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You Tube

Social Media and EDD: Riches and Risks

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Intermountain E-Discovery Conference



Social Media and Electronic Discovery: Riches and Risks

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Intermountain E-Discovery Conference 2010

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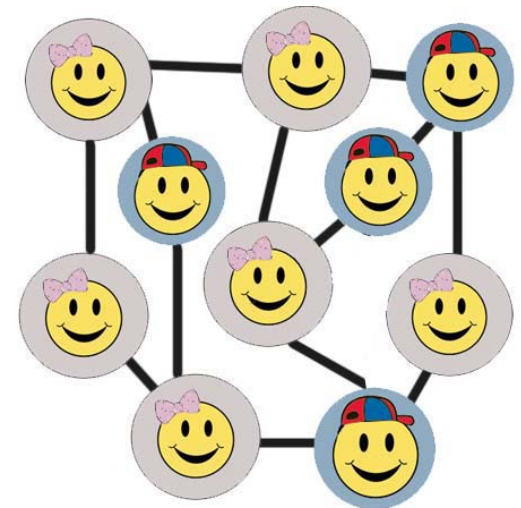
Where we're going

- Very quick overview of SM today
- Riches, yes. Risks, if you don't know how to properly locate, request, subpoena and authenticate SM evidence
- Finding evidence on SM sites
- What will courts allow you to get?
- How to subpoena Facebook?
- Authentication of SM ESI
- Some of the famous ESI cases



The global stats

- Facebook – over 500 million users worldwide (July 2010)
- Twitter – the new kid on the block, 190 million users
- LinkedIn – 75 million
- Plaxo – 40 million
- MySpace – 65 million



Twitter

twitter



- June 2010 – 2 billion tweets per month
- A UK court allowed service of an injunction via Twitter and an Australian court has authorized service of process via FB

Coyote Ugly Lawsuit

- P filed slip and fall case against popular bar
- Fell while climbing onto the bar
- D sought Facebook photos and comments regarding incident
- Magistrate Judge ordered P to friend him for purposes of reviewing/retrieving relevant info after which he would close FB account



Blogs and You Tube – also social media

- May 2010 – more than two billion YouTube views per day
- Google has ranked videos higher because of popularity
- According to Blawg.com, over 2200 legal blogs in 2010



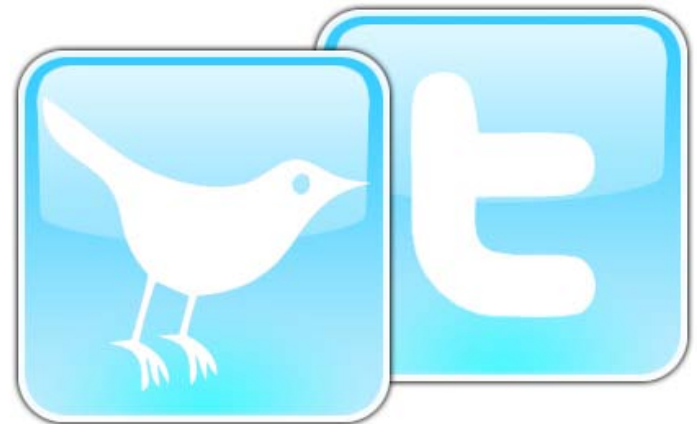
Facebook stats

- 400 million of 500 million active users log on each month
- 309 million – U.S. population
- Over 50% of active users log on every day
- Active users create 70 pieces of content per day
- Total time on FB per month: 700 billion minutes
- Source: Facebook pressroom statistics
- International Telecommunications Union
 - 1.7 billion people have Net access
 - 40% of those use FB
- Nielsen Report
 - 22% of online time spent on SM sites



How long does social media last?

- Approximately forever
- Twitter has kept all tweets
- April 14, 2010 Library of Congress announced that it is acquiring entire public archive of Tweets
- Facebook keeps until deleted items are overwritten
- You can't control what others do with your posts/photos



Deleted does not mean “deleted”

- Computer forensics can recover data until overwritten
- May exist on social media servers until overwritten
- Someone else may have kept the data



What happens to Facebook data when you die?

- There's a form for that 😊
- Report the death for an instant memorial (restricts access to confirmed friends)
- Take the account down (only close family members)
- ESI - Some have subpoenaed data after death successfully, both for closure and for evidence
- Best practice: leave your login info behind with your will with instructions



Finding evidence on social networking sites



- In the old days, there was little privacy and you could mine at will
- Today, the majority of people understand privacy settings
- Always check – many are still “open”
- A “friend” might always provide info
- Deception is obviously unethical (on the part of the attorney)
- If someone else deceives (without your involvement), it will probably come in

Philadelphia Bar Assn.



