

Interesting E-Discovery Developments

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The program at a Product Liability Advisory Council, Inc. (“PLAC”) meeting are always interesting, and the one just before Columbus Day was no exception. It focused on social media and e-discovery. Here are some highlights:

“Patent” Model Order on E-Discovery

Everybody knows the expense of e-discovery in modern litigation is out of control. Well, it’s just as much a problem in patent cases as in mass torts, but at least the patent bench and bar are taking concrete steps to do something about it. The Advisory Council for the Federal Circuit created a special subcommittee with the sole aim of creating a model court order to govern e-discovery. Here’s a [copy of the model order](#), which the special committee unanimously endorsed.

The model order was introduced a couple of weeks ago by Chief Judge Rader of Federal Circuit, at a Texas judicial conference. For those interested in a more complete discussion, here’s a [copy of Judge Rader’s talk](#) (it’s nominally about patent litigation, but mostly about e-discovery). This order has features that we’re certain could be usefully applied to e-discovery in **all types** of litigation, especially mass torts. Specifically, the model order provides:

- “Disproportionate” e-discovery requests are grounds for cost shifting.
- Absent “good cause,” metadata (all that stuff lurking in the background of most electronic documents) is not discoverable – period.
- Discoverable background information about a document is limited to when it was sent/received and the distribution list.
- No more “general” demands for production of email.
- Production of email is limited to “specific issues” that must be separately stated in any request.

- Email production is to be “phased,” and may only take place after exchange of “initial disclosures” and “basic documentation.” A mass tort case would similarly tie email production to specific claimed defects or acts of negligence.
- No blanket email production. Specific custodians, search terms, and time frames must be stated to limit the scope of production.
- Unless the parties agree, email requests are presumptively limited to five custodians per producing party and five search terms per custodian.
- With leave of court, email production of an additional five custodians per producing party and five more search terms per custodian may be had. Anything more than that, and the requesting party must pay for the extra e-discovery itself.
- Limits on overbroad search terms are imposed, and enforced by cost-shifting.
- Privileged e-discovery cannot be used by the requesting party.
- There is no waiver of privilege by the inadvertent production of e-discovery
- “Mere production” of e-discovery as part of a “mass production” is not a waiver for “any purpose.”

We think this [model order](#), and particularly its hard caps, an excellent start to taming the e-discovery monster, which Chief Judge Rader said in [his talk](#) “endanger[s] the entire system” and had become “such a burden” that “outweigh[s] any benefit.” The basic foundations of the model order: (1) hard numerical limits; (2) specificity of requests, and (3) cost-shifting for “disproportionate” e-discovery demands, are universal. Since the problems with e-discovery extend far beyond patent cases, we recommend the model order, with minor subject-matter-specific modifications, for use in any litigation, and especially mass torts.

Seventh Circuit Model Order on E-Discovery

Another somewhat less definitive, but still useful, approach to e-discovery, is the Seventh Circuit’s pilot program (see the website, [here](#)), which was rolled out in 2010 and had been expanded to more cases along the way. Although the Seventh Circuit’s approach doesn’t include the bright lines and enforceable sanctions of the Federal Circuit’s model order, it’s still a step in the right direction.

The Seventh Circuit's approach is based upon the [following principles](#):

- A duty to meet and confer on e-discovery issues (identification, scope, formats, phasing, protective orders) and to identify disputes promptly for early resolution before the case progresses into actual discovery.
- Appointment of e-discovery liaisons who will be the “go to” persons for any e-discovery issues that arise.
- Preservation orders cannot be vague or overly broad and must include specific information delimiting their scope.
- Limits on the scope of e-discovery, including restrictions on discovery relating to preservation itself, and presumptively excluding: unallocated data; ephemeral data; on-line access data; automatically updated metadata; duplicative backup data; and anything else that would “require[] extraordinary affirmative measures that are not utilized in the ordinary course of business.”
- Identification of discoverable information that prevents duplication, uses filters, and encourages use of “advanced culling technologies” beyond mere keywords.
- Formatting must be agreed upon, and need not improve the original state of the information (no need to make unsearchable documents searchable), although parties may agree to split costs of such upgrades. Any “incremental cost” in creating the requested information is to be borne by the requesting party.
- Both judges and parties need to become educated about e-discovery, which is an excellent subject for CLE.

The Seventh Circuit's program also relies on a model standing order, which tracks these principles. Here's a copy of [that order](#).

The Latest On E-Discovery For Defendants

We've [posted before several times about](#) how defendants can employ e-discovery affirmatively, given that social media sites almost surely contain discoverable information about the physical and mental condition (and more) of plaintiffs claiming personal injury. Here's the latest on that front:

Held v. Ferrellgas, Inc., 2011 WL 3896513 (D. Kan. Aug. 31, 2011). Information from a plaintiff's Facebook page is relevant and must be produced, subject to minor limitations:

"Defendant is attempting to mitigate Plaintiff's privacy concerns by allowing Plaintiff to download and produce the information himself, rather than providing login information. Indeed, Defendant itself notes that it is not seeking unfettered or unlimited access to Plaintiff's Facebook, but rather limited access during the relevant time frame."

Id. at *1. The sort of voluntary limits discussed in Held are undoubtedly useful in encouraging courts to order discovery of what are still somewhat novel forms of information. Held was a discrimination case, so the court also ordered production of job search website information. Id. While that's not pertinent to most of our cases, we mention it to encourage defendants to think about what discovery into other types of social media might be relevant in a given case.

