



Recent Social Media Case Law, Use, and Discovery Considerations

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Webinar Presenter

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Social Media

The Legal Case

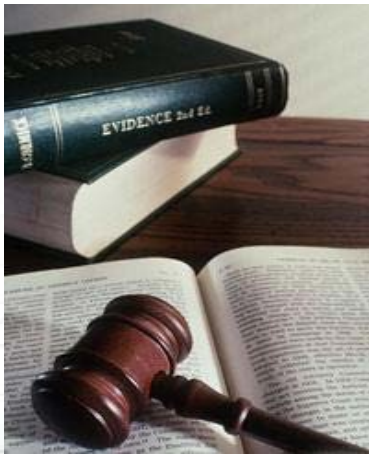
- **Parties to litigation are increasingly aware of Social Media issues**
 - One vendor tracked 689 published cases that included Social Media from 2010 through 2011, and 320 published cases in the first-half of 2012.
 - Another source stated that social networking was cited in over a third of divorce filings last year, leading to...
 - A commentator coining the term “InstaRegret” for online behaviors—and their ramifications.



Social Media

The Legal Case

- **Judicial sophistication has increased as well**
 - Courts appreciate social media's impact on litigation, including judges' trial experiences.
 - Some foreign judges are Tweeting, while U.S. Federal Judges seek to prevent jurors from using Twitter, LinkedIn, Facebook, or YouTube to research their cases.
 - While case law is continually catching-up, decisions are expanding the evidentiary reach of most courts.



Contrast that with...

Social Media

The Business Case

- **Enterprise Social Collaboration Software**

- Most organizations do not realize the full potential inherent in social media technologies and collaboration platforms.
- The internal value to organizations that social collaboration software presents may be double that of social technologies used for customer interaction.
- It is estimated that social technologies may increase productivity of workers by 20-25%; however, 50% of CEOs have banned social media use in the office.



Social Media

The Business Case

- **Customer Interaction Channels**



- 16% of CEOs use social media to interact with customers.
- Expected increase to 57% within the next three-to-five years.
- Usage is becoming the norm, rather than the exception.

Court Guidance and Court Experience

Social Media

Privacy and Personal Choice

- ***Zimmerman v. Weis Markets***, No. CV-09-1535, 2011 WL 2065410, at *1 (Pa. Com. Pl. May 19, 2011) (“All the authorities recognize that Facebook and MySpace do not guarantee complete privacy.”)
- ***Offenback v. L.M. Bowman***, Civ. Action No. 1:10–CV–1789, 2011 WL 2491371 (M.D. Pa. June 22, 2011) (classifying certain social media data as discoverable after *in camera* review)
- ***Held v. Ferrellgas, Inc.***, No. 10–2393–EFM, 2011 WL 3896513 (D. Kan. Aug. 31, 2011) (allowing discovery of plaintiff’s Facebook and job search accounts)
- ***Largent v. Reed***, No. 2009-1823, 2011 WL 5632688 (Pa. Ct. Com. Pl. Nov 8, 2011) (same)

Social Media

Privacy and Personal Choice

- *Patterson v. Turner Construction Co.*, 931 N.Y.S.2d 311, 312 (N.Y. App. Div. 2011) (describing Facebook data as not privileged, regardless of the use of platform privacy controls)
- See also *FCC v. AT&T*, 131 S. Ct. 1177 (2011) (finding that corporations do not have right of “personal privacy” for FOIA cases)
- But see *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, Civ. No. 2:11–cv–03305, 2012 WL 1949668 (D.N.J. May 30, 2012) (Court considered Plaintiff’s “reasonable expectation that her Facebook posting would remain private, considering that she actively took steps to protect her Facebook page from public viewing” and did not grant Defendant’s motion to dismiss Plaintiff’s common law invasion of privacy claim)

Social Media

Office and Home Collide

- ***Maremont v. Susan Fredman Design Group LTD.***, 772 F.Supp.2d 967 (N.D. Ill. 2011) (court issued decision dismissing employee's common law right to privacy claims where company took control over employee's private Facebook and Twitter accounts during employee post-accident rehabilitation)
- ***PhoneDog LLC v. Kravitz***, No. 3:11-cv-03474-MEJ (N. Dist. Cal.) (First Amended Complaint filed Nov. 11, 2011) (Former employer accused defendant of misappropriating Twitter handle)
- ***Brown v. Montgomery County***, 470 Fed. Appx. 87 (3rd Cir. 2012) (Employee terminated for pictures of work party posted to MySpace)

