

Social Media Changes Game in Litigation

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Facebook is the new smoking gun.

In Spokane, Wash., police use a thief's posted video showing suspected stolen loot as evidence against him.

In Suffolk County, N.Y., a judge admits photos and messages posted by a woman claiming to be homebound as a result of injuries from a defective office chair, showing her active and on vacation.

And in divorce cases in courts around the country, postings are being offered to support adultery claims.

"Social media is the greatest thing for investigations since the trench coat," said Richard Plansky, senior managing director of business intelligence and investigations for New York-based Kroll. "It's an incredibly powerful tool. But it's also a way that companies find themselves getting into trouble with the things their employees do."

The proliferation of electronic information has lawyers and clients doing battle on multiple fronts, protecting information from competitors and rogue employees, preserving it in the face of potential litigation and mining that information – both their own and their adversaries' – to secure a verdict or settlement.

"The technology is always out ahead of the security," Plansky said.

This year for the first time, the more than 1,000 worldwide executives surveyed for Kroll's annual fraud report identified theft of information as more common than theft of physical items, according to Plansky. And that theft is more often at the hands of insiders than anyone else.

"It really makes all the sense in the world because we're living in an economy that is increasingly information based," Plansky said. "Today, a company's value is very often determined by its intellectual property. Ideas live on sophisticated information systems in the form of digital data. The great thing about that is that it makes it easy for lots of people to access that information, so that they can work together in an enterprise fashion. The downside is that the valuable property a company has is much more easily available and stolen than it has been before."

Protect, preserve, produce – that's become the mantra of litigators everywhere, as they continue to grapple with how best to advise clients swimming in a sea of information stored electronically.

"Litigation support doesn't necessarily have to be only e-discovery, but it's becoming synonymous with it, because it's so pervasive, and the needs are so high," said Mike Mitchell of Raleigh's Smith Anderson.

Gone are the days of the paper exchange. "People use email like they used to just pick up the phone, so everything is documented for better or worse," Mitchell said. "So there will always be some e-discovery in any type of case."

And it's not just about email. "Facebook, Twitter – all those avenues of communication are potential places where discoverable information resides," Mitchell said.

'Metadata is key'

In North Carolina, as of October 1, 2011, information about that email or tweet – the "data about the data," or metadata — is also discoverable. That includes information such as date sent, date received, author and recipients.

"I've always told the attorneys that metadata is key," said Giovanni Masucci, president and senior digital forensic examiner of Raleigh-based National Digital Forensics. "We need to know when the file was created, when it was accessed, if it was modified."

Masucci's company does forensics for any type of litigation that involves digital information. "Cell phones, iPhones, GPS systems, videos, Blackberries, laptops, servers -- where there's digital data that can be extracted, we extract and analyze it," he said. "Emails, text messages, chat, deleted data, webcam, people putting data on a USB device – we trace and analyze that. We tell clients: 'Digital DNA is still there and we can recover it.'"

Masucci also counsels lawyers during litigation about what to look for and what to ask for, based upon the type of case. "A lot of times they don't think about the back-up tape drive, the third-party vendor, the server, or the personal computers that may be involved," he said.

Beyond navigating a much larger realm of discoverable information, lawyers are searching for cost-effective e-discovery tools and grappling with the lack of predictability that comes with emerging case law.

"The whole trick with e-discovery has been how to reduce the amount of attorney time through the use of technology," Mitchell said. "We're turning the corner on that. As lawyers get more savvy about the use of vendors and understand that cost is negotiable, they're able to get a better price for the client. And frankly, that can make the difference between whether your clients pursue their rights, because the costs can be so prohibitive."

In this economy, clients are especially cost-conscious. Womble Carlyle's Dave Mazza heads BullDox, the group his firm assembled years ago to do document review work exclusively. "Clients will no longer put up with associates doing document review type work, filling time gaps so to speak," Mazza said. "Firms are either developing their own review team or partnering with vendors that provide a review team, and then supervising that review team."

The group also does some e-discovery work, Mazza added, and the firm is looking at more sophisticated and cost efficient technology to limit the use of outside vendors. With e-discovery, though, client concerns extend beyond cost.

"Clients are concerned about what they need to do," Mazza said. "They're scared of making a mistake and being sanctioned. They know that it's important, but they're not sure what to do. No one's told them 'Here's the nuts and bolts.' We provide that advice."

Judges get up to speed

Courts are beginning to flesh out those nuts and bolts. “Just this year we began to see a real evolution in the way that judges are thinking about and writing opinions relating to e-discovery,” said Michele Lange, director of e-discovery for Kroll Ontrack, a New York-based e-discovery service provider. “We saw more intricate, complex e-discovery challenges than ever before. It was clear that judges were very quickly getting into the details when it comes to preserving and producing electronically stored information.”

And courts are now dealing with more complex issues, like social media, Lange added. “We’re just starting to see courts grapple with Facebook data – is it discoverable, how do you access it, what happens if it’s pulled down, how do you preserve it,” she said.

“I can remember a meeting with lawyers in 2001-02, when a lawyer said ‘You can’t possibly tell me that a judge one day is going to order me to produce an email.’ ‘Well I think that day is coming,’ I told him, ‘because that’s how we communicate.’”