Social Media Cases Illustrate the **Loosening Court Trends in E-Discovery**

This article explores the scope of discovery in social media and considers cases that delve into the courts' treatment of discovery sanction requests since the passage of the revised Federal Rules of Civil Procedure in December 2015. The case decisions demonstrate how much the pendulum has swung in the direction of limiting discovery sanctions.

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Prior to December 2015, the scope of discovery included all information "reasonably calculated to lead to the discovery of admissible evidence." This broad mandate wrought havoc on the scope of discovery because parties used this language to convince the courts to leave no stone unturned, particularly when it came to electronic discovery (e-discovery). The effect on litigation was tremendous, often leading to case settlements – irrespective of merit – simply because the cost of discovery far outweighed the amount at issue.

To help alleviate this problem, the 2015 revised Federal Rules of Civil Procedure (FRCP) now limits discovery to relevant non-privileged matters, and, most notably, it has to be proportional to the needs of the case, as defined in Rule 26 (b) (1):

> Parties may obtain discovery **regarding any nonprivileged matter that is relevant** to any party's claim or defense **and proportional to the needs of the case,** considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. [Emphasis added.] Fed. R. Civ. P. 26.

Court Decisions Regarding Discovery Requests

In the context of social media, examples of the scope of discovery requests include all online communications, including the following:

- Online profiles
- Log-in data and passwords
- Posts, messages, tweets, replies, re-tweets
- Status updates, wall comments
- Groups joined, activity streams, blog entries
- Photographs and videos posted

Because all social media communications are within the scope of discovery, the following cases provide evidence of how the courts have handled certain requests since the revisions to the FRCP.

'Private' Social Media Posts Are Still Discoverable

Palma v. Metro PCS Wireless, Inc. concerned compensation for unpaid hours. The defendant sought discovery of the plaintiff's social media activity to contest whether she was actually working during the allegedly unpaid time. The plaintiff objected to the scope of discovery on the grounds that she had activated her social media site's privacy settings to restrict who may view her postings. The court found that privacy settings do not provide blanket exemption from discovery, and the plaintiff was ordered to honor her discovery obligations even for information marked "private" in social media.

Requests for Logins, Passwords Are More Restrictive

Moore v. Wayne Smith Trucking Inc. centered on a fatal accident. While driving his motorcycle, Deron Ross was struck and killed by the defendant's truck. The plaintiff alleged the defendant's negligent driving caused Ross's death. During discovery, the plaintiff sought information from the defendant's social media accounts that might have been relevant to the case, including access to logins and passwords. In response, the defendant identified his Facebook accounts but objected to providing usernames and passwords.

The court declined to require the defendant to share login or password information. Instead, it directed that the defendant's postings be made available to the defendant's counsel for its review – not at the defendant's own discretion – to determine if they fit into one or more of the categories of discovery.

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case…FRCP Rule 26(b)(1)

Requesting Prolonged Periods of Online Activity Is Overbroad

Artt v. Orange Lake Country Club Realty, Inc. concerned employment compensation for unpaid wages. To mount its defense that the plaintiff was not actually working during the hours in question, the defendant sought content from her Facebook, MySpace, Instagram, Linkedln, and any other social networking accounts posted between 7 a.m. and 7 p.m. on any date between June 19, 2011, and her last day of employment in 2013.

The court found this request to be overbroad, unduly burdensome, and unreasonable and therefore denied the defense motion to compel production of the employee's social networking communications.

Similarly, *Giacchetto v. Patchogue-Medford Union Free Sch. Dist* was a disability discrimination case with a focus on the plaintiff's emotional state. As part of its defense, the defendant requested the plaintiff's Facebook archive from 2006 (the year Facebook became available) until her death in 2013.

The court found the scope of the request to be flawed because it was not limited to a reasonable period. The court did allow a limited scope of discovery by permitting a sampling of the plaintiff's Facebook activity from November 2011 to November 2013, restricting it to any "specific references to the emotional distress [Plaintiff] claims she suffered" in the complaint, and to any "treatment she received in connection [there]with."

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Cell Phone Activity Has Fifth Amendment Protection

In *Restrepo v. Carrera*, which concerned a deadly accident, a court of appeals reversed an order from the trial court that required the petitioner to provide information on all of her cell phone activity during the six hours before the crash and the six hours after it.

The appeals court found that while the petitioner's criminal case was pending, the lower court order violated her Fifth Amendment privilege against self-incrimination. This privilege can be asserted in any proceeding in which the person reasonably believes that the information sought could be used against him in a criminal proceeding, even if potentially relevant in a civil lawsuit for damages. By invoking this privilege, the person cannot be compelled to provide information that may incriminate him.

Court Decisions Regarding Sanctions for Spoliation

Rule 37(e) of the FRCP has been amended to address how the courts need to treat the issue of sanctions for spoliation (destruction) of evidence. Under Rule 37, if electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court may:

- Upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice; or
- Only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation:
  - Presume that the lost information was unfavorable to the party;
  - Instruct the jury that it may or must presume the information was unfavorable to the party; or
  - Dismiss the action or enter a default judgment.

Thus, the court has two avenues in deciding whether to issue sanctions if evidence goes missing. Where the court finds an intent to deprive or spoliate the evidence, the severity of sanctions may be increased. This is where recent case law has shown tremendous restraint on the part of the courts, which have issued sanctions only in the most extreme cases.

This new direction should give organizations more peace of mind in knowing that only the most intentional acts of spoliation – as opposed to unintentional loss of data that could occur during routing and good-faith operations – will warrant serious sanctions. Representative examples of this case law are discussed next.

