

Social Media and E-Discovery: How to Win Friends and Preserve Your Data (and Your Dignity)

There's no escaping it: social media is now a part of our everyday lives. The Social Media Success Summit, one of the largest online summits held every year, recently featured 24 social media professionals giving advice on growing an online presence through websites like Twitter, LinkedIn, YouTube and Facebook. Each of these websites features tens of millions of users:

- **YouTube reports more than 42 million accounts (not including those who casually browse the site without a username)**
- **LinkedIn serves 65 million business professional users**
- **Twitter reports more than 190 million unique accounts**

- **Facebook boasts a jaw-dropping 500 million users around the globe**

Fortune 500 companies such as Whole Foods Market, Best Buy and The Home Depot include two or more free social media websites among their arsenal of marketing tools, often citing Flickr, a photo-sharing service, as another popular resource. What big and small businesses alike have begun to understand is that connecting with consumers on websites they already visit is a powerful resource worth investing — time, not money — in. With a stunning 50 million tweets published per day — each of those tweets posted for free — it’s no wonder businesses have turned to Twitter and other social media sites to get their names and messages out to a potential audience of tens of millions.

THE POTENTIAL FOR FAUX PAS

While businesses certainly have great reasons for using this new media, the challenges that social media pose in e-discovery are as plentiful as the tweets and status updates themselves. With no standard procedures or guidelines for using social media in the workplace, each company’s policy looks a bit different, each interacting with this phenomenon in a unique way. The rewards of social media are clear: businesses have a free tool to connect with their target audience. The risks, however, are not as straightforward.

Social media marketing isn’t just limited to Fortune 500 corporations — many AmLaw 100 law firms and e-discovery software vendors (like Exterro) have blogs, Twitter accounts and Facebook fan pages. The advent of legal-specific sites like JDSupra and Avvo further complicate the landscape.

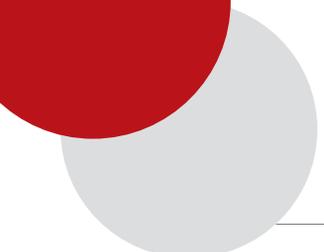
In an article for *Executive Counsel*, Tamara Devitt, a social media expert and partner at Fisher & Phillips LLP, describes a nightmare scenario for an employer with a strong Web

presence: learning of an employee’s uncouth status updates or racy pictures from a business trip to Las Vegas. While this particular scenario was

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fictional, Devitt uncovers several instances of personal social media use by employees that pose a risk for the company. An additional risk that businesses face is the misuse of a company account (as opposed to a personal account) by an employee. On October 21, 2010, for example, the Twitter Marketing Case Studies website reported that The Washington Post came under fire after a controversial tweet, in response to a news story on its official Twitter account, caught the eye of a national political activist group.

While not all such blunders end in litigation, companies choosing to utilize social networking services must prepare themselves for the



possibility. In addition, social media data, like e-mail before it, is swiftly becoming another discoverable data source during litigation.

In a recent case, *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 Pa. Dist. & Cnty. LEXIS 270 (C.P. Jefferson, Sept. 9, 2010), the defendant sought information stored not on the plaintiff's computer or in e-mail, but specifically in social media accounts. In the motion to compel, the court ruled:

Where there is an indication that a person's social network sites contain information relevant to the prosecution or defense of a lawsuit ... and the law's general dispreference for the allowance of privileges, access to those sites should be freely granted.

While this case involved the social media data of an individual, the principle certainly applies to enterprise social media data as well. Without proper policies to help control such data, companies face risks regarding their social media content.

In perhaps the highest profile case of subpoenaed Twitter information, the U.S. Department of Justice recently subpoenaed Twitter account information for accounts associated with the group WikiLeaks. On January 10, 2011, *The Wall Street Journal* reported:

The court order — initially secret — was unsealed at the request of Twitter on Jan. 5. In it, the Justice Department seeks data related to the four Twitter accounts, including billing information, session logs and IP addresses. Issued by U.S. Judge Theresa C. Buchanan,

the order says the Justice Department provided "specific and articulable facts" to show the records were "relevant and material to an ongoing criminal investigation."

ONWARD THROUGH THE FOG

The questions employers and their legal teams face in this new and unclear world are how to handle employee indiscretions online, and how to deal with the possibility of litigation and discoverability. The answer is preparation through clear policy guidelines, controls for creating and monitoring social media content, and technical procedures for obtaining and producing social media content.

In the past, many businesses have steered clear of social media, mandating that their employees do the same, at least in regard to the business. With so much for companies to gain through the use of social media, avoidance is no longer the best solution. Instead, many companies are choosing to deal with social media in e-discovery with *prevention* of uncontrolled social media content and *preparation* for litigation.

In addition to the risks of businesses suffering a public relations nightmare and possible litigation from employees or those outside the company, the risks companies face by being unprepared for possible discovery of social media could amount to hundreds of hours of playing catch-up, with not a minute to spare.

