including social media.

Social Media Discovery

Social media platforms such as Facebook and Twitter, are largely replacing email as the primary form of electronic communication. Although social media communication has largely been on a personal level, more and more businesses are taking advantage of these systems as well. As business communications expand to include social media, the evolution of e-discovery software will have to follow suit, and new methods for preserving, collecting, and reviewing this data will need to keep pace.

Enter X1 Social Discovery

X1 Social Discovery is an e-discovery investigation platform launched by its parent company X1 Discovery. First released to the market in 2003, X1 e-discovery software has broken new ground with its search engine technology. X1 Social Discovery takes e-discovery to a whole new level – or rather, to a different and more specific level: social media. The tool is designed to probe Facebook, Twitter, and LinkedIn in order to search, preview, collect, and then index relevant data, and is geared toward preserving chain-of-custody in the process.

Real World Social Discovery

Over the last couple years, the legal world has seen a dramatic rise of cases that include social media, many of which are setting new legal precedents for discovery of social media. Below are a few recent and significant cases that are setting case law.

Lester v. Allied Concrete Company

In Virginia, a state judge ordered attorney Matthew Murray to pay over $500,000 in fines for telling his client to delete less-than-flattering information from his Facebook page. Mr. Murray reportedly resigned his position as managing partner and is no longer a practicing attorney. The client, Isaiah Lester, was separately sanctioned $180,000 for listening to his lawyer's bad advice, and the lawsuit amount awarded to him was cut nearly in half.

In this particular case, Mr. Lester had a photo of himself on his Facebook page wearing a T-shirt ("I heart hot moms") and drinking a beer. His lawyer instructed him via email to clean up his account and remove the photo: "We do not want blow ups of other pics at trial so please, please clean up your Facebook and MySpace!" Counsel was concerned the pictures would send the wrong message to jurors and prejudice his case against Allied Concrete for the wrongful death of his wife.

If a lawyer instructed a client to destroy physical documents, photos, or even delete emails, this would be considered a highly unethical destruction of evidence, yet Mr. Murray felt social media profiles were exempt from typical discovery rules. The Virginia court, however, did not agree, and as a result, legal precedence was set.

Zimmerman v. Weis Markets

In this case, the court ruled that anyone posting information or photos to a public site has no reasonable expectation to privacy, which would exclude them from normal inclusion in discovery.

Zimmerman, the plaintiff in the personal injury suit, filed damages for a forklift injury incurred to his leg while at work for the defendant's subcontractor. Zimmerman was ordered to provide the defendant with all log-in information (usernames and passwords) for any social media accounts, which were maintained by him; the public portions of the defendant's profiles showed information and photos relevant to the case, therefore it was assumed the private portions of the social media sites might also contain relevant evidence to Mr. Zimmerman's claims. For example, due to his visible scar, the plaintiff claimed that he was too embarrassed to wear shorts after his accident, yet pictures posted to these sites showed him wearing shorts with his scar in full view.

In its ruling, the court stated:

"By definition, a social networking site is the interactive sharing of your personal life with others; the recipients are not limited in what they do with such knowledge. With the initiation of litigation to seek a monetary award based upon limitations or harm to one's person, any relevant, non-privileged information about one's life that is shared with others and can be gleaned by defendants from the Internet is fair game."

McMillen v. Hummingbird Speedway

Similarly to Zimmerman v. Weis Markets, the plaintiff was ordered to turn over his usernames and passwords for Facebook and MySpace in order to allow opposing counsel to investigate whether comments made on those platforms might contradict his claims to damages and disability.

McMillen was injured when his vehicle was rear-ended by another car during the cool-down lap portion of a race. Since the publicly visible portion of his Facebook page included comments about attending another race after the incident, and going fishing, the defendants demanded his login information in order to "determine whether or not plaintiff has made any other comments which impeach and contradict his disability and damages claims."

The Pennsylvania court stated that relevant materials are included as discoverable as long as it was not privileged. The State of Pennsylvania recognizes only very limited privileges, and social network sites are not included in the exceptions.

The court stated:

"Facebook, MySpace, and their ilk are social network computer sites people utilize to connect with friends and meet new people. That is, in fact, their purpose, and they do not bill themselves as anything else. Thus, while it is conceivable that a person could use them as forums to divulge and seek advice on personal and private matters, it would be unrealistic to expect that such disclosures would be considered confidential."

Essentially, communications posted within social media platforms should be considered another viable piece of legitimate communication discovery, along with memos, emails, and documents.

The court's final ruling declared that if "there is an indication that a person's social network sites contain information relevant to the prosecution or defense of a lawsuit …, access to those sites should be freely granted."

Crispin v. Audigier

This case involves a claim of copyright infringement brought by Crispin, an artist, against Audigier, a designer. Crispin alleged that Audigier used his works outside the bounds of their original oral agreement, including sub-licensing the artwork out to other individuals and companies (who were also named as co-defendants) without additional consent from Crispin.

Defendant counsel served subpoenas to Facebook and MySpace requesting them to release communications between the two parties, and between Audigier and the other co-defendants. Crispin filed a motion fighting this move, citing protection under the Stored Communications Act (SCA) of 1986, which prohibits providers of Electronic Communication Services (ECS) and Remote Computing Services (RCS) from releasing such communications. The motion was denied; Judge John E. McDermott declared that social media platforms did not qualify for protection under the SCA guidelines.

Crispin appealed this decision, which was then partially reversed by District Court Judge Margaret Morrow. Judge Morrow found that the protections provided by the SCA and related discovery procedures did somewhat apply, since those platforms do provide private messaging features, which qualifies them as both CS and RCS providers. However, Judge Morrow added, there was not enough evidence to determine whether postings in public areas of these sites in comment fields or as wall postings qualified for the same protection, as they are dependent upon the user's privacy settings.

This sets a legal precedent of potentially limiting social media discovery based on SCA protections in the future, although many feel the Stored Communications Act is severely outdated. This case is the first instance of the SCA being invoked as protection against social media discovery.

THE FUTURE OF SOCIAL DISCOVERY

As with any great shift in the status quo, the new era of e-discovery, and particularly social discovery, is still in its infancy. However, the nearly limitless potential for tapping into case-relevant information suggests the means of procuring this data will make tools like X1 Social Discovery indispensable. As privacy settings (and laws) take hold, it will create new challenges for those seeking information via social discovery – social discovery technologies and expertise will become increasingly important.

Forward-thinking firms and companies are recognizing this important stage and developing policies and processes to address the emerging practice of social discovery. Working with knowledgeable partners such as TERIS, is one way firms are ensuring all their bases are covered.

If you would like to learn more about social discovery and X1 Discovery tools, please contact us.

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