Zen & The Art of Legal Networking

INSIGHTS & COMMENTARY ON RELATIONSHIP BUILDING WITHIN THE INTERNATIONAL LAWYERS NETWORK

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Conference Review: ALM's Social Media: Risks & Rewards - E-Discovery & Social Media

The third session of ALM's Social Media: Risks and Rewards conference focused on social media's impact on e-discovery, and was presented by Michael Lackey, Jr. a partner at Mayer Brown LLP.

Lackey started with an overview of his presentation, saying it would discuss how social is coming up in litigation and the roadblocks to be aware of. He commented that there are a couple of high profile cases that are defining the limits of what you can get and how you can get it. For organizations that have social media content that becomes relevant in litigation, there are obligations for preserving this information. Often, it is being hosted by someone else, so that creates challenges.

As many of us involved with social media would agree, Lackey said that there's no doubt that social media is not a fad - it's here to stay. He mentioned some of the more traditional platforms for social media, but also included lawyer rating agencies and other kinds of technology, such as FourSquare, for consideration in litigation.

He said that consumers have a lot of trust out there and like the interactivity, especially in terms of connecting with corporations. Lackey added that digital word of mouth marketing would top $3 billion by 2013.

Issues in Litigation

In terms of the issues in litigation, Lackey talked about what's out there, whether it's discoverable, how it's being used in litigation, and how law firms can get it. He said for the holder of information or an employee with their own Facebook page, these are interesting questions.

What's Out There

Lackey said that there's a lot out there that's becoming relevant:

1. Wall postings: Essentially, they're communications that are analogous to email and can become important in litigation.

2. Status updates.

3. Posting on your site: One issue is people who post on your sites - what can and can't you control? There's also the situation on some platforms where you don't know who's posting because of the anonymous nature.

4. Photos: Personal photos or photos on Facebook. Depending on how the photo is uploaded, it's possible to get the location and time that the photo was taken, and this information can be used in litigation. Also depending on the way it was taken, that meta data could be available and you want to be alert to it and thinking about it. A recent case highlighted this point when a prosecutor used Google Earth photos to show the defendant's location during a burglary to show that he could be at the scene of the crime, and it was admitted to evidence. Lackey commented that there would be more of that kind of defense coming in.

Is it Discoverable?

Lackey commented that this question is the first point in any litigation. People have found it surprising that there's no change to the rules of discovery just because something is social media. There was a recent argument by an attorney where they argued there was a social media privilege because they thought it was private. The court said no, that privilege is to be narrowly construed, and so they rejected this argument. Lackey said that he's seeing more creative arguments, but the bottom line is that there is information that is out there that is relevant to claims of defense and relevant in litigation.

Lackey also talked about privacy, saying that it doesn't play into relevancy and burden. The privacy argument has been raised about individuals not understanding privacy, and so they'd say that you can't get the information or that it's embarrassing. However, Lackey pointed out that there's a lot turned over in discovery that's embarrassing that's not related to social media, so courts have routinely rejected those arguments.

Privacy does come into play in one particular area. Lackey cited the Crispin case out of California. The case was about an artist who was involved in a trademark dispute with an apparel manufacturer. They wanted Facebook and MySpace pages to see the scope of the activity. In this case, the defendant served a third party subpoena, which Lackey said was an important distinction.

The court went through a long process to determine whether it should be considered stored or private communication. Lackey said that the distinction the courts have been making is that if someone has sent a message but it hasn't been opened yet, it's stored communication. But if it has been opened, it's protected as if it was intended to be private.

The courts asked Crispin what his privacy settings were to determine whether his information was publicly available. Lackey said that the case was interesting because it was one of the first where the court didn't just routinely deny the subpoena. Most of them say no, that it's a criminal violation to produce the information. But in this instance, the privacy settings mattered. For more information about the Crispin case, see Doug Cornelius' summary and comments.

The other way that privacy comes into play is with direct document processing. Lackey said that if you have a Facebook account and you are in a third party litigation, that doesn't apply to you. People try to put privacy and privilege arguments, but courts routinely reject those. He said that if you can serve it as a discovery request, there's not a lot of push back - the only argument is relevance, which is broadly interpreted. Most lawyers,

instead of going the third party route, will be serving document requests on the party and asking for these sites when they think there's something there that's useful to their litigation.

