



Want To Be My Friend?

Social Networking's Impact on Discovery

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Discussion Overview

- Why Care?
- Case Law Developments
- Discovery Challenges
 - » Preservation
 - » Collection
 - » Production
- Managing Social Media



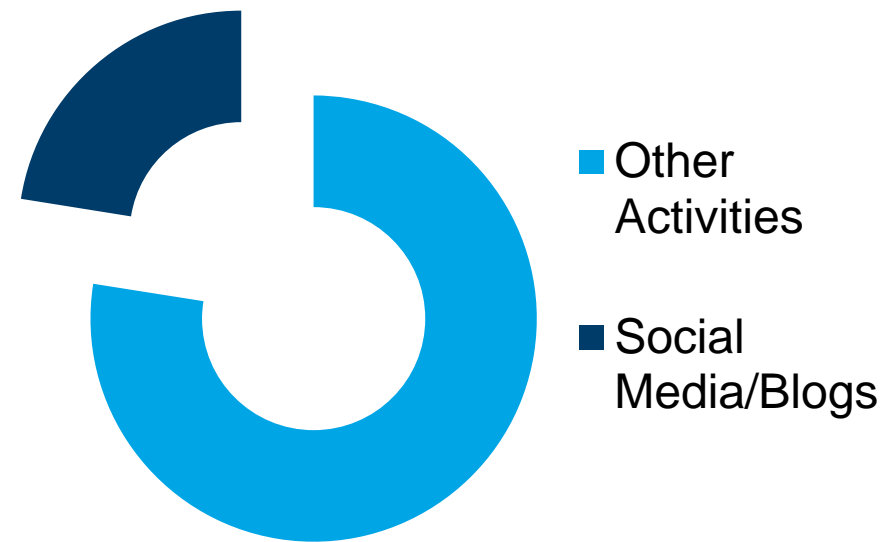


Why Care?

Why Care?

- **Social media use is becoming increasingly pervasive in our society**
- Americans **spent 22.5%** of their time online using social networking sites and blogs as of September 2011

