

Morgan Lewis

Social Media Webinar Series:
Social Media in eDiscovery

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An Overview

- Social Media/Web 2.0
 - Definitions and Types
- The eDiscovery Impact
 - EDRM: Best Practices and Pitfalls
- Hypotheticals
 - What Courts Are Saying
- Minimizing the Risks
 - Best Practices and Considerations

Social Media/Web 2.0

EDD 1.0



EDD 2.0



Social Media – Web 2.0

- Social Media
 - Designed to be disseminated through social interaction, using highly accessible and scalable publishing techniques
 - Use web-based technologies to transform and broadcast media monologues into social media dialogues
 - http://en.wikipedia.org/wiki/Social_media
- Web 2.0
 - Applications that facilitate interactive information sharing, interoperability, user-centered design and collaboration on the World Wide Web
 - http://en.wikipedia.org/wiki/Web_2.0

Social Media Variety

- Social networking sites (Facebook, MySpace)
- Business networking sites (LinkedIn, Plaxo)
- Online media (YouTube, Hulu)
- Twitter
- Personal blogs
- Employer/corporate sponsored blogs





The eDiscovery Impact

FRCP – The 2006 Amendments

FRCP

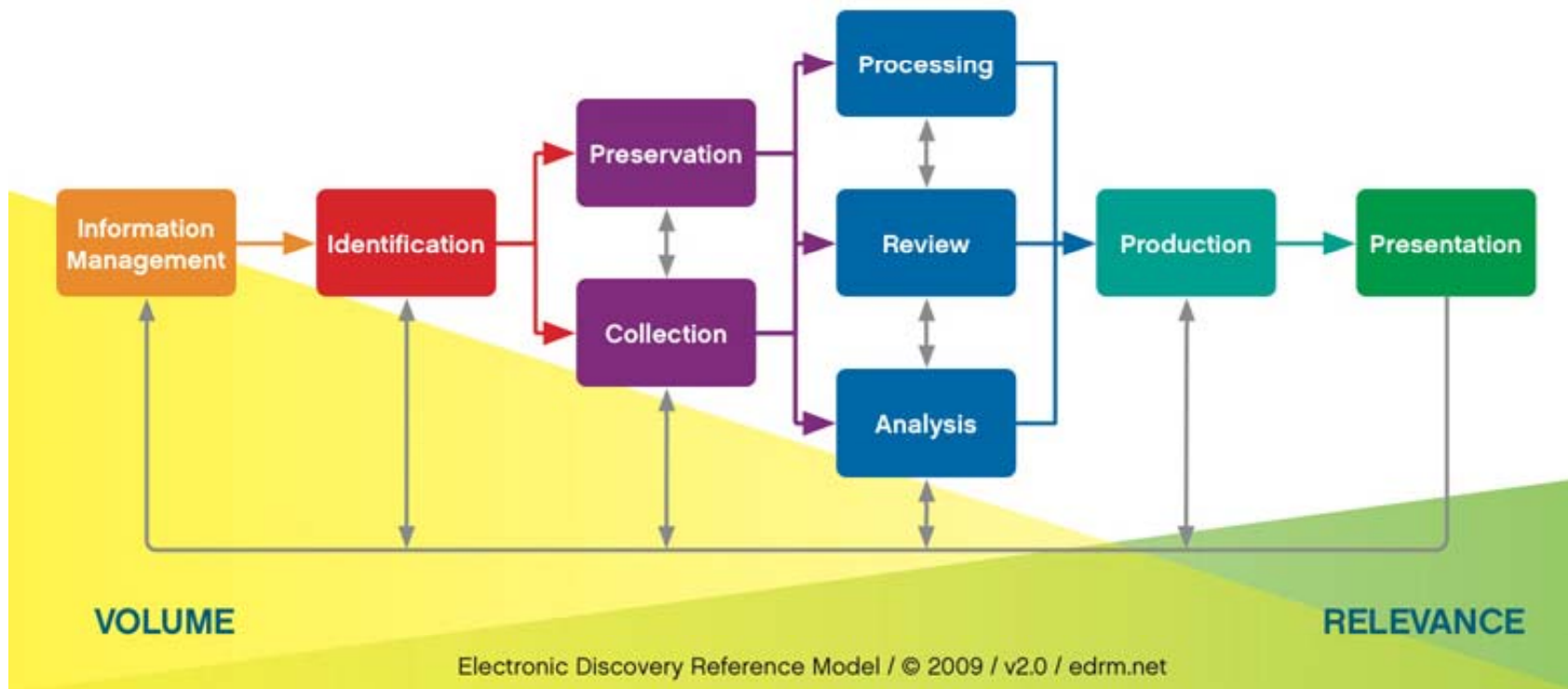
- ESI – 34(a)(1)(A)
- Early attention to eDiscovery issues by the parties – 16(b); 26(f)
- Form of production - 34(b)(2)(E)
- Discovery of data “not reasonably accessible” – 26(b)(2)(B)
- Inadvertent production and waiver of privilege – 26(b)(5)
- “Safe Harbor” – 37(e)

Web 2.0: Discoverable ESI?

