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Social Media and Discovery – Be Careful What You Post

Social media is here to stay. Facebook has more than 700 million users, 50 percent of whom log in every day. LinkedIn has more than 100 million users. About 200 million tweets are sent every day on Twitter. New social media utilities and applications are popping up daily. Moreover, social media use is not limited to individuals, as companies are increasingly using such outlets to promote their products or services, and to connect with potential customers.

The biggest concern with social media is not its prevalence, but rather the informality associated with its content. In most instances, users hastily post candid messages from iPhones, Blackberries or other smartphones, often saying things they would never say in a formal letter. Users may post where they are, who they are with and what they are doing. As a result, social media has become a gold mine for prejudicial information, and can be a game-changer in litigation.

Not surprisingly, savvy trial lawyers are routinely requesting access to social media history, and in many cases, courts are requiring that such information be produced. In most cases, courts weigh the relevancy of the information against any privacy concerns of the user. For example, in *Equal Employment Opportunity Comm'n v. Simply Storage Mgmt. LLC*, 2010 WL 3446105 (S.D. Ind. May 11, 2010), the defendant requested profiles, postings, photographs, videos and other materials from the claimants' Facebook and MySpace pages that related to their mental health. The court first noted that discovery relating to social media "requires the application of basic discovery principles in a novel context." Consequently, the court held that while a party may be entitled to social media content that is related to a claim or defense in the case, "not all information must be disclosed." As for privacy, the court dismissed the claimants' argument that privacy settings should protect their posts from discovery, stating "a person's expectation and intent that her communications be maintained as private is not a legitimate basis for shielding those communications from discovery."

In *McMillan v. Hummingbird Speedway*, 2010 WL 4403285 (Pa. Com. Pl. Sept. 9, 2010), the court also looked to the relevancy of the information found on the plaintiff's social network when determining whether certain information was discoverable. The court held that "where 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." The court also rejected the plaintiff's claim of privacy, stating that "while it is conceivable that a person could use [social media] as forums to divulge and seek advice on personal and private matters, it would be unrealistic to expect that such disclosures would be confidential."

Many courts have looked to the social networks' policies and procedures to evaluate the expectation of privacy a user may, or in most instances, may not have. In *Romano v. Steelcase Inc.*, 2010 WL 3703242 (N.Y. Sup. Ct. Sept. 21, 2010), the court, citing Facebook's and MySpace's



own policies, noted that “when plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social-networking sites else they would cease to exist.” Consequently, the court ordered that the plaintiff give the defendant access to her Facebook and MySpace accounts, including any previously deleted or archived records.

In a unique twist, the court in *Offenback v. L.M. Bowman, Inc.*, 2011 WL 2491371 (M.D. Pa. June 22, 2011) recently conducted an *in camera* review of the plaintiffs’ Facebook and MySpace accounts after being provided with the passwords, and ordered production of information relating to the present activities of a plaintiff who claimed injury from a motor vehicle accident.

The takeaway from this line of cases is that irrespective of any privacy settings incorporated into a social network, nothing posted is ever truly private, nor does it expire. Consequently, individuals and companies should expect that an opponent in litigation will have access to some, or even all, of the content in one’s social network, and therefore should exercise sound judgment and common sense when posting on social media sites. When in doubt, do not post.

As for companies, employees must understand the implications and possible repercussions of discussing company-related issues online. Companies should develop a social media policy that outlines who may post information on behalf of the company, content that may be posted on social media networks, protocols associated with use of social media and the consequences associated with improper use of social media. While a social media policy will not shield a company from its discovery obligations in litigation, it will assist in preventing improper content from being posted in the first place.

FOR MORE INFORMATION

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