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BNA INSIGHT

Mayer Brown attorneys set out some basic principles to follow when conducting discovery involving social media.

A Primer on Social Media eDiscovery



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Scenario

A large corporation has been sued by former employees who allege that their supervisors harassed them and made inappropriate remarks in the workplace and on social media. During discovery, the corporation receives a document request for the supervisors' social media postings, e-mails and related files. The corporation must determine how to access, review and produce the requested information and considers seeking similar social media discovery from the former employees.

Understanding the Challenges of Social Media E-Discovery

Although the concept of electronic discovery and the need to preserve e-mails and computer files in anticipation of litigation is familiar, the advent of social media has greatly increased the potentially relevant information that is available electronically. Similar to other

forms of electronic discovery, information posted to social media sites such as Facebook, Twitter or LinkedIn can be subject to discovery.

However, knowing when or how to request and/or produce social media information can be a challenge. The following basic principles can provide guidance with regard to social media discovery.

■ **Social Media Can Be Discoverable:** The discovery of social media information is governed by the same procedural rules that govern other forms of electronic discovery in litigation. Although these rules differ from jurisdiction to jurisdiction, the general limiting discovery

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principle is whether the information being sought is reasonably calculated to lead to the discovery of admissible evidence.

If the information being sought on a social media site will reasonably lead to the discovery of admissible evidence, it will likely be discoverable.

■ **Social Media Sites Constantly Evolve:** The social media landscape is constantly evolving. Although Facebook and Twitter are currently popular social media sites in the United States, that may not be the case one year from now as new sites are developed.

In addition, existing social media sites are frequently updated to provide their users with new ways to share and receive information. As a result, the information that is commonly shared on social media today may not be the same type of information that is shared in the future.

Therefore, it is important to stay apprised of the new developments in social media.

■ **Social Media Sites Contain Different Types of Data:** Social media sites also differ with regard to the information that is being shared. While sites such as Facebook, Twitter and Instagram are primarily used to post photographs and status messages or to hold online conversations, an employee or competitor is more likely to share confidential or proprietary company information using a site such as DropBox or Yammer.

It is therefore important to understand how each social media site functions, the information likely to be shared on the site and the various ways to access that information. This will allow a company to assess whether social media discovery may be potentially necessary in litigation.

■ **Social Media Implicates Privacy Concerns:** Social media sites are predominately used for personal reasons and social media accounts frequently contain private, non-public information. As a result, there is an inherent concern that broad requests for information on social media may invade an individual's right to privacy.

Recently, some courts addressing requests for social media have required the party seeking the information to first establish that a review of publicly available social media information revealed a reasonable likelihood that the review of private social media information would lead to the discovery of admissible evidence. These courts have stressed that simply requesting all forms of social media information without limitation is improperly overbroad and that requests must be tailored to the issues in the case.

Accordingly, to ensure that the social media information being sought in discovery is potentially relevant, it is advisable to first determine the universe of information that is publicly available on social media and then consider whether additional discovery is needed.

Managing Social Media eDiscovery

As more people use social media, social media discovery has become more frequent. Given that employees are often accessing and posting to social media sites using personal and company-owned devices, compa-

nies should consider the following tips for developing social media discovery strategy.

■ **Employee Cooperation:** Unlike work e-mail accounts and network files, most companies do not have access to their employees' personal social media accounts. In fact, a number of states have recently enacted laws prohibiting employers from requiring current or prospective employees to provide their social media passwords.

As a result, if an employee's social media posting becomes relevant in litigation, the company will likely need the employee's cooperation to access the account. Companies should therefore consider seeking out such cooperation at the onset of litigation in order to facilitate the discovery process.

■ **Preservation of Social Media:** The requirement that relevant documents be preserved in anticipation of litigation also extends to relevant social media information. Because different social media sites contain different types of information, companies should evaluate how, and to what extent, their employees are using social media and whether their use potentially implicates company business.

If it is reasonably foreseeable that an employee's social media postings may be relevant in a future litigation, the company should consider taking steps to ensure that the relevant information is properly preserved.

Moreover, if the company anticipates seeking social media discovery from the opposition, it should request early in the litigation that any relevant social media information be preserved.

■ **Review Social Media Contextually:** Social media postings are often impulse driven, and they do not always contain the same contextual clues as an e-mail or internal memo. As a result, the relevance of social media information is not always readily apparent.

For example, Twitter postings are limited to a finite number of characters and users frequently employ abbreviations, nicknames and code words. Consequently, simply viewing a person's Twitter account on its own without a full understanding of the issues in a case may result in relevant information being overlooked or disregarded.

In order to ensure that the social media information is properly evaluated, it should be reviewed at the same time as the other discovery in the case.

Conclusion

Social media discovery presents its own unique set of challenges. Although social media sites are no longer a new phenomenon, social media discovery is a relatively new issue that is still being developed. To prepare for the challenge of social media discovery, companies should consider how social media affects their business and the types of information that is shared on different social media sites. By having an understanding of what social media is, how it is used and how it can be accessed, a company can be prepared when the issue of social media discovery arises in litigation.