- FRCP
 - No substantive definition of ESI
 - Scope is deliberately flexible
 - Contemplates changing technology
 - *The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information (FRCP Rule 34(a) – 2006 Advisory Committee Note)*

The Basics: The EDRM Model

Electronic Discovery Reference Model



Social Media eDiscovery Risks

- Social media data presents unique challenges throughout EDRM range
 - Management
 - Identification
 - Preservation
 - Collection
 - Analysis, review
 - Production
 - Use in legal proceedings

Web 2.0: Discoverable ESI?

- It is electronic
- It is information
- But is it “stored?”
 - By whom?
 - Where?
 - For how long?
- Possession, custody, or control

Hypotheticals

Hypothetical Fact Pattern: Relevance, Scope



Relevance, Scope

- Personal injury matter: plaintiff alleges that injuries he sustained at a company facility have left him unable to work
- You learn that plaintiff has several social media accounts that may contain photographs and postings about a recent family vacation, a wedding, a home renovation project. Hoping to see evidence of plaintiff dancing, swimming and climbing ladders, you request discovery of the sites.
- When plaintiff resists you move to compel production of plaintiff's Facebook and MySpace accounts. Do you win?

Relevance, Scope

- *Broad discovery granted:*
 - *Romano v. Steelcase*
907 N.Y.S.2d 650 (NY Sup. Ct, Suffolk Cty 2010)
 - *McMillen v. Hummingbird Speedway*
2010 WL 4403285 (Pa. Com. Pl.)

Relevance, Scope

- *Discovery reined in:*
 - *McCann v. Harleystville Ins. Co. of NY*
910 N.Y.S.2d 614 (NY Sup. Ct App. Div. 4th Dep't 2010)
 - *affirming denial of defendant's overbroad "fishing expedition"*
 - *Piccolo v. Paterson* (Pa.Com.Pl.)
 - *denying motion to compel access to plaintiff's Facebook account*

Relevance, Scope

- *EEOC v. Simply Storage Management* (S.D. Ind. 2010)
 - Employer requested production of photographs and videos posted by former employees on Facebook or MySpace, all updates, messages, wall comments, causes joined, activity streams, and applications, claiming that information was relevant to the employees' emotional distress claim.
 - Court ordered production of materials that reveal, refer or relate to any emotion, feeling or mental state, communications that reveal, refer or relate to events that could reasonably be expected to produce a significant emotion, feeling or mental state and any pictures because claimants' appearance may reveal their emotional or mental status.
- *Bass v. Miss Porter's School* (D. Conn. 2009)

Hypothetical Fact Patterns: Preservation



Preservation

- Noticing that a data custodian's Facebook page contains information that may be called for in an anticipated litigation, you print out some screenshots of the relevant pages or instead, ask your litigation support staff to handle this, instructing them to document the steps taken
- Have you done enough to meet your duty to preserve?

Preservation

- *Simple issue:*
 - *Facebook download feature*
- *General issues:*
 - *Static images/dynamic content*
 - *Missing information – depending on the case this can be vital (layout, appearance over time)*
 - *Available technologies*
 - *Meet and confer: agreement with requesting counsel*

Hypothetical Fact Patterns: Form of Production



Form of Production

- You request that plaintiff "friend" you or a neutral party in order to gain access to the content of her social media sites
- Is this an acceptable form of production?

Form of Production

- Native versus reasonably usable format
- Need for cooperation
- *Piccolo v. Paterson* (denying request for "neutral friend" to access Facebook)
- *Barnes v. CUS Nashville* (Magistrate Judge proposed witnesses "friend" him to facilitate in camera inspection of photographs)

Hypothetical Fact Patterns: Authentication



Authentication

- You seek to introduce at trial screenshots you prepared of your opponent's social media site page
- What issues are you likely to face?