- 2009 bar opinion
- Explicitly stated that Model Rule 8.4 is violated if an attorney engages a 3rd party to gain access to a Facebook site by asking to friend the user

A new discovery development



- Civil subpoenas were long honored, especially when they came from courts – still are
- Now, one by one, the ISPs are citing the ECPA, challenging the subpoenas and winning
- 18 U.S.C. Sec. 2702-2703 – can't divulge the contents of e-mails or other electronic records
- Can criminal defense counsel subpoena? Not clear – government entities are exempt
- Law enforcement is therefore clearly exempt

Leading case

- In Re Subpona Duces Tecum to AOL, LLC, 550 F. Supp. 2d 606, 2008 U.S. Dist. LEXIS 39349 (E.D. Va. April 18, 2008)
- ECPA prohibits an e-mail service provider from producing customer's e-mail in response to a civil subpoena because it is not a disclosure exemption under the Act



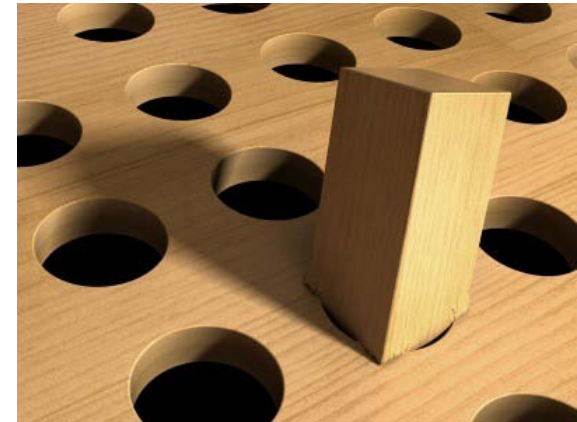
Stored Communications Act

- It isn't pretty and it doesn't really fit
- But it is being used to withhold the content of SM



Crispin v. Christian Audigier, Inc.

- C.D. CA., May 26, 2010
- First case to hold that Stored Communications Act applies to social networking sites
- Held that messages and comments visible to a restricted set of users were private
- Artist Crispin claimed Ds violated copyright – Ds wanted all MySpace and Facebook references to Defendants
- Trying to fit facts into SCA (1986 law) – a very bad fit – will it hold up?



EEOC v. Simply Storage Management



- May 11, 2010, S.D. Indiana
- Permitted discovery of all relevant SM data whether or not it was private
- EEOC had sued on behalf of two women claiming sexual harassment
- Defendant employer sought the info

What will happen in civil (and maybe your) cases?

- The information will probably still be found to be discoverable and the respondent will have to provide it
- If they don't, attorneys will ask court to compel the respondent
- Stay tuned, more to come



How to subpoena Facebook

- <http://www.facebook.com/help/?safety=law>
- “Facebook urges parties to resolve their discovery issues without involving Facebook”
- Stored Communications Act, 18 U.S.C. § 2701 et seq prohibits disclosure of all but basic subscriber info



FB and user have access to same data



- Unless user has terminated account
- You must serve a valid California or Federal subpoena on Facebook. Out-of-state civil subpoenas must be domesticated in California. Facebook's registered agent for service of process:

Custodian of Records, Facebook, Inc.
c/o Corporation Services Company
2730 Gateway Oaks Drive
Suite100
Sacramento CA 95833

What does it cost?

- \$500 for each account
- \$200 for expedited response
- 30 days response time
- Must include user consent form



Authentication



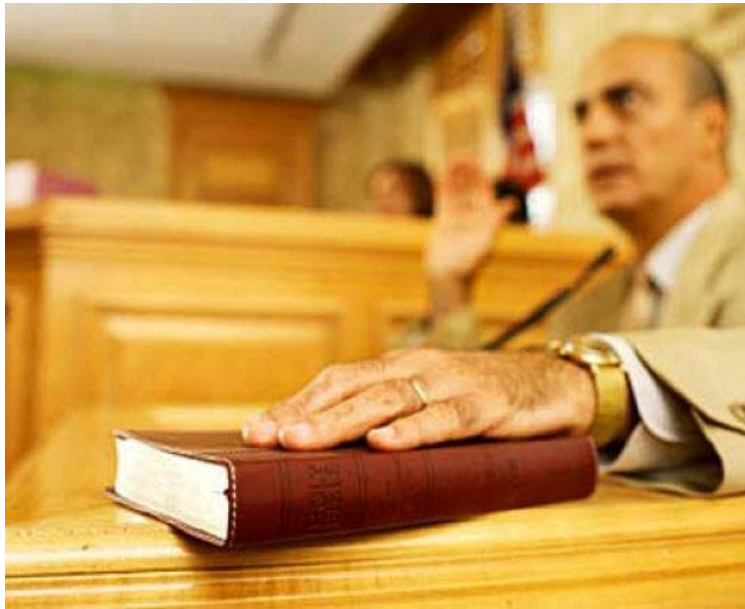
- Notarized declarations as to validity provided (an extra \$100)
- But no witnesses for trial or depositions
- Will notify user of subpoena to allow time for motion to quash

How do you authenticate?

- Smart lawyers
 - Requests for admission
 - Stipulations
- Many courts have common sense rule: If the other side doesn't object, it comes in



Authentication



- Did you post this?
- Did you see this post?
- Context and content can authenticate
- Expert testimony
- Computer forensics if data was deleted

Snitches get stitches: U know who you are!