How is it Being Used?

1. Family Cases & Tort Cases: Lackey said that social media is being used a lot in family cases, like divorces and child custody, as well as some tort cases, like slip and falls. He said it's being used to replace "day in the life" cases, where previously private investigators would be hired to take video.

   Lackey added that people post amazing things on their Facebook pages and cited one case in New York, the Romano case. The person was at Stony Brook, fell out of a chair, and had some injuries. The defendants could tell from her Facebook page that she was smiling and had been on a trip to Florida. This made them think that there was more information there, and the court allowed them to have access to her Facebook and MySpace pages. Lackey said this makes you stop and think - be careful about what you put on Facebook if you're going to be involved in a litigation.

2. To show mental or emotional state: Lackey said if someone is blogging or posting about this area, it may be relevant in a particular case. In some cases it can show conduct that's inconsistent.

3. Discrimination and harassment cases: Lawyers are looking for postings that are consistent with their theory. This raises questions about employment social media policies - Lackey suggested that it's something that companies have in there about their private sites. It must be consistent with the organization because there is real potential litigation risk out there as to what individual employees are posting.

   Lackey said that this is the same for harassment cases - what kinds of groups is the person affiliated with? Are they consistent with intolerance? You can often find this information in social media.

4. Client interaction with customers: Lackey said that this area hasn't evolved yet, but he predicts that it will. He's been exposed to a lot of clients who are very interactive with their customers via social media. In some cases, they may be talking about the effect of medications and how they're working. Even patients put up websites. If something were to go wrong down the road, that information can come back and be relevant on either side. Lackey suggested that companies be monitoring this type of thing along with brand protection. And if it's something that the company is sponsoring, how can they retain this information?

5. Criminal defendants: Courts are seeing more and more of this, especially with photographs. If someone can prove that they were in Florida on spring break, it can be helpful if a crime was committed somewhere else at the time. Lackey cautioned against damaging the photos in any way so that important data is lost.

6. To learn about the opposing party, judge, jurors, witnesses: Lackey said that he's been seen a lot of cases of this. He commented on a recent case where a juror was blogging throughout the whole trial (and happened to be a lawyer, which he didn't disclose during voir dire). He blogged about the trial and it later came up. It led to a mistrial and he was sent to disciplinary review in his state.

7. Lackey said that this isn't just an issue with lawyers - jurors are told not to talk about the case, the judge didn't say anything about blogging. He suggested that if you think you're involved in a case and the judge hasn't explicitly instructed the jury about social media use, even though it seems like common sense, requesting him to make explicit instructions isn't a bad idea.

   Courts are also seeing juror researching the cases - this is not a new issue, but it's more problematic because there is so much information out there. Jurors can look up their lawyers online. Lackey mentioned that there are paid sites where you can have the site assign only the good information about the attorney to appear in search results and the bad information about the opposing side. He questioned whether this would be ethical or not.

Learning about the opposing party is another area of tremendous information that's available now that didn't used to be. It's the same for learning about witnesses.

8. Pre-sentencing proceedings: Lackey cited a recent case in South Carolina where a defendant wasn't supposed to leave the state, but has posted pictures of himself online on vacation in Florida. The prosecutor got his bond revoked. In another case, a teenage girl was involved in a substance homicide and usually would have just gotten detention. However on her Facebook page, she wasn't expressing any remorse. The court found that there was no remorse and instead of detention, she was sent to a juvenile facility until she was 21. Lackey commented that people are not thing about how what they post will be used.

   Social media is also being used to try to get leniency. In one case, a public official was convicted of impropriety. He sent out to his Facebook friends a letter about what a great guy he was and asked them to sign an online petition. He was sentenced under the guidelines range. Lackey said that he wasn't sure how much influence the online petition had, but it must have had some.

   In another case, a rap star put together a petition of how important her music is, and she got eight years instead of 13. Lackey said there's a myriad of ways this is being used in litigation and the only limit is the creativity of the attorneys involved.

   Lackey gave one last example, saying that in California, a judge was sentencing a defendant accused of 50-something counts of molestation. A newspaper started a blog about it, and the community was pretty outraged. The judge in the sentencing of the defendant referred to that, saying that he wouldn't give leniency. This was an issue in appellate review. There was no indication that he was too biased in his sentencing. Lackey said he didn't condone judges using blogs, but said that it's the kind of thing that's out there and companies want to get alert to. What information is the judge getting?

