Defendants Want Social Media, Plaintiffs Want E-Discovery

By Christopher B. Hopkins

In the advent of social media and e-discovery, plaintiff and defense lawyers have specific questions to pose to their clients about social media and email. On the plaintiff-side, the lawyer needs to know what the client has put on the internet – with the suggestion that the client reduce his or her Facebook presence while the case is pending. On the other hand, defense lawyers, upon receiving a new matter, inquire of their corporate client, "Do you have an e-discovery preservation policy?"

The roles of social media discovery and e-discovery often create distinctly one-sided burdens in litigation. Social media and e-discovery are completely different – any lawyer who rattles off both phrases in the same breath likely has experience with neither. In injury or employment cases where a person sues a company, it is often the defendant who seeks out the plaintiff's social media content. On the other hand, rarely is the defendant-business' social media content of value. This is a powerful, one-sided discovery tool for the defendant since a plaintiff's social media is somewhat personal; enlightening as to the plaintiff's personality and activities; and it may lead to new witnesses and further evidence.

Meanwhile, the plaintiff often has little to no electronically stored information (ESI) – but a defendant corporation may have mounds of ESI and must comply with Florida's E-Discovery Rules (http://bit.ly/WeSPoU). Here, the plaintiff has the one-sided advantage. Internal emails often read no different than a plaintiff's social media posts. In this situation, plaintiffs can demand ESI from the defendant with impunity (having little to produce themselves) and the defendant's e-discovery requirements becomes an expensive undertaking which is rife with potential mistakes, oversights, and internal department conflicts.

In short, defendants want their opponents' social media content whereas plaintiffs want the defendants' e-discovery. Are both sides treated equally? Given that Florida's E-discovery Rules have been in place only a handful of months and the emerging guidance on social media is scarce, the outcome of any social media/e-discovery battle could be case (or judge) specific. The same is true with attempts to shift discovery costs. That puts counsel on both sides in the difficult position of researching authorities from outside of Florida and resorting to guesswork to predict the outcome of a motion to compel.

One example of the tug of war which can happen in discovery arose in the Fourth District case, Alvarez v. Cooper Tire. Defense lawyers throughout Florida drew a sharp breath after reading former Judge Farmer's December 2010 opinion which proclaimed that Florida had "a strong policy to allow parties to do some fishing to learn what possible trial evidence may actually be out there." But, nearly a year later, in November 2011, a contradictory opinion emerged in the same case, without a reference to "fishing," and with a concluding sentence which cautioned that "the cost and burden of civil litigation will imperil its very existence."

During the early stage of social media discovery, emerging trial orders and appellate decisions seemed to favor the defendants. Even to today, most courts which have considered production of social media content agree that it is neither private nor privileged. Defendants, it appeared, were obtaining orders permitting social media discovery as long as requests were reasonable in scope. More recently, however, a few opinions suggest that there needs to be some basis before the court will order production of a party's social media posts (like an admission by the plaintiff or some indication of relevance in the public portion of the plaintiff's profile). In some instances, there appears to be a heightened standard for social media discovery compared to the long reach of e-discovery which is now baked into the procedural rules.

In a recent case before Judge Sasser, she concluded that, "it is apparent that the critical factor in determining when to permit discovery of social media is whether the requesting party has a basis for the request" (http://bit.ly/YwJAKT). In short, the court opted for requiring the requesting party to make a threshold showing of relevance rather than permit "fishing." In those instances, defense counsel need to refine their deposition questioning of plaintiffs, family members, and witnesses about the nature of the plaintiff's social media posts in order to lay a foundation (http://bit.ly/QUzPpF). That said, different cases and courts lead to different results during the nascent stage of social media discovery. Judge Sasser's order comes to the opposite conclusion of an earlier Broward County order (http://bit.ly/YwKuHh).

Meanwhile, predicting the outcome of e-discovery orders requires similar prediction skills. In a recent case out of Colorado, Christou v. Beatpoint, a defendant was sanctioned for failure to preserve text messages on an iPhone even where all evidence suggested that there was nothing relevant to the case on that phone.

In response to broad e-discovery requests, defendants have turned to motions for protective order to shift costs to the requesting party. A similar tactic was employed by medical malpractice defense lawyers in the mid- to late 2000's when faced with Amendment 7 requests for incident reports (see generally, http://bit.ly/YwMEH5). In 2011, just prior to the E-Discovery Rules, the Fifth District held, in *SPM Resorts, Inc. v. Diamond Resorts Management*, that a party should not be compelled to "fund its adversary's litigation" by paying $20,000 for a computer expert to search its own computer system. Prior to that, other Florida courts have discussed shifting electronic discovery costs. *See Biomet, Inc. v. Fleury*, 912 So.2d 706 (Fla. 2d 2005); *Centex-Rooney Construction Co. v. Martin Co.*, 725 So. 2d 1255 (Fla. 4th DCA 1999). Whether these cases present viable authority in light of the E-Discovery Rules has yet to be explored.

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