

# The e-Discovery 4-1-1

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Legal Strategies. Business Solutions.

## Social Media Discovery: It's Not So Different After All

by Cris Whitman

As the use of social media continues to grow, so do concerns about preserving and collecting related content. Topics surrounding the discoverability of social media and related collection, preservation and production issues can be unnecessarily complex because of the dynamic and innovative nature of the underlying technology.<sup>1</sup> In approaching discovery, it is easy to get bogged down by the technical details related to new and dynamic technologies. However, parties can develop an effective strategy for dealing with social media content if they remain steadily focused on the basic tenets of the Federal Rules, e-discovery best practices and helpful guidance from recent case law.

The 2006 amendments to the Federal Rules clearly contemplate the discovery of all forms of documents and electronic information.<sup>2</sup> Although it is not explicitly stated in the amendments, one can reasonably infer that "electronic documents and data" include social media content. Regardless of form, the guiding principle for discoverability is the same -- documents and data are discoverable if relevant to a claim or defense. As such, successful strategies for obtaining social media content should first and foremost be focused on the relevant content.

Considering the popularity of social media and people's tendency to over-share information on social media sites, it is likely that relevant photos, videos, messages and other content exist in these locations. Particularly for defendants facing product liability claims or personal injury lawsuits, social media sites have proven to be illuminating sources of revealing information about a plaintiff's condition or other evidence to dispute an alleged injury or harm.<sup>3</sup> Fortunately, the vast majority of social media content is available for the world to see. Parties seeking discovery of social media content should leverage this

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## Predictive Coding: Webcast to Explore Uses, Best Practices

LeClairRyan's William Belt, Jr. and Daryl Shetterly will present "Computer Assisted Review: What Is It and Is It Defensible?" via webcast on Tuesday, January 10.

The webcast is hosted by DRI, an international membership organization of civil defense lawyers, and will discuss popular topics related to predictive coding and how to ensure defensibility when applying this document review method. Visit DRI to [register online](#).

To learn more about [managed self collection](#), please visit LeClairRyan's blog, The e-

access by taking ethical steps to investigate the information available on these sites. The initial investigation may include viewing pages related to a party or witness and printing or taking screenshots of the publicly available content. However, the investigation should never include using deceptive tactics to access social network content, such as impersonating a "friend" to gain access to a user's private profile information.<sup>4</sup>

How then are parties able to access this so-called "private" content? The most effective way to access social media content, including "private" information, is to specifically request it from the opposing side.<sup>5</sup> Courts have found the information on social media pages to be within the control of the content owners<sup>6</sup> and that there is an obligation to produce relevant social media content. In party discovery, an objection to a request for social media content on "privacy" grounds is unlikely to be successful. The rules of evidence define the scope of discovery, in which relevance is the controlling factor. Relevant information -- regardless of whether it comes from a locked filing drawer, a personal email account or a "private" social media page -- is discoverable.<sup>7</sup>

Written discovery requests should include language specifically requesting relevant social media content. To the extent the request is challenged on relevancy grounds, the requesting party's preliminary investigation may serve as justification for the request. Screenshots or printouts of publicly available content may help establish the likelihood that relevant information exists within the non-viewable or "private" spheres of a user's social network.<sup>8</sup>

Although most courts have found relevant content on a private page to be discoverable, courts take privacy concerns into account to appropriately limit access to information.<sup>9</sup> Therefore, the requesting party should also avoid seeking unfettered access to a user's social media account. Requests that are less intrusive and narrowly tailored to address relevant content and date ranges are more likely to be upheld as reasonable in the face of a challenge.<sup>10</sup>

Comprehensive social media discovery strategies also account for the dynamic nature of the content. Social media sites are interactive and frequent user activity means the content is always changing. The risk that an opposing party will remove or alter relevant information can be mitigated significantly by implementing a preservation order for social media content. The language of the order should specifically provide that existing social media is not to be altered. Otherwise, any claimed spoliation may be deemed "unintentional."<sup>11</sup>

<sup>1</sup>See *Barnes v. CUS Nashville, LLC*, 2010 WL 2265668 (M.D. Tenn. June 3, 2010) (illustrating the unnecessarily complex process involved in the

discovery of clearly relevant photos on the plaintiff's social media page).

<sup>2</sup>FED.R.CIV.P. 34(a)(1) defines "electronically stored information" to include "data or data compilations – stored in any medium from which information can be obtained..."

<sup>3</sup>See *Offenback v. L.M. Bowman, Inc.*, 2011 WL 2491371 at 3 (M.D. Pa. June 22, 2011) (finding content on plaintiff's social media page that directly refuted claims of "psychological injuries" and inability to participate in certain activities to be discoverable).

<sup>4</sup>Such actions are contrary to ABA Model Rule 4.2 and likely violate similar local rules of professional conduct pertaining to deceptive practices such as fraud, misrepresentation and unauthorized contact of a represented party.

<sup>5</sup>Although it may be possible to gain access to social media content through a subpoena to the third-party social networking website, the Federal Stored Communications Act (SCA) may preclude a third party from providing certain types of social media content. For a detailed discussion of the SCA requirements related to the discovery of "private" social media content, see *Social Media and Word-of-Mouse Discovery Tips*, an article in the DRI online newsletter available at the following website link: [click here](#)

<sup>6</sup>See *Katiroll Co., Inc. v Kati Roll & Platters, Inc.*, No. 10-3620 (GEB), 2011 WL 3583408 (D.N.J August 3, 2011).

