

ITEM 9.12 | DISCOVERY OF SOCIAL MEDIAL ESI

Social media is a term referring to a broad array of networking sites with varying participation by individuals, businesses, governmental bodies, and other organizations. Social media sites are proliferating in type, form, and content. No longer just a way for kids and young adults to connect about their current activities and status, social media has captured the attention of individuals of all ages as well as businesses, corporations, government entities, and virtually any organization or person that wants to reach target or broad audiences. Some of the more popular social media sites are Facebook, Myspace, LinkedIn, Wikipedia, Flickr, Instagram, YouTube, and Twitter, but there are many more. Social media policies, agreements, structure, make-up, and culture all differ from site to site, which creates varied and complex data management and ownership issues and significant challenges in preservation of social media content. Most social media sites include features allowing members to send direct messages between themselves, much like emails or text messages. Assuming relevancy under the facts and circumstances of a given case, social media evidence is discoverable. See *Nucci v. Target Corp.*, 162 So. 3d 146 (Fla. 4th DCA 2015).

Social media may contain important relevant evidence in any number of different legal disputes. It is important to note that the information of a member in a social media site is not obtained by subpoena of the social media provider itself, any more than email is obtained by subpoena of an email provider. The information is discovered from the member. It is their information, they own it, not the providers, and thus the proper course of conduct is a request for production, or subpoena, from them.¹⁰⁰ Text searches are run, the use of key words only determines potentially relevant documents or files. The fact that a document or file comes up in a key word search, or otherwise is found to contain an agreed upon keyword, does not in and of itself make it discoverable.

Example: Party A in a commercial case seeks discovery of all emails in the possession or control of Party B that relate to the same transaction that is at issue or similar transactions for the previous five years. Two key words selected by Party A are the word "cobalt" and the name "Prosser." Party B is willing to run those key words and then select and produce discoverable, non-privileged documents. Party A contends that it is entitled to receive all emails containing "cobalt" or



"Prosser." Is Party A entitled to the discovery of all the emails identified in the word search using these terms? Answer: NO. Relevancy is determined by examination of the document itself. The words used in a search, even if they are agreed upon by the parties as appropriate search terms, are but a tool to identify potentially relevant documents. Relevancy is determined by legal analysis of whether the document is (1) relevant to the case's subject matter, and (2) admissible in court or reasonably calculated to lead to evidence that is admissible in court.¹⁰¹ Documents that turn up in a word search may or may not meet these criteria, and Party B is only obligated to produce discoverable documents. The analog equivalent to the demand made by party A is to request a search of all file folders with the words "Cobalt" and "Prosser" on the file labels and then contend that all paper within those folders is discoverable. The determination of relevancy is made by examination of the document itself, not normally by the wording of the label on the folder in which the document is found.

*Trial Lawyers Section of the Florida Bar
Conference of Circuit Court Judges
Conference of County Court Judges*

Footnotes

¹⁰⁰ **Stored Communications Act** (SCA, codified at 18 U.S.C. Chapter 121 §§ 2701–2712) is a law that addresses voluntary and compelled disclosure of "stored wire and electronic communications and transactional records" held by third-party internet service providers (ISPs). It is a waste of time to subpoena internet service providers. Instead, a social media member should be requested to produce their information, and motions to compel should be directed against them if they do not comply.

¹⁰¹ Fla. R. Civ. P. 1.280(b)(1); Balfour, *supra* n. 16.