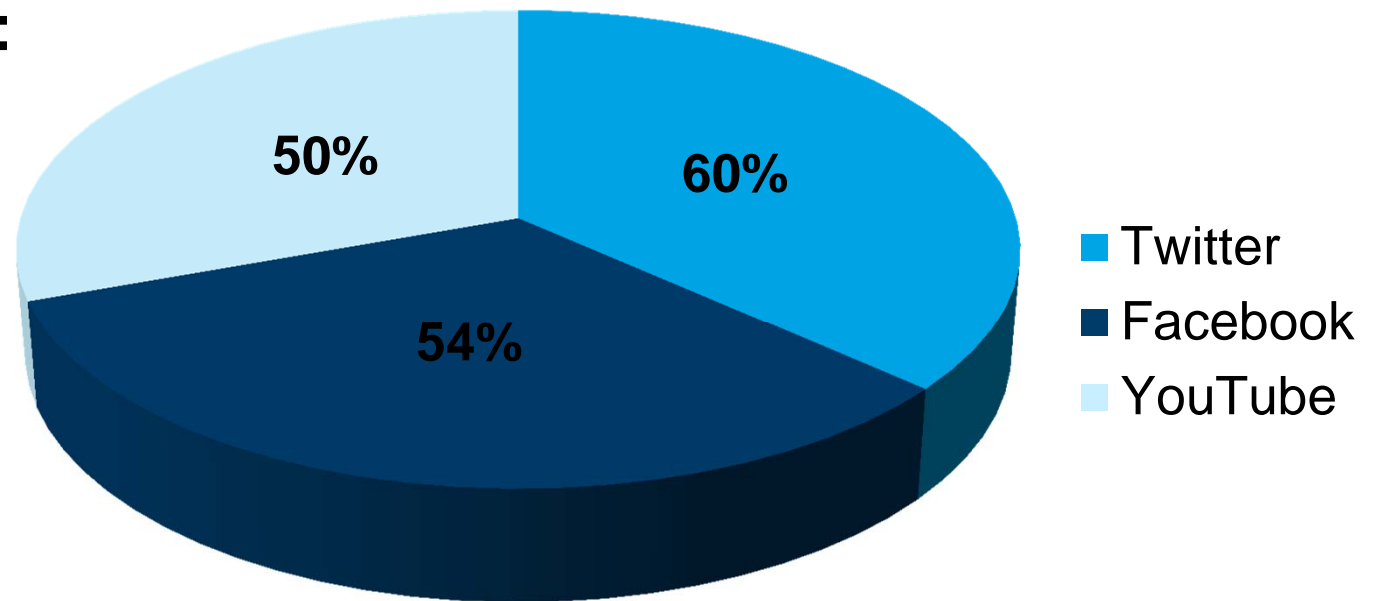
Internet Usage



The Nielsen Company, <http://blog.nielsen.com/nielsenwire/social/>

Why Care?

- **80% of Fortune Global 100 companies use some form of social media**
- **Most used:**

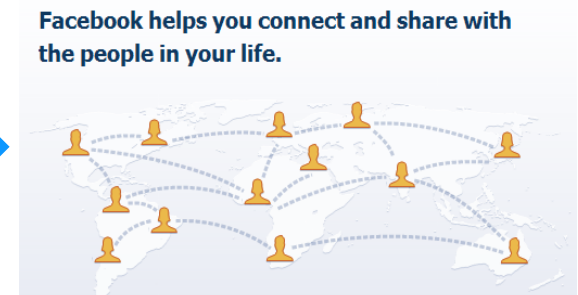
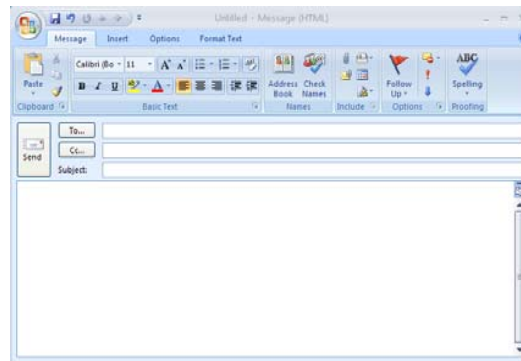
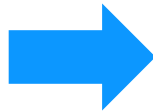


Burson-Marsteller Fortune Global 100 Social Media Survey 2/2010

Why Care?

- **Social media is predicted to replace e-mail as the dominant form of communication by 2014**
 - » *Gartner Predicts Social Networking to Overtake E-Mail*, Computerworld.com, July 8, 2010.

Transition from paper, to email, to social networking...



Why Care? Significant Security Threats

- **Twitter reached a settlement with the Federal Trade Commission regarding charges it failed to safeguard users' personal information**
 - » Lapses in Twitter's data security led to access of non-public user information and ability to send out phony tweets

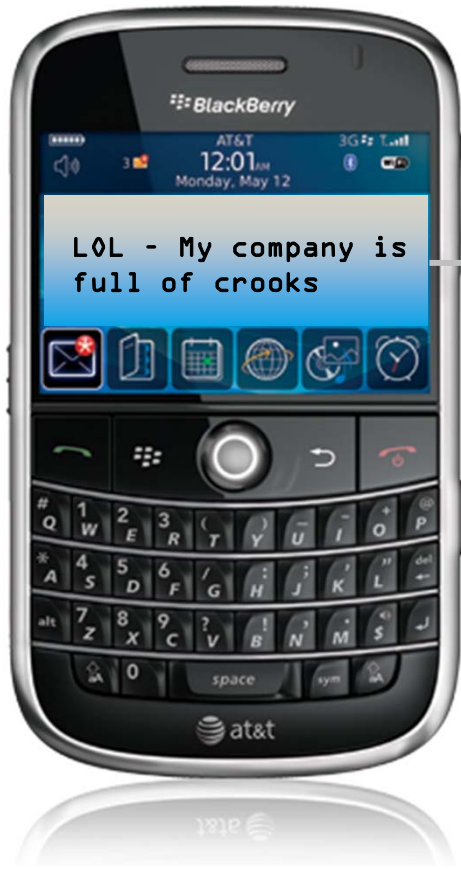




Why Care? Significant Security Threats

- **Towards end of 2008, virus named “Koobface” hit Facebook and spread to several other social networking sites**
 - » Sent messages to infected users’ friends with a clickable link
 - » Once the link was clicked, the friend’s computer became infected and directed web traffic to contaminated sites which posed risks for such calamities as identity theft