The basic challenges are in the structure of how social media works on the Web and where the information is stored — off of company servers, operated by a third party. Businesses can use these free social media services, but ultimately the information is handled by (an often public) social

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media company. While enterprise legal teams, along with IT support, might feel prepared for discovery of company documents and e-mail messages stored on company servers, producing information controlled by social media companies presents unique challenges for these teams.

In her November 29, 2010 article for the *National Law Forum*, Jennifer Schaller outlines where social media falls in a company's duty to preserve:

The 2006 Federal Rules of Civil Procedure amendments changed the discovery rules to allow a party to request "electronically stored information" within the "possession, custody, or control" of the responding party... Social media data fits the definition of ESI; thus, businesses must deal with the issue of preserving and possibly producing social media data that fall under their data retention policy.

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to manage and monitor that content through up-to-date data mapping and flexible legal project management software.

Randal Girouard of Haynes and Boone, LLC, coauthor of “E-Discovery Project Management” for ILTA’s October 2010 white paper, cites “coordinating the resources used in the process [of e-discovery] to produce a repeatable, sustainable, and defensible process” as one of

the major challenges in e-discovery.

Girouard continues:

Project management tools and strategies facilitate the coordination of the many parties and point tools involved, promote communication and collaboration between those

parties, create a record of the process, promote discipline and consistency, and provide a framework for compliance enforcement.

THE NEW FIRM MOTTO: BE PREPARED

What does all this mean for legal and IT teams? With social media here to stay — and growing in popularity every day — the question needs to change from “How do we avoid these sites?” to “How can we manage our risk?”

One way is to include social media content in the information governance policies of an enterprise, and

There are advanced technologies provided by e-discovery companies that specialize in legal software solutions. These companies are well-positioned to help enterprise legal and IT teams prepare their clients for e-discovery challenges created by social media. By investing time in e-discovery

project management processes and software and data mapping solutions, businesses will be better prepared for dealing with the discovery of social media content.

One of these technologies, Exterro Fusion, assists IT and legal teams by positioning social media as just one of many data assets mapped to litigation profiles. By automating processes with e-discovery project management software, businesses and their legal teams have access to the information required in e-discovery and they can manage the process. This is but one example of the very clever technological solutions on the market.

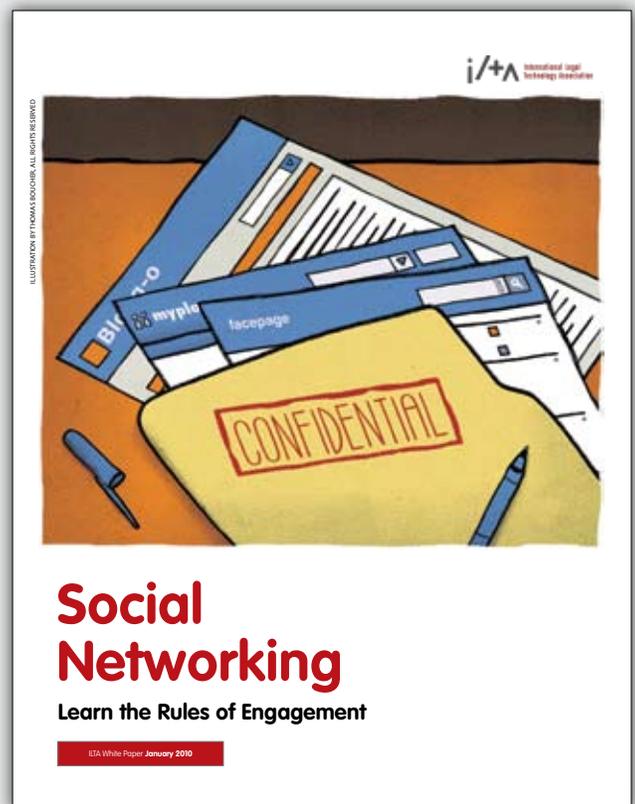
MOVING FROM WALLFLOWER TO SOCIAL BUTTERFLY

Applying legal project management principles and technological solutions to social media content turns information existing on sites like Twitter and Facebook into just another data type for preservation and possible production. Through a comprehensive social media policy, businesses can limit the risks of social media use. By employing technology solutions that are flexible enough to encompass and allow for social media content, IT and legal teams can incorporate social media content into their overall e-discovery policies and processes. For legal counsel and IT teams, these technological solutions can be a key component of overall information governance and can position enterprises to be better prepared for a world where e-discovery is likely to include rather complex pieces of social networking information.

Social media can be a valuable resource for companies in today's complex and growing world economy. By managing the legal and operational risks associated with them, social media is free —

literally and figuratively — to work for your company, not against it. **ILTA**

For more on social networking, check out our January 2010 White Paper.



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