<sup>7</sup>See *Held v. Ferrellgas, Inc.*, 2011 WL 3896513 (D.Kan. Aug.31, 2011) (finding that relevant information from a plaintiff's Facebook page must be produced, subject to minor limitations.) See also *EEOC v. Simply Storage Management, LLC*, 270 F.R.D. 430, 436 (S.D. Ind. 2010) (holding that social media content related to the emotional or mental status of the plaintiff was discoverable as relevant to the claims in the workplace harassment suit).

<sup>8</sup>See *Romano v. Steelcase*, 2010 WL 3703242 (N.Y. Sup. Ct. Sept. 21, 2010) (granting requesting party's access to non-public social media content based on publicly available photographs and suggesting additional relevant content was likely to be found in the non-public areas).

<sup>9</sup>Held at 1.

<sup>10</sup>Effectively drafted preservation orders, like document requests, should also be informed by considerations of relevancy. Although, the scope of preservation is broader than the scope of discovery, the language in social media-specific preservation orders should still be limited to sources of potentially relevant content.

<sup>11</sup>See *Katiroll Co. v. Kati Roll and Platters, Inc.*, 2011 WL 3583408 (D.N.J. Aug. 3, 2011) (holding that the alteration of social media profiles was unintentional when the party had not been clearly ordered to refrain from tampering with them).

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## Thorough Custodian Interviews Uncover Valuable Information

by [Daryl Shetterly](#)

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Interviewing key custodians is a crucial component of the e-discovery life cycle. Information gathered during custodian interviews helps e-discovery professionals identify relevant documents in the corporation and uncover valuable information that aids in privilege review as well as deposition and trial preparation.

It is important that custodian interviews are properly documented for

defensibility purposes. To aid in documentation and ensure consistency across interviews, develop an electronic form that allows the interviewer to record the custodian's answers as they are given.

The questions asked during the interview will depend on the facts of each case. However, the six topics below should be addressed during every custodian interview.

### **Potential Privilege**

Identifying potentially privileged documents related to the data being collected allows access to valuable information that can be shared with the document review and production team. Maintain a list of names and email addresses of each attorney with which the custodian has communicated. Use this information to draft a list of search terms to isolate potentially privileged material prior to review and production. Save time and money by foregoing a frontline review of these documents and instead route them directly to the privilege review team.

### **Legal Hold Notice**

Case law and The Sedona Conference<sup>®</sup>, among others, indicate that the preservation obligation does not end with a properly drafted and distributed litigation hold notice. It is important to follow up with the custodians. During the custodian interview, ask whether they received, understand and are following the litigation hold. A blank stare followed by the question, "litigation, what?" is generally not a good sign.

### **Scope of Relevant Documents**

Develop a checklist that tracks the relationship between each custodian and category of the document requests. This will allow e-discovery professionals to see at a glance which custodians have in their possession documents responsive to each document category. When the theory of the case shifts or issues are dropped, refer to the checklist to prioritize documents for production or make prompt exclusion decisions. Tracking this type of information will also aid in identifying gaps in the collection of relevant documents and highlight instances in which the same information is being collected from multiple individuals. This checklist will prove beneficial regardless of how few custodians there are, and it will become indispensable as the custodian list grows.

### **Locations of Relevant Documents**

Custodians will often identify only a few locations when asked where potentially relevant document may reside. However, by asking specific questions and looking around custodians' offices, e-discovery professionals may find additional files in other folders on their computers or in binders, boxes and external media on their shelves. Walk through a list of potential data sources with each custodian,

including:

- Corporate email account
- Personal email account
- Corporate computers
- Personal computers
- Network servers
- Databases
- Portable media (CDs, DVDs, external hard drives)
- Social media sites (Facebook, LinkedIn, Twitter)
- Text messages or other information on personal or corporate smartphones that are not synced with a computer
- Audio (voicemail and Skype)
- Instant messaging
- Document management tools (SharePoint)

In addition, remember to ask about paper documents, which may reside in custodians' offices, centralized departmental storage or offsite archives.

### **Technical Specifications**

For each source of potentially relevant information identified in the above list, include a description of the data and relevant technical specifications of the storage device on the interview form. Having this information will streamline document collection and ensure that the data is gathered from the correct locations. It also makes it easier to later audit the collection steps. Remember, while the custodian may point to a computer and say that everything is on that computer, the trend toward cloud storage makes it increasingly likely that the data is stored in the cloud rather than on the actual machine.

### **Other Custodians**

Before concluding the interview, ask each custodian if there are other individuals – inside or outside the company – who may possess relevant documents. The names gathered will provide early insight into the distribution of relevant documents across the organization in the event the company lacks technology that can provide this type of information. This list will also prove useful if the need to perform additional collections for a particular category of documents arises.

Conducting a thorough custodian interview takes time, and in some cases a lot of time. However, the investment put into a custodian interview early in the document collection process will inevitably save hours of work down the road and make for a streamlined and cost-effective trial preparation.

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