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Today’s Presenters

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Consider how much this computer could tell us about its user.
Introduction

Now consider how much Facebook, Twitter and other social media sites could tell us about the same user.
Introduction

Do companies and their employees ever have a reasonable expectation of privacy when using a social media site? Can relevant information posted on the sites be used as evidence in litigation?
What we’re going to do:

1. Quickly discuss relevant federal jurisprudence regarding privacy and the discovery of information in litigation.
What we’re going to do:

2. Briefly explain what courts outside the U.S. have said about the privacy of information maintained on social media sites.
What we’re going to do:

3. Discuss ramifications: What does this all mean for the employer and its employees?
What we’re going to do:

4. Discuss ways in which parties may avoid pitfalls.
Let’s get started …
1. Relevant Federal Jurisprudence
1. Relevant Federal Jurisprudence Regarding Privacy

  - Fourth Amendment requires a court issued warrant when there is a "constitutionally protected reasonable expectation of privacy".

  - “Reasonable expectation of privacy” is found where a person has exhibited an actual expectation of privacy and, second, that the expectation is one that society is prepared to recognize as “reasonable.”
1. Relevant Federal Jurisprudence Regarding Privacy

WHY IS THIS IMPORTANT?

- Federal courts generally recognize a right of privacy that can be raised in response to discovery requests.

- The party or person whose privacy is affected may object to the discovery request or seek a protective order.
1. Relevant Federal Jurisprudence Regarding Privacy and Computer Use


- **U.S. v. Angevine**, 281 F.3d 1130 (10th Cir. 2002) – University employees warned data “is not confidential either in transit or in storage” and that “network administrators and others were free to view data downloaded from the Internet.”

- **U.S. v. Ganoe**, 538 F.3d 1117 (9th Cir. 2008) – “Download” folder on defendant’s computer was available to anyone using a peer-to-peer file sharing program, and defendant was warned before installation that the folder would be shared.
1. Relevant Federal Jurisprudence Regarding Privacy

These, and the decisions of other federal courts that have addressed the issue, support the proposition that use of computers and the Internet in the face of network user agreements and other policies can eliminate any expectation of privacy with respect to data communicated and stored in such media.
2. What courts outside the U.S. are saying.
2. What courts outside the U.S. are saying—*Leduc v. Roman* (2/09 Canada)

“A party who maintains a private … Facebook profile stands in no different position than one who sets up a publicly available profile. Both are obliged to identify and produce any postings that relate to any matter in issue in [a lawsuit].”
2. What courts outside the U.S. are saying—*Leduc v. Roman* (2/09 Canada)

“Given the pervasive use of Facebook … it is now incumbent on a party’s counsel to explain to the client, in appropriate cases, that documents posted on the party’s Facebook profile may be relevant to allegations made in the pleadings.”
3. So what are the ramifications?
3. **Ramifications—Federal Jurisprudence: Employee Technology Use Agreements**

The current legal trend strongly suggests that persons using computers and accounts managed and screened by a network server have little or no expectation of privacy within the company.
3. Ramifications—Canadian Law: Is it Relevant?

- *Leduc v. Roman* focused on whether there is an objective expectation of privacy. If there is not, the data is discoverable *if it is relevant.*
Facebook Privacy Policy

- “We may disclose information pursuant to subpoenas, court orders, or other requests…if we have a good faith belief that the response is required by law.”
- “We keep track of the actions you take on Facebook…When you access Facebook from a computer, mobile phone, or other device, we may collect information from that device about your browser type, location, and IP address, as well as the pages you visit.”
LinkedIn Privacy Policy

“We will disclose [personal] information wherein we have a good-faith belief that it is necessary to comply with a court order, ongoing judicial proceeding, subpoena, or other legal process or request to LinkedIn brought in any country throughout the world, or to exercise our legal rights or defend against legal claims.”
4. How to Avoid Pitfalls
4. How to Avoid Pitfalls – Develop Corporate Policy

- How are social media sites currently being used?
- This is invaluable in developing a common sense corporate policy around what is and is not appropriate for social media.
4. How to Avoid Pitfalls – Develop Corporate Policy

- Policy should:
  - Emphasize that if employees are using any of the different social networking outlets that they are speaking as individuals and not as representatives of the corporation.
  - State that the company has its own formal/official presence on social media sites, which is managed by authorized personnel and that they should refrain from mentioning the company or its products or services on their personal profiles.
  - Require each employee to read and sign off on this kind of policy to help ensure that everyone within the organization is aware of it and is expected to comply.
Litigation holds should also explicitly address employee use of social media sites for business purposes.

This will help ensure that those employees who are authorized to maintain the company's formal/official presence on social media sites also begin to take the necessary steps to preserve relevant data.
Social Media Law Series

Next webinar in the series …

E-Discovery Implications of Social Networking Sites

April 20, 2010
10:00 am PDT | 12:00 pm CDT | 1:00 pm EDT

Kathy J. Owen
Partner
Questions?