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Social Media Law & Policy Report™

From Friend Requests to Document Requests: Preserving Social Media in Anticipation of Litigation

By Dan Meyers and Brendan Derr

I. Introduction

Courts addressing the duty to preserve electronically stored information (ESI) existing on social media platforms have applied the usual rule that a party is obligated to preserve all documents and information, including social media, once a party reasonably anticipates litigation. The preservation of social media, however, raises unique concerns. Social media platforms are not designed to present stagnant content, but instead to enable users—both the original author and any other account holder that is ''connected'' or ''linked'' to the original author—to manipulate and modify content over time. As a result, to be effective, a social media preservation program must capture postings on a constant and ongoing basis in order to ensure that the posting is preserved in all of its various forms and configurations. Such a preservation program is burdensome and costly (typically requiring the retention of an outside vendor service for a lengthy period of time). Further, given the inherently pliable nature of social media postings, even a rigorous preservation program may prove imperfect.

Some protection against the inadvertent failure to preserve perfectly all social media postings is afforded by the amendments to Rule 37(e) of the Federal Rules of Civil Procedure, which have been proposed by the federal Judicial Conference's Committee on Rules of Practice and Procedure, and are expected to be effective Dec. 1, 2015. The proposed amendments limit the circumstances in which the federal courts may sanction a party for failing to adequately preserve ESI, including social media, by incorporating standards of proportionality and reasonability into the sanctions analysis. Savvy litigants and their counsel, therefore, can minimize the burden, cost and risk associated with the preservation of social media by crafting a preservation program that analyzes the available options and implements measures proportionate to the amount in controversy in the relevant dispute, the scope and relevance of the pertinent social media postings and the costs of the various preservation options.

As corporations and businesses continue to embrace social media as a means of connecting with their customers and marketing their products, the relevance of social media-based evidence will no longer be limited to employment discrimination cases and personal injury actions. The consumer class action bar has already targeted Twitter feeds and Facebook postings as the next vehicles of corporate communications to monitor and scrutinize. Corporate litigants must be prepared to preserve such communications through a considered and case-customizable preservation program.

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II. Document Preservation Obligations Include Social Media

Every U.S. court addressing the duty to preserve ESI existing on social media platforms has determined, either expressly or implicitly, that such preservation obligations are governed by the usual rule that a party is

obligated to preserve *all* potentially relevant documents and information when it reasonably anticipates litigation.[1] Parties who fail to implement the appropriate preservation policies and procedures may face sanctions for spoliation of evidence if relevant social media content is destroyed.

In *Painter v. Atwood*,[2] the U.S. District Court of Nevada emphasized the need for proper preservation of social media and cautioned that destruction of such information will not be tolerated. The case involved a sexual harassment lawsuit brought by Heather Painter against her former employer (Aaron Atwood). Painter alleged that Atwood made unwanted sexual advances towards her, causing her extreme emotional distress.

At the close of discovery, Atwood filed a motion for spoliation sanctions, alleging that Painter and two of her witnesses intentionally destroyed Facebook posts and text messages that contradicted Painter's claims and deposition testimony. Specifically, Atwood alleged that Painter deleted Facebook comments and posts in which she favorably described both her boss and her employment situation.[3]

Addressing the destruction of social media, the court applied the normal rules governing the loss of ESI. Thus, the court defined spoliation of evidence as ''the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.''[4] The court continued, ''while a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.''[5]

Because Painter failed to produce the requested posts, the court concluded that they were destroyed. Painter's attorney argued that the Facebook posts were not relevant to her claim because Painter had already admitted enjoying working for Atwood and because her claim centered solely on an isolated event.[6] The court rejected those arguments because Painter's ''Facebook comments discussing her opinion on working and interacting with Defendant . . . are directly relevant to this litigation. Plaintiff's entire lawsuit centers around her assertion that the work environment at Defendant Dr. Atwood's dental practice was sexual in nature.''[7] The court concluded that Painter knew or should have known that the Facebook comments were relevant to Atwood's case at the time she deleted them.[8] Thus, the court ordered that an adverse inference instruction would be given to the jurors, allowing them to draw the conclusion that Painter intentionally deleted the Facebook comments that contained evidence that was detrimental to her claims.[9]

Similarly, in *Gatto v. United Air Lines, Inc.*,[10] the defendants brought a motion for spoliation sanctions against the plaintiff for the deletion of the plaintiff's Facebook account. In this action, Frank Gatto, a grounds operations supervisor for JetBlue Airways Corp., alleged that he was injured when a set of fueler stairs crashed into him while he was unloading baggage from an aircraft. Gatto alleged that he sustained numerous injuries that rendered him permanently disabled. Consequently, Gatto claimed that he was unable to work and was limited in his physical and social activities.