Why Care? Increasing Importance in Litigation & Investigations



**Information on social media can be
relevant evidence in an investigation/trial
and...
can be informative as to jury selection**

**My boss is a complete
crook. No joke.**



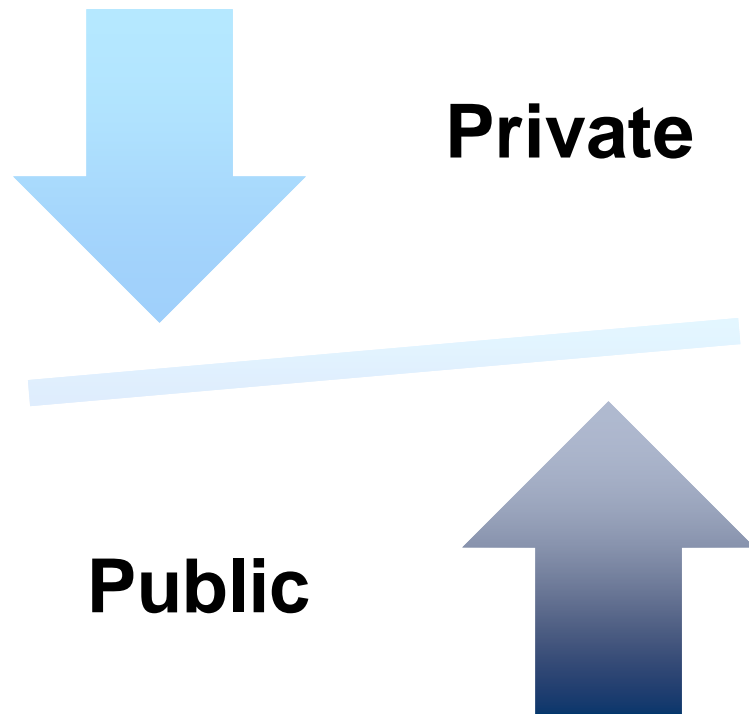
Case Law Developments

Discoverability: Social Media

- Federal Rules of Civil Procedure 26(b)(1) permits discovery of electronically stored information (ESI) “regarding any non-privileged matter that is relevant to a any party’s claim or defense.”
 - » **Information contained on social media is ESI, and therefore generally discoverable**



Discoverability: Social Media



- Social media discovery disputes often focus on this distinction
- Most courts have so far considered “private” material within the scope of discovery
 - » Must be relevant to the matter

Discoverability: Private vs. Public

Supreme Court, Suffolk County, New York.
Kathleen ROMANO, Plaintiff,
v.
STEELCASE INC. and Educational & Institutional
Cooperative Services Inc., Defendants.
Sept. 21, 2010.

- Defendant sought discovery of current and historical data from the plaintiff's Facebook and MySpace accounts – both public and private

- Court rejected plaintiff's privacy argument and ordered production:

“privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking.”

-Romano v. Steelcase Inc., 907 N.Y.S.2d 650 (Sept. 21, 2010).

Discoverability: Private vs. Public

BILL R. MCMILLEN, SR.,
Plaintiff,

vs.

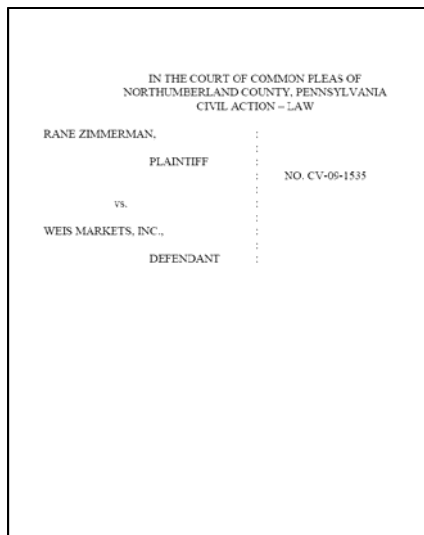
HUMMINGBIRD SPEEDWAY, INC., a
Pennsylvania Corporation; LOUIE
CALTAGARONE; DAVE RESINGER; and
JOSIE LEE WOLFE,
Defendants.