Social Media

Office and Home Collide

- ***EEOC v. Abercrombie & Fitch Stores***, No. C10-03911 EJD (HRL) (N.D. Cal. Feb. 14, 2012) (Facebook evidence relevant to employment claim)
- ***Gresham v. City of Atlanta***, No.1:10-CV-1301-RWS-ECS, 2011 WL 4601022 (N.D. Georgia Aug. 29, 2011) (Facebook post leads to employment issues)
- ***Parson v. Clear Channel Communs. Inc.*** No.11-CV-17289 BMS (E.D. Penn. May 3, 2012) (Facebook posting was relevant to demotion claim)
- ***See also Ehling v. Monmouth-Ocean Hosp. Serv. Corp.***, Civ. No. 2:11-cv-03305, 2012 WL 1949668 (D.N.J. May 30, 2012) (posting led to termination of employment)

Social Media

From Chats to the Courtroom

- ***In Re Standard Jury Instructions in Criminal Cases***, 95 So.3d 868 (Mem) (Florida 2012) (Twitter use by jurors prohibited)
- ***Khoury v. ConAgra Foods, Inc.***, 368 S.W.3d 189, 2012 WL 694827 (W.D. Missouri 2012) (Juror's Facebook activity leads to juror dismissal)
- ***Coleman v. Brown***, 728 S.E.2d 111 (Sup. Ct. App. W. Va. 2012) (MySpace used to impeach Juror)
- ***Dale v. State***, 2012 WL 1382446 (Ct. App. Tex. April 18, 2012) (MySpace evidence used in attempt to impeach key witness)

Social Media

From Chats to the Courtroom

- ***Montour v. Blaisdell***, No. 11-cv-369-SM, 2012 WL 1088668 (D. N.H. March 30, 2012) (victim's MySpace page and photographs considered by investigator)
- ***Social Media Crashes The Courtroom***, National Public Radio (September 17, 2009)
- ***2011 Survey of 508 Federal Judges***
 - 6% of jurors used social media during deliberations or trial
 - Jurors attempted to do independent research, communicate directly with trial participants, or disseminate information regarding the trial

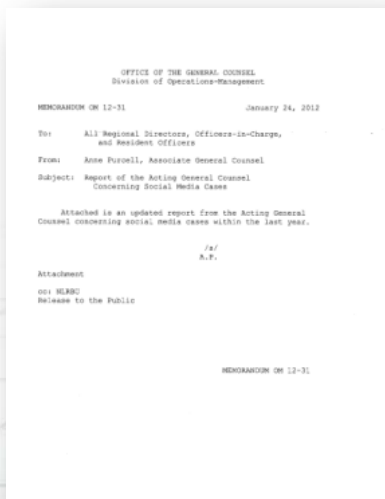
Other Important Considerations

Social Media

User Policy Guidance from the NRLB

- ***Report of the Acting General Counsel Concerning Social Media Cases***

- Addresses several user policy adjudications
- Recommends avoiding overly-broad employee policies—do not prohibit activity otherwise protected by law
- States that mere employee gripes are generally not protected if they do not relate to employee group activity



Social Media

User Policy Guidance from the NLRB



- ***Recent Adjudications***
 - ***EchoStar Technologies, LLC***, Case No. 27-CA-066726 (N.L.R.B. Div. of Judges Sept. 20, 2012) (finding prohibition of use of social media on “Company Time” violates the National Labor Relations Act)
 - ***Costco Wholesale Corp.***, 358 N.L.R.B. 106 (2012) (finding use policy as too broad and potentially prohibiting Section 7 concerted Activity)
 - ***Karl Krautz Motors, Inc.***, 358 N.L.R.B. 164 (2012) (same)

Social Media Regulatory and Industry Requirements

SEC Investment Adviser Use of Social Media

Registered Investment Advisors that communicate through social media must retain records of those communications if they contain information that satisfies an investment adviser's recordkeeping obligations



National Examination Risk Alert

By the Office of Compliance Inspections and Examinations¹

In this Alert: Volume II, Issue 1 January 4, 2012

Topic: Observations related to the use of social media by registered investment advisers

Key Takeaways:

Investment advisers that use or permit the use of social media by their representatives, advisors and/or third parties should consider specifically evaluating the effectiveness of their compliance programs as it relates to social media. Factors that might be considered include usage guidelines, content standards, sufficient monitoring, approval of content, tracking, and. Particular attention should be paid to third party content (permitted) and recordkeeping responsibilities.

