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Social media discovery: 20 commonly asked questions

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In part one of this two-part series, we address the first 10 of 20 basic questions that often arise when parties seek social media records or other forms of electronically stored information, or ESI. Here are the final 10.

11. May a lawyer "friend" or request to "follow" a represented adverse party to obtain access to private social media posts? It is ethically problematic and not advisable. Attorneys who "friend" a represented adverse party risk violating rules of professional responsibility and ethics. *See* San Diego County Bar Association Legal Ethics Opinion 2011-2 (May 24, 2011). Adding an adverse party as a friend also could constitute a violation of California Rule of Professional Conduct 2-100, which forbids attorneys from communicating with adverse parties about the "subject matter of the litigation."

12. What obligations do parties have to preserve social media evidence? The general obligation to preserve evidence applies equally to social media content. *See Nutrition Distrib. LLC v. PEP Research, LLC*, No. 16cv2328-WQH-BLM, 2018 U.S. Dist. LEXIS 205250, at *16 (S.D. Cal. Dec. 4, 2018) ("Defendants have failed to preserve social media posts for Plaintiff's use in this litigation after Defendants' duty to preserve arose."). An immediate and appropriate litigation hold must be issued whenever litigation becomes reasonably foreseeable. *See* State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion Interim No. 11-0004 (*citing Hynix Semiconductor Inc. v. Rambus Inc.*, 645 F.3d 1336, 1345

(Fed. Cir. 2011)). Attorneys should instruct their clients not to alter or delete the content of any social media accounts once the proverbial "first shot" is fired.

Some states require attorneys to take affirmative steps to ensure their clients preserve relevant social media evidence. *See* Philadelphia Bar Association Ethics Opinion 2014-5 (July 2014). Attorneys might have some leeway in instructing their clients to make social media content private or to remove social media content *before* the duty to preserve has been triggered. *See* New York State Bar Association, Social Media Ethics Guidelines (May 11, 2017) ("A lawyer may advise a client as to what content may be maintained or made non-public on her social media account, including advising on changing her privacy and/or security settings. A lawyer may also advise a client as to what content may be 'taken down' or removed, whether posted by the client or someone else. However, the lawyer must be cognizant of preservation obligations applicable to the client and/or matter ... relating to the preservation of information, including legal hold obligations. Unless an appropriate record of the social media content is preserved, a party or nonparty may not delete information from a social media account that is subject to a duty to preserve.").

13. Must a party produce social media and other ESI in the form most helpful to the opposing party? Not necessarily. A party typically is required to produce responsive material as it is kept "in the usual course of business" and to produce ESI in the form specified by the requesting party, or, if no form is specified, in a "reasonably usable form." *See* Fed. R. Civ. P. 34(b)(2)(E). There is no obligation to produce ESI in the format that is most convenient for the requesting party. *See Wilson v. Conair Corp.*, No. 1:14-cv-00894-WBS-SAB, 2015 U.S. Dist. LEXIS 57654, at *10 (E.D. Cal. Apr. 30, 2015) ("The Rules do not require a party to produce ESI in the form most helpful to the opposing party.").

That said, both federal and California rules of civil procedure allow a requesting party to specify the form or forms in which each type of electronically stored information is to be produced, and responding parties must comply with those specifications. *See* Fed. R. Civ. P. 34 (b) (2)(E); Cal. Civ. Proc. Code Section 2031.030(a)(2). Likewise, the Advisory Committee Notes for Federal Rule of Civil Procedure 34(b)(2)(E) provide that a responding party may be required to translate its ESI into a "reasonably usable" form.

14. Do courts frown upon ESI and social media "data dumps?" Generally yes. Some courts have required a responding party to organize and label ESI and indicate which documents are responsive to specific requests. *See Venture Corp. Ltd. v. Barrett*, No. 5:13-cv-03384-PSG, 2014 U.S. Dist. LEXIS 147643, at *8-9 (N.D. Cal. Oct. 16, 2014); *Diesel Mach., Inc. v. Manitowoc Crane Grp.*, No. CIV 09-4087-RAL, 2011 WL 677458, at *11 (D.S.D. Feb. 16, 2011). These courts construe subparts (i) and (ii) of FRCP 34(b)(2)(E) as being supplementary to one another, with subpart (i) imposing an organizational requirement on the forms of production for ESI described in subpart (ii). Other courts have ruled that a responding party need not sort and label responsive ESI as long as the produced documents are text searchable. S*ee Kwasniewski v. Sanofi-Aventis U.S.LLC*, No. 2:12-cv-005150-GMN-NJK, 2013 U.S. Dist. LEXIS 91217, at *7 (D. Nev. June 28, 2013); *Anderson Living Tr. v. WPX Energy Prod., L.L.C.*, 298 F.R.D. 514, 527 (D.N.M. 2014).

15. Must requests for production of social media and other ESI be proportional to the needs of the case? Yes. Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1). Rule 26 applies equally to requests for social media. *See Henson v. Turn, Inc.*, 2018 U.S. Dist. LEXIS 181037, at *15 (N.D. Cal. Oct. 22, 2018). This has broad implications in the context of ESI, where an overly broad request for production could potentially call for multiple terabytes of data. District courts regularly order parties to "cooperate in the development of search methodology and criteria to achieve proportionality in ESI discovery, including appropriate use of computer-assisted search methodology." *See Boardley v. Household Fin. Corp. III*, No.: PWG-12-3009, 2015 U.S. Dist. LEXIS 70098, at *21-22 (D. Md. June 1, 2015); *Design Basics, L.L.C. v. Carhart Lumber Co.*, No. 8:13CV125, 2014 U.S. Dist. LEXIS 165704, at *4-5 (D. Neb. Nov. 24, 2014).