During discovery, defendants requested documents and information relating to Gatto's social media accounts. When Gatto failed to provide an authorization for the release of his records from Facebook, the magistrate judge ordered Gatto to execute an authorization for the release of documents and information. Gatto also agreed to change his password, which was provided to defense counsel for the purpose of accessing Gatto's Facebook account.[11] Ultimately, the parties agreed that Gatto's attorney would download his client's account information and provide it to the defendants with a certification that the data had not been modified or edited.[12]

However, prior to the retrieval and production of his records, Gatto deactivated his Facebook account. Gatto claimed that he did so because he had received a notification that an unknown IP address had accessed his account, even though he was aware that defense counsel had direct access to his password and permission to log on.[13] Despite defendants' demand that he reactivate his account, Gatto's account had been ''automatically deleted'' by Facebook, in accordance with their policy, after 14 days of deactivation.[14]

The court was not persuaded by Gatto's claim that the evidence was not intentionally suppressed. ''Even if Plaintiff did not intend to permanently deprive the defendants of the information associated with his Facebook account, there is no dispute that Plaintiff intentionally deactivated the account. In doing so, and then failing to reactivate the account within the necessary time period, Plaintiff effectively caused the account to be permanently deleted.''[15] The court concluded Gatto's failure to preserve the relevant evidence prejudiced defendants because they lost access to evidence that was potentially relevant to Gatto's credibility and damages.[16] As a result, the court granted defendants' request for jury instruction ''that it may draw an adverse inference against Plaintiff for failing to preserve his Fa-

[1] *Ogden v. All-State Career Sch.*, No. 2:13-CV-406, 2014 BL 112996, at *5 n.3 (W.D. Pa. Apr. 23, 2014); *Painter v. Atwood*, No. 2:12-CV-01215-JCM, 2014 BL 74567 (D. Nev. Mar. 18, 2014) *reconsideration denied,* 2014 BL 204655 (D. Nev. July 21, 2014); *Hawkins v. Coll. of Charleston*, No. 2:12-CV-384-DCN, 2013 BL 317501 (D.S.C. Nov. 15, 2013); *Gatto v. United Air Lines, Inc.*, No. 10-CV-1090-ES-SCM, 2013 BL 80118 (D.N.J. Mar. 25, 2013); *Howell v. Buckeye Ranch, Inc.*, No. 2:11-CV-1014, 2012 BL 258589, at *1 (S.D. Ohio Oct. 1, 2012).

[2] 2014 BL 74567.

[3] *Id.* at *2.

[4] *Id.* at *3 (quoting *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir.2002)).

[5] *Id.* at *6 (quoting *Wm. T. Thompson Co. v. Gen. Nutrition Corp., Inc.*, 593 F. Supp. 1443, 1455 (C.D.Cal. 1984)).

[6] *Id.* at *6.

[7] *Id.*

[8] *Id.*

[9] *Id.* at *9.

[10] 2013 BL 80118.

[11] *Id.*

[12] *Id.* at *2.

[13] *Id.*

[14] *Id.*

[15] *Id.* at *5.

[16] *Id.*

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cebook account and intentional destruction of evidence.''[17]

As *Painter* and *Gatto* demonstrate, early jurisprudence concerning the obligation to preserve and produce social media (and the consequences of the failure to do so) has largely involved employment disputes and personal injury actions. Nevertheless, as corporations and businesses increasingly focus on their social media presence as a means of communicating with their customers, it is only a matter of time before these issues arise in complex commercial disputes. In turn, the time has come for corporate litigants to prepare a considered and case-customizable social media preservation program.

III. Social Media Presents Unique Preservation and Production Concerns

The preservation and production of social media raises unique concerns because social media platforms are designed not to be static sources of information, but instead to be dynamic, interactive and pliable repositories through which end users can manipulate and modify content. In turn, a thorough social media preservation program requires potential litigants to incur costs and satisfy burdens that are materially higher and different from those incurred to preserve other forms of ESI (such as e-mails).

Corporations and attorneys are confronted by several challenges when attempting to preserve and produce information stored on social media accounts. It is not enough for litigants simply to advise the employees, IT staff and relevant third parties not to delete pertinent social media accounts. Once a corporation reasonably anticipates litigation with respect to which social media postings might be relevant, the corporation must affirmatively take steps to preserve (and ultimately produce) such postings.

The initial obstacle that must be overcome is the constantly evolving nature of social media accounts. Third-party vendors can be retained to collect and preserve a ''snapshot'' of a single social media account for an apparently reasonable flat rate of $700. But those quickly snowball when the corporation has multiple social media accounts (e.g., accounts on Facebook, Twitter, LinkedIn and Instagram), and each account must be ''collected'' every day to capture the evolution of postings over time. And even daily collections may prove inadequate in certain cases, leading parties to demand (and vendors to offer) the ability to take such snapshots *every few minutes* day after day until the dispute is resolved.