No Immediate Sanctions for Failing to Provide Website Content

McFadden v. Washington Metro. Trans. was a case that concerned defamation and infliction of emotional distress. Among the defendants was a physician whom the plaintiff accused of diagnosing him with psychiatric and psychological conditions the plaintiff did not have. This diagnosis allegedly impaired the plaintiff's reputation at his workplace. This defendant claimed the forum state court where the plaintiff filed his lawsuit lacked personal jurisdiction over him – in other words, that the plaintiff had sued him in the wrong court. In an effort to demonstrate that the court did have jurisdiction over the doctor, the plaintiff presented a screen shot of the defendant physician's website which represented that the physician "has performed over five hundred Independent Medical Evaluations (IME) on behalf of attorneys, insurers, and employers in the state of Maryland and Washington, D.C. areas."

The court attempted to access the doctor's website at the URL shown on the plaintiff's screen shot, but by the time the matter was before the court, the site had been taken down. Rather than issue severe discovery sanctions, the court simply granted further discovery into the issue of where the defendant did business.

The court noted that it was "troubling" that the website no longer existed. It warned that if the defendant could not produce an accurate archive of his website prior to the next hearing, sanctions for spoliation could be issued. The court explained that further discovery was warranted since the physician's claim that he had no ties with the forum state were contradicted by evidence that he solicited business in the forum state where the plaintiff filed his lawsuit.

No Sanctions for Destroyed WhatsApp Messages

Moulton v. Bane was a suit brought by the buyer of the defendant's butcher shop assets after its financial collapse. Among other things, the plaintiff alleged the defendant made fraudulent misrepresentations to induce him to purchase the assets and thus breached their agreement. At issue in court were the defendant's communications on WhatsApp, some of which were destroyed while the lawsuit was pending. The plaintiff sought sanctions against the defendant in this action on the grounds that the defendant discarded more than 1,600 WhatsApp messages.

In its defense to the sanctions request, the defendant contended the messages were lost without his knowledge when he replaced his smart phone, which happened to be while the action was pending. The defendant assumed the messages would be transferred to his new phone by the cellular service provider. In his motion for spoliation sanctions, the buyer of the butcher's shop sought an adverse inference instruction, which is an instruction to the jury that it may presume the lost evidence was unfavorable to the party who lost it.

This case shows how extreme the circumstances must be before a court issues severe sanctions for spoliation. In this matter, the social media posts were destroyed well after the lawsuit had begun...

The court found that the loss occurred through the *routine operation* of an electronic information system; that there was no evidence of intent to destroy discoverable evidence; and that the messages were later recovered through other means. Thus, the court found no evidence of intentional misconduct to warrant such a serious sanction as an adverse inference instruction to the jury.

A Case of Adverse Inference Instruction for Spoliation

Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona involved a religious congregation's action against a community in California. The plaintiff challenged certain zoning and wetlands laws that it viewed as discriminatory. At issue were social media posts made by the defendant nearly six years *after* the litigation was commenced and a litigation hold had been issued. Given the legal hold and the destruction of social media posts during the litigation, the court found that the required element for spoliation sanctions against the village had been established.

The court found the village and its mayor had an obligation to preserve social media posts and related text messages as of the date of the postings. Accordingly, the court granted an adverse inference instruction; the jury was told it could infer that the contents of the social media posts indicated discriminatory hostility by the village towards the Hasidic Jewish population.

This case shows how extreme the circumstances must be before a court issues severe sanctions for spoliation. In this matter, the social media posts were destroyed well after the lawsuit had begun and should have been preserved as part of the litigation hold.

Moving Away from a 'Scorched Earth' Approach

Roberts v. Clark County School District, a gender discrimination and emotional distress case, illustrates the court's distaste for a "scorched earth," or "leave no stone unturned" approach to discovery. Here, the plaintiff was a female-to-male transgender police officer employed by the school district. After legally changing his name, he requested his employment records be changed to reflect that he was male. Subsequently, the plaintiff was subjected to innappropriate comments about his sexuality and to overly intrusive and unnecessary demands for information about his gender and genitalia.

During discovery, the defendant sought an order compelling the plaintiff to produce years of medical records, healthcare history, access to his social media sites and e-mail addresses, and more. The plaintiff objected to the sweeping discovery requests, saying his employer did not have the right to rummage at will through his personal information, which he had limited from public view.

The court here went out of its way to express its desire to upend the "scorched earth" approach to discovery. The court found the demand for information from the plaintiff's social media profiles was overbroad and that the plaintiff was not required to turn over his social media sites and e-mail addresses.

However, the court did instruct plaintiff's counsel to review content from the plaintiff's social media sites and to produce the following: anything referencing this lawsuit, the defendant's response to the plaintiff's transgender transition, the plaintiff's emotional response to his transgender transition, and the manner in which he was treated by school district employees.

Other than those limited activities, the court denied the defendant's request to produce medical, employment, administrative, and tax records. Instead, the school district was required to ask the plaintiff about his distress at a deposition. In doing so, the court essentially called for an end to a scorched-earth discovery approach.

Rely on Routine IM Practices to Avoid Sanctions

The case law cited in this article illustrates the approaches the courts have taken to broad requests for social media content in the discovery process. In terms of scope, there is a clear pattern of narrowing discovery requests to more reasonable measures. Further, the courts are showing greater reluctance to issue severe sanctions, while issuing a warning shot to parties that the days of "scorched earth" discovery are past. For information management professionals, this means that a reliance on routine, good-faith business operations will help their organizations avoid serious spoliation sanctions.

Editor's Note: This article is based on the 2017 ARMA International Annual Conference presentation "Ensuring Social Media Litigation and Discovery Readiness" and an updated version presented with the Honorable Ron Hedges, a retired federal magistrate, at the 2018 MER conference. E

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