16. Will a party always be sanctioned for failure to preserve social media and other ESI? No. A party has no duty to preserve evidence when there is no litigation on the horizon. If social media information or other ESI is deleted in good faith as part of routine document retention procedures before litigation could reasonably be anticipated, it is unlikely a party will be sanctioned for spoliation of evidence. *See* Cal. Civ. Proc. Code Section 2031.060(i)(1) ("absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system."); *Gladue v. St. Francis Med. Ctr.*, No. 1:13-CV-186- CEJ, 2015 U.S. Dist. LEXIS 36542, at *2-3 (E.D. Mo. Mar. 24, 2015).

17. Could a court impose sanctions even when there is no proof of "intent to deprive" the other party of the social media or other ESI? It's possible. A responding party may be sanctioned for failing to produce the requested material where there is "prejudice to another party from loss of the information" or where the responding party acted "with the intent to deprive another party of the information's use in the litigation." Fed. R. Civ. P. 37(e). After the duty to preserve evidence arises, a party can be sanctioned for failing to preserve ESI even if the party did not act with the intent to deprive the requesting party of the information. *See Brewer v. Leprino Foods Co.*, 2019 U.S. Dist. LEXIS 14194, at *31 (E.D. Cal. Jan. 29, 2019) (sanctions were appropriate under Fed. R. Civ. P. 37(e)(1) simply because defendant was prejudiced by plaintiff's deletion of discoverable text messages, as well as under Fed. R. Civ. P. 37(e)(2) because plaintiff acted with intent to deprive); *Franklin v. Howard Brown Health Ctr.*, 2010 U.S. Dist. LEXIS 171609, at *12-13 (N.D. Ill. Oct. 4, 2018) ("subdivision (e)(1) clearly does not require any finding of intent on the defendant's part, only prejudice to the plaintiff.").

18. What if the court determines there was "intent to deprive?" Prepare for harsh consequences. More severe sanctions are available where a party intentionally deletes or destroys social media information or other ESI for the purpose of depriving another party of the information's use in litigation. *See* Fed. R. Civ. P. 37(e)(2); *Brewer*, 2019 U.S. Dist. LEXIS 14194, at *31 (E.D. Cal. Jan. 29, 2019); *Small v. Univ. Med. Ctr.*, 2018 U.S. Dist. LEXIS 127803, at *235 (D. Nev. July 31, 2018). Sanctions may include the imposition of a jury instruction that the missing information was unfavorable to the party, outright dismissal of the action, or entry of a default judgment. *Id.* Proving intent to deprive can prove difficult, however, and federal courts are more likely to impose the milder sanctions authorized by Federal Rule of Civil Procedure 37(e) (1). *See Fuhs v. McLachlan Drilling Co.*, 2018 U.S. Dist. LEXIS 184264, at *43-45 (W.D. Pa. Oct. 26, 2018).

19. May an attorney be sanctioned personally for intentional destruction of social media evidence? In egregious situations. An attorney was personally sanctioned for participating in the intentional spoliation of social media evidence. *See Allied Concrete Co. v. Lester*, 285 Va. 295, 303 (2013) (discussing trial court's decision to impose monetary sanctions in the amount of $542,000 against an attorney who instructed his client to delete pictures from his social media account). *See* also State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion Interim No. 11-0004. Additionally, attorneys may expose their clients to potential sanctions where they fail to take adequate steps to ensure their clients have produced all responsive documents and ESI. *See also Brown v. Tellermate Holdings Ltd.*, No. 2:11-cv-1122, 2014 U.S. Dist. LEXIS 90123, at *3-4 (S.D. Ohio July 1, 2014) (although no attorney was sanctioned, "[C]ounsel fell far short of their obligation to examine critically the information which Tellermate gave them about the existence and availability of documents requested by the [Plaintiff.]").

20. Are e-discovery sanctions limited by the amount in controversy? Not necessarily. Some courts have held that sanctions need only be proportional to the offense in question, not the amount of recoverable damages. *See Zambrano v. Tustin*, 885 F.2d 1473, 1480 (9th Cir. 1989); *Klipsch Grp., Inc. v. ePRO E-Commerce Ltd.*, 880 F.3d 620, 627 (2d Cir. 2018) (holding that district court's decision to impose $2.7 million in sanctions for spoliation of evidence was proper, even though the case would likely result in about $20,000 in damages). The *Klipsch* court held that the dollar amount accurately reflected the costs incurred by the plaintiff in attempting to remedy the defendant's discovery misconduct and that the sanctions were not punitive. *See also Shire L.L.C. v. Abhai, L.L.C.*, 298 F. Supp. 3d 303, 332 (D. Mass. 2018) ("the offended adversary's counsel is not being rewarded for its success in the litigation; rather, the adversary is simply being compensated for costs it should not have had to bear.").

Conclusion

Social media is ubiquitous, and social media accounts are a rich source of potentially discoverable information. Savvy practitioners should keep abreast of the growing social media universe and should stay attuned to the changing rules governing how this critical evidence is treated in discovery and at trial. Many attorneys will soon encounter, if they have not already done so, a case that turns on a single post, Tweet or other piece of social media content. Attorneys are wise to be prepared for that case.

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