Additional technical challenges arise once a party is ready to begin producing social media content. There is no native format for content on sites such as Facebook, Twitter or LinkedIn, so the underlying content will be contained in different formats from one day to the next (at the whim of the provider). Likewise, the metadata attached to social media content (even for direct ''messages'' sent between social media account holders) is qualitatively different than the format of metadata litigants are accustomed to demanding in the context of ESI. Sites such as Facebook offer the ability to download the account holder's information directly through the site, but potentially relevant information such as photographs, messages and timeline posts are delivered in the form of htm files that are both too large and too difficult to review to be readily useful. Once again, specialist vendors must be retained in order to effectively collect such data, create a metadata log (to establish chain of custody and authentication) and ultimately review the resulting content.

The conclusion is inescapable that as the prevalence of social media—and its relevance in litigation—continues to skyrocket, so do the costs and burdens associated with preservation and production of potentially relevant content.

IV. Proposed Amendments to Rule 37(e) Can Be Used to Mitigate the Costs and Burdens of Preserving Social Media

The federal Judicial Conference's Committee on Rules of Practice and Procedure recently proposed amendments to Rule 37(e) of the Federal Rules of Civil Procedure to limit the circumstances in which the federal courts may sanction a party for failing to adequately preserve ESI, including social media. These new rules, however, do not reprieve potential litigants from the initial obligation to implement mechanisms to preserve social media when litigation is reasonably anticipated. Further, it remains to be seen how courts will interpret and apply the proportionality and negligence standards contained in the proposed new Rule 37(e) with regard to the preservation of social media. Nevertheless, those standards can be used as a road map for a savvy litigant to analyze and adopt a social media preservation strategy that will stand up to future attacks and sanctions motions.

The amendments, set to take effect on Dec. 1, 2015, are intended to ''establish greater uniformity in the ways in which federal courts respond to a loss of ESI'' and ''to relieve the pressures that have led many potential litigants to engage in what they describe as massive and costly over-preservation.''[18] Under the current rule, there is a circuit split as to how sanctions should be applied to the loss of ESI. The Second Circuit, for example, holds that an adverse inference instruction may be imposed for the negligent or grossly negligent loss of ESI.[19] Whereas other circuits, such as the Tenth, require a heightened standard of a showing of bad faith before an adverse inference instruction may be given to a jury.[20] As a result of these divergent applications of Rule 37(e), companies have been forced to be overly cautious in their ESI preservation in order to avoid sanctions in jurisdictions applying the lower negligence standard.

The revised rule applies if ESI ''that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it.''[21] The Advisory Committee notes that courts should consider a party's resources and the proportionality of the efforts to preserve when determining the reasonableness of the steps taken to preserve the

[17] *Id.*

[18] Report to the Standing Committee, Advisory Committee on Civil Rules, May 2, 2014, at 35.

[19] *Id.* at 37.

[20] *Id.*

[21] *Id.* at 40.

ESI.[22] Thus, proposed Rule 37(e)(1) provides that ''upon finding prejudice to another party from loss of the information'' the court may only ''order measures no greater than necessary to cure the prejudice.'' This proposal thus grants courts the broad discretion to cure the prejudice caused by loss of ESI.[23]

Alternatively, proposed Rule 37(e)(2) enumerates specific sanctions that can be ordered ''only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation.'' Specifically, a court may ''(A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.'' This revised provision aims to resolve the circuit split over the intent requirement for spoliation sanctions.[24] Under the new rule, mere negligence will no longer result in the more severe spoliation sanctions. Rather, such sanctions will require a heightened showing of bad faith.

In drafting the new rule, the Advisory Committee recognized the need to limit its application to ESI. ''ESI is created in volumes previously unheard of and often is duplicated in many places. The potential consequences of its loss in one location often will be less severe than the consequences of the loss of tangible evidence. ESI also is deleted or modified on a regular basis, frequently with no conscious action on the part of the person or entity that created it.''[25] The Advisory Committee's concerns are well-placed considering the substantial role ESI now plays in litigation. While more attention should be paid to the unique challenges preservation and production of social media presents, the proposed amendments to Rule 37(e) provide businesses and corporations with a road map to an effective and satisfactory social media preservation program based on the nature of the particular dispute, the pertinence of social media postings thereto and the cost and burdens of preservation options. Corporate litigants should craft a written social media preservation program that documents the preservation options at its disposal, analyzes the reasonability of those options and adopts a program proportional to the corporation's resources and circumstances.

[22] *Id.* at 41.
[23] *Id.*
[24] *Id.* at 42.
[25] *Id.* at 311.

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