- Defendants sought production of the user names, log-in names and passwords granting access to the plaintiff's Facebook and MySpace accounts

- Denying plaintiff's request for a "social network site privilege" court ordered plaintiff to preserve existing information and *provide user names and passwords to defendants' counsel*

-*McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD (C.P. Jefferson Sept. 9, 2010).

Discoverability: Private vs. Public



- No privilege exists in Pennsylvania for social website information
- Individuals post on social media with intent to share information
- Court ordered plaintiff to provide all passwords and user names to the defendant and preserve all existing information

-*Zimmerman v. Weis Markets, Inc.*, No. CV-09-1535 (C.P. Northumberland May 19, 2011).



Discoverability: Stored Communications Act

Does the Stored Communications Act prohibit production of social media?

- Stored Communications Act (SCA) prohibits Electronic Communication Service (ECS) and Remote Computing Service (RCS) providers from knowingly divulging the contents of a communication it stores unless the divulgence is to an intended recipient of such communication or express permission from the sender is obtained





Discoverability: Stored Communications Act

Does the Stored Communications Act prohibit production of social media?

- Prohibits
 - » Electronic Communication Service (ECS) and
 - » Remote Computing Service (RCS) providers

- from:
 - » *knowingly* divulging the contents of
 - » a communication
 - » it stores

- **Unless** the divulgence is
 - » to an intended recipient of such communication or
 - » express permission from the sender is obtained

Discoverability: Stored Communications Act

United States District Court,
C.D. California.
Buckley H. CRISPIN, an individual, Plaintiff,
v.
CHRISTIAN AUDIGIER, INC., a California corporation; Nervous Tattoo, Inc., a California corporation, Shop on Stage, Inc., a California corporation, Christian Audigier, an individual; 3A Watch, LLC, a Cali-

- Plaintiff moved to quash subpoenas for private information contained on his various social networking site accounts.

- Court found that with respect to private messages, social networking sites acted as both ECS and RCS providers, and the SCA prohibited disclosure of privately stored information.

-*Crispin v. Audigier, Inc.*, 2010 WL 2293238 (C.D. Cal. May 26, 2010).



Discoverability: Deleted Information

- **How do these principles extend to deleted or historical information?**
- **Problem:**
 - » User cannot supply the information if it has been deleted
 - » Social networking site service provider can potentially access the information, but prohibited from disclosing information pursuant to a subpoena under the SCA



Discoverability: Deleted Information

- **Solution:**

- » Obtain court order requiring user to provide authorization to disclose the requested information



Romano v. Steelcase Inc., 907 N.Y.S.2d 650 (Sept. 21, 2010).



Discovery Challenges

Preservation, Collection & Production

Social Media: Preservation

- **All the discovery obligations apply, including the duty to preserve**
- **Problem...**
 - » Changes very frequently
 - » Stored on third-party servers
 - » Security and privacy settings block access
 - » Few technologies available for social media preservation



Social Media: Preservation

How do you preserve social media that is stored in the cloud by a third party service provider?

Issue litigation holds to third-party service providers whenever litigation is anticipated so the evidence is preserved



Social Media Collection: What To Do

- **Capture publicly viewable information**
 - » Investigators can freely search and extract information from an open, public page
 - » Capturing software is preferred method in recording user's internet activities by investigators



Social Media Collection: What To Consider

- **Enlist the help of an experienced investigator or service provider**
- **Must be willing and able to testify to the following:**
 - » Authenticity
 - » Collection process
 - » Precautions taken
 - » Chain of custody



Social Media Collection: What Not To Do

- **Deception is not permitted: “Faux Friending”**

- » Courts will largely not allow a person to falsely represent themselves as a “friend” to collect data

- » Philadelphia Bar Association Professional Guidance Committee advisory opinion that Facebook Friending opposing litigants may be considered misconduct. See *Philadelphia Bar Op. 2009-02* (March 2009).