Katiroll Co. v. Kati Roll and Platters, Inc., 2011 WL 3583408 (D.N.J. Aug. 3, 2011), is an extension to social media e-discovery of the sort of spoliation stinks that we've seen plaintiffs make in mass tort litigation. The plaintiff (in a trade dress action) sought spoliation sanctions because certain Facebook pages were not preserved. But the plaintiff had demanded that these pages be taken down in the first place. Id. at *3. The court found that spoliation sanctions would be "unjust." Id.

Beyond that, the Katiroll includes a useful discussion of "control" that could be helpful in cases where a mass tort plaintiff deliberately attempts to destroy social media evidence and argues that the defendant should have gotten the material itself:

"Courts . . . have still found public websites to be within the control of parties who own them. Further, this is an attempt to "pass the buck" to [parties seeking social media e-discovery] to print websites that [social media users] are obliged to produce. Given that [social media users] have a discovery obligation to produce them and that only [they] knew when the website would be changed, it is more appropriate for [them] to have that burden. Thus, the Court concludes that the first factor, [social media users'] control, is present."

Id. at *4 (citations omitted). Thus, a person posting public social media information cannot resist spoliation sanctions by arguing that the other side should have copied the material before s/he erased it.

However, Katiroll demonstrates the need for social-media-specific litigation hold/preservation orders. Alteration of social media profiles was “unintentional” when the party had not been clearly ordered to refrain from tampering with them:

“[T]he Court notes that the change of a profile picture on Facebook is a common occurrence. Active users often change their profile pictures weekly. Therefore, it is hardly surprising that [a social media user] has changed his profile picture during the pendency of this litigation. Further, while [he] was on notice that he had to preserve evidence, it would not have been immediately clear that changing his profile picture would undermine discoverable evidence. As such, the Court determines that this spoliation was unintentional.”

2011 WL 3583408, at *4 (footnote omitted). A word to the wise: make sure that preservation orders specifically provide that existing social media is not to be altered. Otherwise, plaintiffs will claim ignorance.

Even so, the Katiroll court did order some relief – short of spoliation – in response to destruction of social media evidence during litigation. Specifically, the court ordered the offending party to “change the picture [on Facebook] back . . . for a brief time so that [the e-discovering party] may print whatever posts it thinks are relevant.” Id. That’s also a form of relief, short of spoliation sanctions, to be considered in a case where a plaintiff has (unwittingly or otherwise) removed potentially relevant social media information during litigation.

Offenback v. L.M. Bowman, Inc., 2011 WL 2491371 (M.D. Pa. June 22, 2011), presented what we think of a routine social media e-discovery situation. The plaintiff was injured in a “vehicular accident” and claimed he couldn’t do various things anymore, including ride motorcycles. He also claimed “psychological injuries” including “post-traumatic stress” that limited his social activities. Discoverable material on the plaintiff’s social media profile – detailed at length in the opinion – quite graphically refuted these claims. Id. at *2-3. The court ordered this evidence (of plaintiff’s physical and social activities described online) produced. Id. at *3.

However, the Offenback court expressed annoyance that production of this social media evidence had required its *in camera* review, and chastised the parties for not agreeing to production of obviously relevant social media evidence without such extraordinary measures:

“[W]e express some confusion about why the parties required the Court's assistance in deciding what information within Plaintiff's Facebook account is responsive to Defendants' discovery requests and therefore properly discoverable. Although Defendants have taken a broad view of the potential relevance of Plaintiff's Facebook account, Plaintiffs do not appear to have argued that the information in the bulleted paragraphs above should be protected from disclosure in this lawsuit. It is thus unclear why the Court was called upon to conduct an initial review of Plaintiff's entire Facebook account to determine whether it contained potentially responsive, non-privileged information that should be produced as part of discovery in this case. Given that the Plaintiff is the party with the greatest familiarity with his own Facebook account, we submit that it would have been appropriate and substantially more efficient for Plaintiff to have conducted this initial review and then, if he deemed it warranted, to object to disclosure of some or all of the potentially responsive information included in his account.”

2011 WL 2491371, at *3 n.3. We concur with the court's sentiments. Social media e-discovery is here to stay, and both defendants (by using appropriately tailored discovery requests) and plaintiffs (by not treating social media as somehow privileged when it's not) need to get used to it.

The sentiments of the court in Offenback will eventually do away with the need for extraordinary procedures of the sort employed in Barnes v. CUS Nashville, LLC, 2010 WL 2265668 (M.D. Tenn. June 3, 2010). The nature of the underlying suit is somewhat unclear, but evidently social media “pictures of the Plaintiff and her friends dancing on the bar [were] highly relevant.” Id. at *1. The plaintiff's e-discovery intransigence was telling:

Plaintiff's counsel could have helped resolve the matter by clearing up the issue of the various witnesses, who are friends of the Plaintiff, to produce the various photos on Facebook. Their resistance does raise the specter with the defendant that there is something there they want to hide.

Id. To prevent future social-media-related discovery disputes, the court in Barnes authorized what we think is an unnecessary “overkill” procedure:

“[T]he Magistrate Judge is willing to create a Facebook account. If [certain witnesses] will accept the Magistrate Judge as a “friend” on Facebook for the sole purpose of reviewing photographs and related comments in camera, he will promptly review and disseminate any relevant information to the parties. The Magistrate Judge will then close this Facebook account.”

Id. While this procedure would probably work, we really don't see the reason for it. There's absolutely no valid claim to any sort of privilege in this type of material, and thus no reason to invest scarce judicial resources in this fashion. Photos are photos, and if social media weren't involved, this type of issue would be resolved by a simple order compelling production on pain of contempt.

In any event, these recent cases continue to demonstrate both that social media are a fertile source of e-discovery for defendants, and that courts will order properly cabined discovery of such materials despite obstacles thrown up by the other side. In time, as courts become more accustomed to this type of discovery, we expect that they will be less and less tolerant of the sorts of obstruction described in the cases.