Authentication

- Information from social media is subject to the same rules as all other evidence
- *Lorraine v. Markel Amer. Ins. Co.*, 241 F.R.D. 534, 538 (D. Md. 2007):
- *Griffin v. Maryland*, 419 Md. 343 (Ct Apps Md. 2011)

Authentication Through ARCHIVE.ORG

- Some courts have allowed authentication through the Internet Archive, also known as the "Wayback Machine," when accompanied with an affidavit. The Internet Archive uses a process called "crawling" to visit websites and systematically duplicate and store the data on its own servers, which allows users to retrieve copies of web pages as they existed at various times in the past. With the amount of information posted on the web, it is an indispensable investigatory tool.
- *St. Luke's Cataract and Laser Institute, P.A. v. Sanderson*, 2006 WL 1320242, at 2 (M.D.Fla. May 12, 2006) (finding sufficient "a statement or affidavit from an Internet Archive representative with personal knowledge of the contents of the Internet Archive website")
- *Audi AG v. Shokan Coachworks, Inc.*, 592 F. Supp. 2d 246, 277-78 (N.D.N.Y. 2008) (reasoning that screen shots from the Wayback Machine can be authentication by "a knowledgeable employee of the website")
- *Mortgage Market Guide, LLC v. Freedman Report, LLC*, 2008 WL 2991570 (D.N.J. Jul. 28, 2008) (reasoning that the court would accept authentication through the Internet Archive when accompanied with an affidavit)
- The Internet Archive's website sets out the procedures for obtaining an affidavit and provides a useful sample. See, www.archive.org/legal and www.archive.org/legal/affidavit.php.

Hypothetical Fact Patterns: Privacy



Privacy

- A custodian uses a social media site's privacy settings and shares deeply personal information with selected family and friends via her account
- Are her postings protected from discovery?

Privacy

- *McMillen v. Hummingbird Speedway Inc.*
(declining to recognize a "social network privilege")
- *EEOC v. Simply Storage*

Privacy

- *Beye v. Blue Cross Blue Shield of NJ*, 06-Civ.-5337 and *Foley v. Horizon*, 06-Civ.-6219 (D.N.J. 2008) (cases consolidated for discovery)
- See article: Mary Pat Gallagher, MySpace, Facebook Pages Called Key to Dispute Over Insurance Coverage for Eating Disorders (Feb. 1, 2008)
 - <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005559933>

Privacy: Stored Communications Act

- *Crispin v. Audigier* (C.D. Cal. 2010)
 - Protecting from disclosure pursuant to a subpoena private communications from social media accounts
 - http://www.morganlewis.com/pubs/eData_StoredCommAct_LF_14jun10.pdf

Minimizing the Risks: Best Practices for Corporations

Social Media Usage Policy

- Robust, precise policies specifically addressing social media issues
- Policy refreshers
- User acknowledgments and reminders
- Training
- Enforcement
- Compliance monitoring

Social Media Considerations

- Define “blogging” and “social networking”
 - Apply policy to all communications—blogs, tweets, social networking sites, wikis—regardless of technology and whether owned by employer or employee
- Employees blog at their own risk and are personally responsible for content
 - Require a disclaimer: “The views expressed in this blog are my personal views and they do not represent the views or opinions of my employer”
 - Time spent blogging or on social networking sites should not interfere with job duties
- Define whether/when permissible to discuss company’s competitors, clients, vendors

Social Media Considerations

- Create boundaries for business relationships (e.g., should managers 'friend' subordinates? Should employees friend customers?)
- Regulate or prohibit the use of company name and logo
- Determine whether access to major online networking websites will be blocked from work computers
- Include contact information for the person to whom questions or concerns about a blog or blogging should be addressed
- Ensure security of employer-sponsored blogs using up-to-date technology

Other Considerations

- Describe prohibited activities:
 - Any actions that could be seen as harassing;
 - *Cross-reference anti-harassment policy, code of conduct, etc.*
 - Disclosure of trade secrets, and proprietary and confidential information
 - “Hacking” and related activities
 - Tampering with or disabling security mechanisms on company computers
 - Unauthorized software installation / downloads
 - Violations of copyright or other laws

Other Considerations

- Whether recruiters, HR, and hiring managers can access social networking sites re: job applicants (and if so, with what restrictions)
 - Prohibit accessing private password-protected social networking sites without proper authorization
 - Do not ask a third party to “friend” an applicant to investigate background (privacy, ethical issues)
- Whether to prohibit employees from providing job references on sites like LinkedIn and other professional networking sites
- Do not prohibit employees from discussing terms and conditions of employment
- Disclose the company’s right to monitor postings, tweets, etc., and potential disciplinary actions

Other Considerations

- Train employees on the policy; obtain signed acknowledgements and post the policy
- Enforce the policy and punish violators
- Identify a contact person who can address questions or concerns about a blog or Internet post
- Companies in regulated industries may have additional obligations
 - Financial Industry Regulatory Authority (FINRA) issued guidance applicable to securities firms and their registered representatives
 - Food and Drug Administration is considering whether new regulations are necessary and how its existing regulations apply to social media
- Set Google alerts to keep up with who is talking about the company and what they are saying

Is Your Policy Effective for the Issues in Your Workforce?

Social Media Policy Review and Recommendations

- Review your existing company policies and procedures
- Create a proposal with recommendations and highlights of your risk landscape
- Flat fee for services



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