Social Media: Production

The Case for Cooperation

- Recognizing that data from social media is really no different than traditional forms of ESI and the same rules therefore apply, the **best policy is to cooperate and produce relevant data**
- Job of counsel “to make judgment calls—in good faith and consistent with their obligations as officers of the court—about what information is responsive to another party’s discovery requests. Discovery is intended to be a self-regulating process that depends on the reasonableness and cooperation of counsel.”



Equal Employment Opportunity Commission v. Simply Storage Management, LLC, 270 F.R.D. 430 (S.D. Indiana 2010).

Social Media: Production *The Case for Cooperation*

If counsel doesn't cooperate...

- **Court may allow opposing counsel to access and review information contained in social networking accounts**

Or ...

- **Judge may step in and review the information**

Order providing the defendant “access to ... current and historical Facebook and MySpace pages and accounts ... is granted in all respects.”

– *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (Sept. 21, 2010)

Judge offered to “friend” witnesses to review photographs and related comments *in camera*.

– *Barnes v. CUS Nashville, LLC*, 2010 WL 2265668 (M.D. Tenn. June 3, 2010)



Managing Social Media



Managing Social Media

- Little to no regulatory, legislative or judicial guidance for developing and structuring corporate policies regarding social media, yet prevalence in both routine business and litigation is ever-increasing
- **Onus is on organizations to set policies regarding use in the workplace**
- Courts will likely give deference to official employee usage policies that have been disseminated to and signed by employees

Managing Social Media: Best Practices

Proactively Update Usage Policies

United States District Court,
D. Puerto Rico.
Kareemah AMIRA-JABBAR, Plaintiff
v.
TRAVEL SERVICES, INC., et. al, Defendants.
Civil No. 08-2408 (JA).
July 28, 2010.
Opinion Denying Motion to Amend Sept. 10, 2010.

- **Plaintiff alleged that employer was responsible for offensive comments made by co-worker by permitting use of Facebook during company hours**
- **Employer prevailed, thanks in part to its efforts to remedy its social media policy following the complaint**

-Amira-Jabbar v. Travel Services, Inc., 726 F. Supp. 2d 77 (D. Puerto Rico 2010).

Managing Social Media:

Organizations should consider:

- » Control access
- » Monitor usage
- » Articulate clear policies
- » Ensure understanding
- » Update, disseminate and make information accessible





Managing Social Media: Usage Policies

- **Develop a social media policy that clearly identifies what is and is not acceptable communication**
- **No “one size fits all” approach**
 - » Policy is as much a reflection of corporate culture as law
 - » Must understand your company’s brand, tolerance for dissent and risk, relationship with workforce and balance that with what the law allows
 - » Address online behavior and workplace representations even when using personal devices



Managing Social Media: Usage Policies

- **Possible policy elements include:**
 - » Clear guidelines on proper social media use
 - » Consequences of non-compliance
 - » Employee training
 - » Specifics on what employees can and cannot divulge



Managing Social Media: Usage Policies

- **Employee education and awareness are critical**
 - » Best policies are useless if employees aren't aware or don't understand them
 - » Translation to electronic space not always intuitive
- **Expect and plan for a crisis**
 - » Identify a team and a plan before disaster strikes

Social Media Reminder: Reasonableness

- **As a final reminder, and perhaps a rule of thumb for all:**
 - » If you wouldn't divulge something in normal conversation with a stranger, don't share it online
 - » In the world of social media, conversations live on forever, so it's especially important to practice prudent posting!





Parting Thoughts...



Parting Thoughts

- **Overall trend of judiciary seems to be moving toward greater permissiveness for e-discovery with regard to social media**
 - » Strong likelihood that privacy concerns will be outweighed by the weight and relevance of the information
- **As corporate use of social media continues to increase, counsel's role should include advising clients on best practices for social media e-discovery, employee usage policies and corporate practices**