Investment Adviser Use of Social Media

I. Introduction

Social media is landscape-shifting. It converts the traditional two-party, adviser-to-client communication into an interactive, multi-party dialogue among advisers, clients, and prospects, within an open architecture accessible to third-party observers. It also converts a static medium, such as a bulletin, where viewers passively receive content, into a medium where users actively create content.

The use of social media by the financial services industry is rapidly accelerating. In growing numbers, registered investment advisers ("RIAs" or "firms") are using social media to communicate with existing and potential clients, promote services, educate investors and recruit new employees. Pursuant to Advisers Act Rule 206(a)-7, firms using social media should adopt, and periodically review the effectiveness of, policies and

¹ The Securities and Exchange Commission ("SEC") as a matter of policy, declines responsibility for any third party publication or statement by any of its employees. The views expressed herein are those of the staff of the Office of Compliance Inspections and Examinations, in coordination with other SEC staff, including the Division of Enforcement's Asset Management Unit and the Division of Investment Management, and do not necessarily reflect the views of the Commission or the other staff members of the SEC. The staff of the Financial Industry Regulatory Authority ("FINRA") was also consulted in the preparation of this Risk Alert. The document was prepared by the SEC staff and is not legal advice.

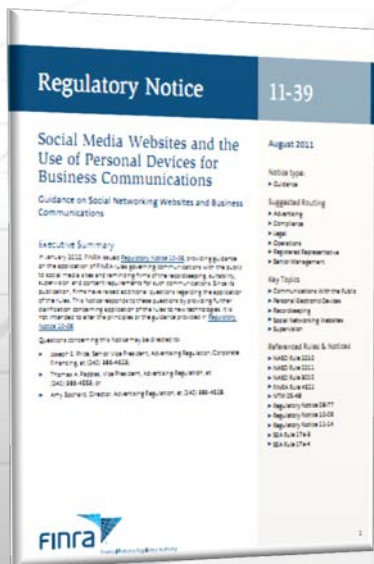
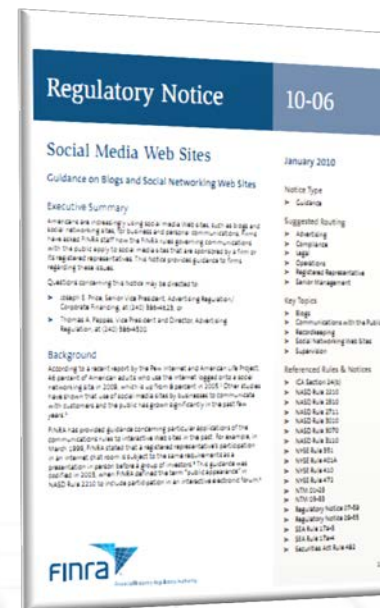
² "Social media" is an umbrella term that encompasses various activities that integrate technology, social interaction and content creation. Social media may use many techniques, including, but not limited to, blogs, microblogs, wikis, photos and video sharing, podcasts, social networking, and virtual worlds. The terms "social media," "social media sites," "sites" and "social networking sites" are used interchangeably in this communication.

³ 17 C.F.R. §206(a)-7.