- Griffin v. Maryland (Ct. of App. MD. May 27, 2010)
- Murder case where D's girlfriend appeared to threaten a witness on MySpace
- Site maintained under pseudonym
- Prosecution sought to intro to rehabilitate witness who changed testimony
- Had photo of D and girlfriend
- Page referred to D as "Boozy" (nickname)
- Court said site could be authenticated from content and context



Danger of spoliation



- Attorneys routinely advising deletions (prior to litigation holds)
- Client often delete after litigation holds
- Preservation of evidence letters critical
- If spoliation suspected, computer forensic may be needed

Canada speaks

- Ontario court (Feb. 2009) – permitted a D to cross-examine a P in a car accident case regarding content of his Facebook page
- Reasonable to infer that his site would demonstrate his quality of life





Jessica Binkerd

- DUI charge after death of her passenger (2007)
- Expected to get probation but got more than 5 years from Judge Joseph Lodge
- Reduced to 3 years by Judge Brian Hill after appeal
- She posted photos to her MySpace page
- They were all the judge talked about



Joshua Lipton



- DWI charge in 2008 seriously injuring a woman
- 2 weeks later, victim still recovering in hospital, he attended a Halloween party dressed as a prisoner
- Someone else posted on Facebook
- Judge called the photos “depraved”
- Sentenced to 2 years in prison

Ashley Sullivan



- Drove drunk and killed her boyfriend in crash
- Went to FL one month later and posted a “Drunk in Florida” photo on Facebook
- Judge refused to treat her (17) as a juvenile and sentenced her to 6 months because of photo



Megan Meier



- Megan (13) committed suicide in 2006 – in love with 16 year old Josh Evans whose bogus MySpace page was created by Lori Drew
- Lori wished to punish Megan for spreading rumors about Lori's daughter
- Missouri had no specific computer harassment statute
- Found guilty of unauthorized access to computers
- Federal judge dismissed, saying the Computer Fraud and Abuse Act was not meant to criminalize violations of Terms of Service of a website

Cedrick D. v. Stacy W.

- Father's parental rights terminated after judge viewed MySpace profile



Family law and social media

- More and more lawyers advising clients to take down social media sites (at least to delete photo albums)
- Parents who can't take children out of state post photos from Disney World



Family law and social media

- LinkedIn profile indicates job in support dispute
- Another support dispute, D said he had no job prospects but tweets indicated he was about to be hired
- Managing Director of Divorce-Online “20% of all petitions contain a reference to Facebook”

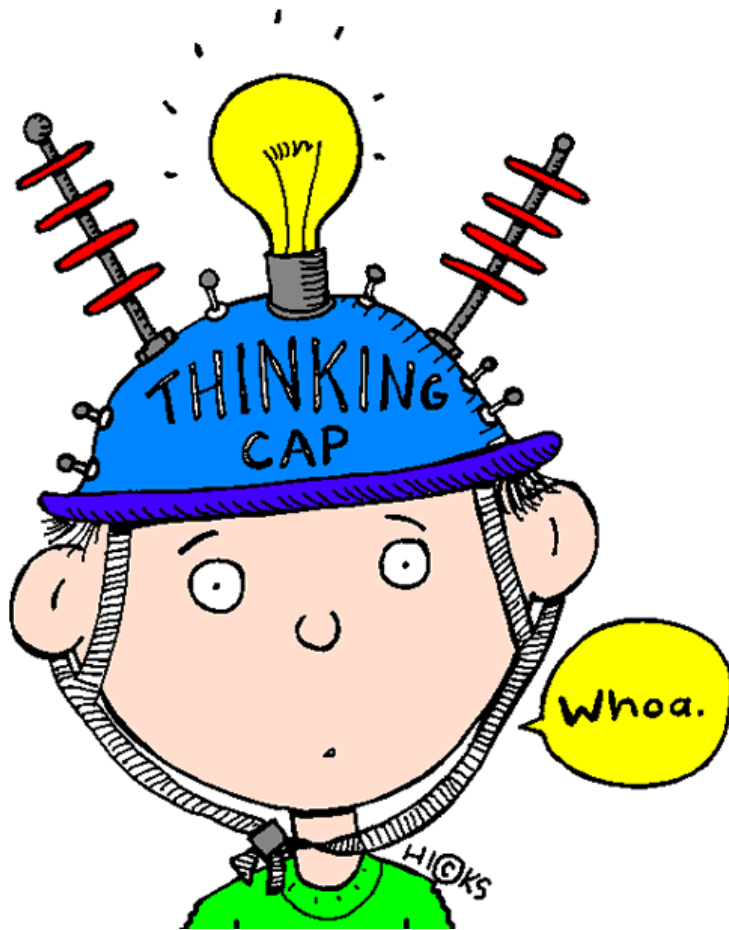


Employment law

- Montana police officer said on Facebook that police should be able to arrest people for being stupid. Resigned.
- Special ed teacher complained on Facebook that she hated her students. Fired.
- Teacher described her school on Facebook as “ghetto”. Reprimanded.



We learn from history, but think about
how little history we have



Facebook created in 2004
Primarily for students
Really, only five years of
history

The future of SM in e-discovery