How Do We Get It?

The most direct way to get the information is from the party opponent and the only issue in this case will be relevance. Lackey suggested just serving it as a document request, and said it's becoming very common in many cases as part of the document request. He said the party will have to explain relevancy, but that's the way to go.

He also mentioned that vast cases have said that you can't get this information from a third party subpoena. If that's the only way you can get the information, if you can't get it from the party, it might be the only way you can go. He suggested arguing the Crispin precedent, but said it would be a more difficult fight.

Lackey added that Facebook has made it clear that they will fight every one of these subpoenas. He said that at LegalTech earlier this year, their general counsel said something along the lines of "bring it on." Facebook is constantly getting these requests and constantly saying no, that they will go to court over it. He mentioned that there was an interesting, novel response to this by a judge in Tennessee in Barnes v. Nashville. Someone was injured at the Coyote Ugly bar and the judge said that they parties couldn't have access to the information on Facebook, but they could "friend" the judge. He would then go on and look at the information and if anything was relevant to either side, he would forward it to them.

How Do I Preserve It?

Lackey said that this raises some interesting issues. Companies know how to handle this information for their own sites, but the bigger problem is third-party hosted sites. He said it's the exact same problem as with cloud computing, because you can't physically take the steps. You need to make sure of your rights when you're going to use these kinds of sites - what rights do I have to get my data? How quickly? How can I get it in a way that preserves my data in the way it needs to be preserved? If I need to delete it, is there a provision? Lackey said to make sure your rights are what they need to be with respect to your litigation response plan.

In terms of employee content, companies need to ask themselves what their policies will be in response to employees' Facebook, MySpace, etc. accounts. If someone is going to sue the company, you can't serve a document request and get his or her website, but you might be interested in it. What should the company put in their policy to allow itself to defend itself in a litigation for harassment? Lackey said it's important to think about those things and be dictated by the policy. He said the terms of use are also important because they go to an employee's ability to get their own information.

How Do I Produce It?

Now that the company has preserved the information and is getting ready to go forward with litigation, they have to get the information. On company-hosted sites, they already have the meta data, etc. Lackey mentioned that the audience is probably aware that there's a movement for requirements of producing in native format or certain kinds of formant, like tiff format. He said there are different ways to produce in general litigation.

If it's on a company's own server, they can generally almost always do this. The problem is when it's on someone else's server, which is not set up for your litigation. How are you going to get this? Lackey used the example of a photo, and said that in sending it to you, the third party may strip out the necessary information, so companies need to ask themselves what they can do to make sure they can get that information.

Can third parties get the information in the time frame that companies need for their litigation? Will the company be able to get that information from teh third party so that they can comply with court obligations? Lackey commented that courts won't be sympathetic if you can't turn it over, so companies need to make sure they can get it in a timely fashion.

Lackey then opened up the floor for questions.

Question & Answer

Question: An audience member had two questions - how much will this cost? Is there any discussion going on about scaling back amendments about discoverable data? Also, what is Lackey telling clients about how to produce apps, so that if a company has an app on iTunes they can produce it?

Answer: To the first question, unfortunately no. He doesn't see any federal rules coming down. He's seeing in some jurisdictions that judges are more sensitive to burden arguments. A southern district of Texas judge talked about the concept of proportionality - what the party is asking for is proportional in respect to the litigation. Lackey commented that this doesn't help in big litigations, but it does in smaller ones.

Lackey said there are talks about the just, speedy resolution of disputes, which people had forgotten about. He said that the amendments weren't hard to get through the first time in 2006 - a lot of defendants wanted a willful standard in there, so the part of the bar that sues the corporations wanted a general standard. They ultimately got a watered down version. Lackey said that this example shows that whatever you're trying to get through for the federal rules, you'll end up with something watered down that's not helpful.

To the questioner's second query, Lackey said that apps are a real problem in most litigations. They're telling folks that if they have info that's relevant out there, it's an issue. Companies need to start talking about this with opposing counsel very early on, and the federal rules encourage this. They need to say "Here's the info we have out there and here's my proposal, i.e. we'll print out reports of the data." Lackey said that it depends on the app, but it should be settled in a meet/confer in the context of a particular case.

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