Social Media Regulatory and Industry Requirements

FINRA Regulatory Notice 10-06

Retention of social media communications



FINRA Regulatory Notice 11-39

Retention regardless of device

Social Media

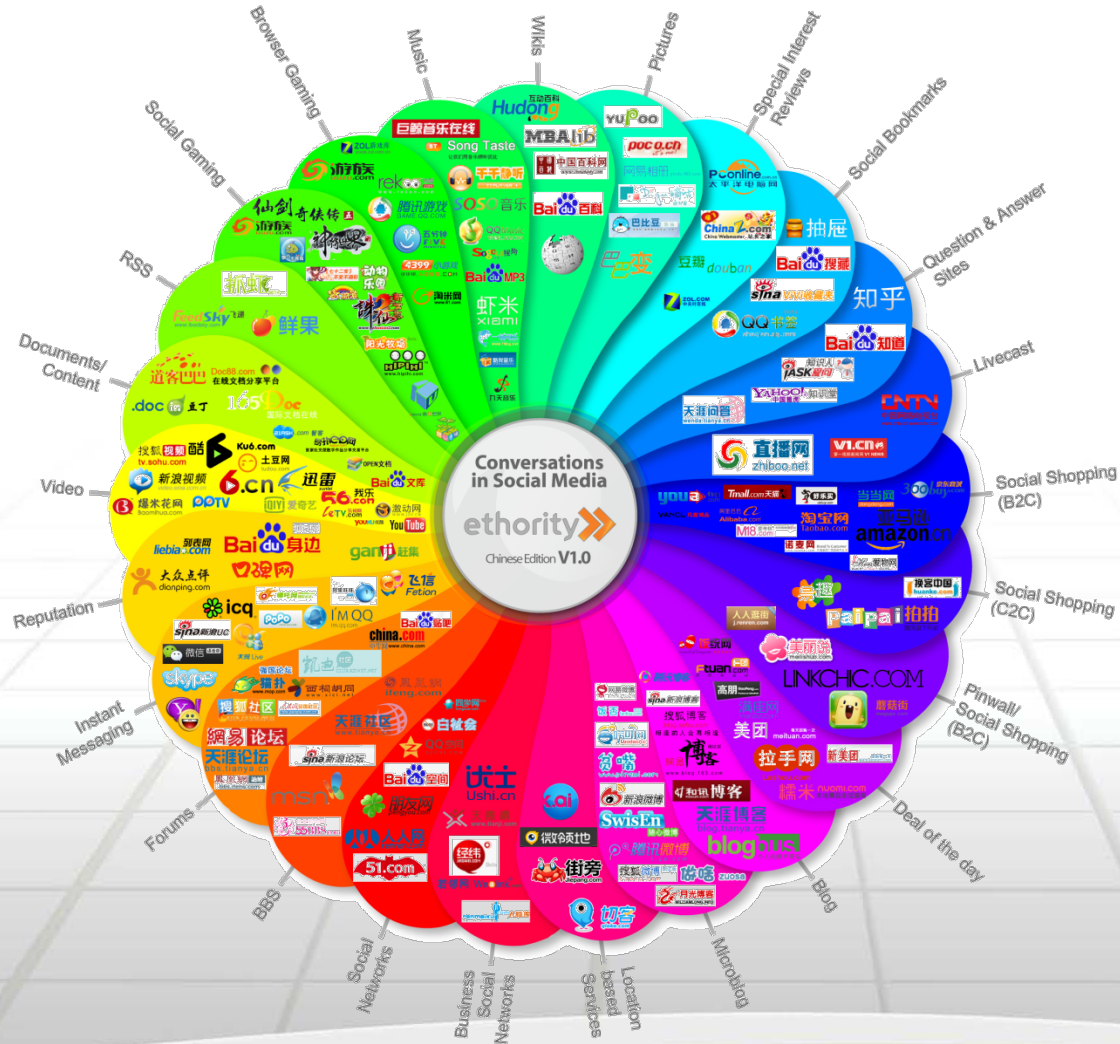
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Social Media

An Additional Visual Depiction



Social Media

Strategy Considerations

- **Stakeholders**
- **Current and prospective sources**
- **Document preservation and retention drivers**
 - **Regulatory**
 - **Legal**

Social Media

Strategy Considerations

- **Document preservation and retention drivers**
 - Records and Information Management
 - Business Purposes
- **Frequency**
- **Proportionality**
- **Risk Analysis**

Social Media

Selected Resources

- The Redgrave Buzz: A Summary of Social Media Case Alerts
<http://redgravellp.com/resources/the-buzz.aspx>
- The BowTie Blog
<http://bowtielaw.wordpress.com/>
- The eDiscovery Team
<http://e-discoveryteam.com/>
- Electronic Discovery Law
<http://ediscoverylaw.com/>
- Shear on Social Media Law
<http://shearsocialmedia.com/>
- The Sedona Conference®
<https://thesedonaconference.org/>