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Discovery Solutions Practice



Legal Strategies. Business Solutions.

## Court Rules Potentially Relevant Social Media Websites, Applications Fair Game

by *Anthony Scott*

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In *Romano v. Steelcase*, 907 N.Y.S.2d 650 (Sept. 21, 2010), an individual litigant's right to privacy in nonpublic portions of social media websites came face-to-face with the opposing party's right to discovery. In this case, the defendant sought access to the plaintiff's current and historical Facebook and MySpace pages and accounts. The plaintiff argued that the Stored Information Act protected information not readily accessible on the public portion of the sites because the act prohibits the social networking sites from disclosing any private information without the consent of the owner of the account.

The court granted the defendant's motion, including any deleted pages and related information, relying on a liberal interpretation of the "material and necessary" discovery standard, the public policy favoring open disclosure, and the absence of expectation of privacy when using social media.

At first blush, this decision is nothing but good news for corporate litigants, particularly those faced with product liability or other personal injury claims, as it signals a willingness by courts to provide free access to the increasingly prevalent information available on social media websites and applications. It is clear from the court's decision in this case that any such information is fair game if the information is potentially relevant, even if it is not generally available to the public. Thus, in-house counsel should ensure that trial counsel seek discovery of information available about an individual plaintiff's use of social media and is aware of the precedent allowing disclosure of even nonpublic information from such sources.

There are corollary messages that are of equal importance, however. The social media discovery sword has at least two edges. First,

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### Meet DSP

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**Dennis Kiker Combines Litigation Experience and Business Process to Reduce Clients' Time, Cost and Risk**

LeClairRyan's Discovery Solutions Practice (DSP) is different, and, in this case, different is good. Discovery today is complex and can impose significant costs and burdens on corporations. Many law firms treat discovery as a purely legal issue, ignoring its impact on business and information technology operations. In contrast, DSP understands the business challenge and takes a unique, multidisciplinary approach to helping clients meet their duty of reasonableness and good faith while balancing competing business concerns. Dennis Kiker embodies this difference.

counsel must consider whether social media may be an issue for any of its own witnesses. As part of internal investigations, companies may need to find out what potentially relevant information might exist on an individual witness's social media sites, and the trial team must properly prepare witnesses for depositions, hearings and trial. It only takes one statement to turn a confident witness into a liability.

In addition, more and more companies are leveraging social media for marketing purposes. Social media sites are the modern extension of magazine and television advertising, and very few companies concerned with public exposure will fail to take advantage of these increasingly important media outlets. Of course, that means one more source of potentially relevant information exists about the company in appropriate cases. It is important, therefore, for in-house counsel to be aware of and involved in decisions about social media marketing. Far more fast-paced than traditional types of advertising, social media are constantly changing, necessitating much faster response times when information must be preserved. Corporations using social media should take steps to ensure that these sources of information are included in their discovery response plans.

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## What's New at DSP

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### **DSP Supports Clients with Intelligent, Targeted Document Collection Services**

Identification, preservation, collection, processing, review and production -- these are the six basic phases of discovery. Experts say the largest discovery costs are incurred in the document review phase. There are a number of practical ways to reduce review costs, but one of the best is to reduce the number of documents that ultimately need to be reviewed. A thoughtful collection strategy can make a big difference in this area.

Some companies have access to sophisticated content management, data archiving and other technologies that can help target potentially relevant information among the ever-increasing amounts of data in various corporate information systems. But for companies that do not have such technologies (and, in some circumstances, even for those that do), collecting data means capturing entire email boxes or complete hard drives for identified custodians and then incurring significant costs to process and filter that data. However, there is a

Dennis joined DSP as a partner in April of this year after spending two years as Director of Consulting for Fios, Inc., an e-discovery company based in Portland, Oregon. Prior to Fios, Dennis spent 14 years as a litigator. Though his practice was primarily in the products liability arena, his true focus was discovery. Dennis served as national discovery counsel for a number of Fortune 500® and smaller companies, managing all aspects of discovery response and representing clients in courts across the country. Dennis was also an early entrant into the e-discovery arena, having provided testimony to the Committee on Rules of Practice and Procedure as it contemplated the changes in the Federal Rules of Civil Procedure that would come into effect in December 2006. Before entering the practice of law, Dennis spent 11 years in the computer and semiconductor manufacturing industries, working for Intel and Digital Equipment Corporation, where he gained invaluable business process experience as a process engineer and production planner.

Today, Dennis combines his extensive experience as a practicing litigator with his knowledge of business process to help corporations reduce the time, cost and risk associated with information governance and discovery response. Effective records management and discovery response requires the right balance of people, process and technology -- all implemented in a manner suited to the particular organization's culture, business needs and risk tolerance. Managing a multidisciplinary team of legal and

better way. It is the Discovery Solution Practice's (DSP) intelligent, targeted document collection process.

DSP professionals have developed an effective collection methodology that begins with an analysis of the scope of the discovery request or other demand for information, followed by assessments of custodians and repositories of potentially relevant data. This information allows the discovery team to defensibly narrow the list of custodians and data sources from which documents will be collected. For every source removed from the collection list, the review volume is reduced, resulting in cost savings to the client.

After the appropriate sources have been identified, DSP professionals conduct custodian interviews and data environment investigations to identify the precise folders and files that contain potentially relevant information. Using industry standard tools, only those targeted files are collected, greatly reducing the volume of data that must then be processed and reviewed.

This service is not self-collection, which is generally disfavored by the courts. Rather it is a fully documented process in which experienced professionals, who understand the case background and discovery standards, work with custodians and client information technology personnel to pinpoint potentially relevant data. The result is a reduced data set, acquired through the use of defensible processes and technologies. While it may not be the right approach for every case, in many instances, DSP's intelligent, targeted document collection process will result in greater accuracy, lower costs and fewer business disruptions.

information systems professionals, Dennis uses defined methods to evaluate and assess current records management and discovery response practices and recommends practical solutions to identified gaps between current and best practices. Dennis offers a different approach that recognizes the fact that DSP's clients need business solutions, not just legal strategies.

[Learn more about DSP](#)

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## **CASE RESULTS DEPEND UPON A VARIETY OF FACTORS UNIQUE TO EACH CASE AND DO NOT GUARANTEE OR PREDICT A SIMILAR RESULT IN ANY FUTURE CASE**

### **DSP Develops Cutting-Edge Native Redaction Procedure for Spreadsheets**

Redaction is a commonly used method to protect nonrelevant, highly confidential or statutorily protected information from disclosure during document production. Typically, documents in native format are converted to static images (TIFF or PDF) so that redactions can be applied using redaction tools available in most document review platforms.

Many file types, such as emails, word processing documents and presentations, generally retain the same length and format when converted to images; however, spreadsheets can become cumbersome and present problems. A modestly sized spreadsheet in native format can become thousands or even tens-of-thousands of pages when converted. While an email may take only a few seconds to redact and a presentation a few minutes, a spreadsheet redacted in TIFF or PDF format may take hours – or even days.

In a recent large-scale e-discovery matter, a branded pharmaceutical manufacturer desired to protect information about its products that were not at issue in documents the company was required to produce. Most of the documents requiring redaction were emails or presentations, and redacting was simply a matter of removing a few lines or slides; however, there were 10 spreadsheets, which, when converted to TIFF images, resulted in approximately 60,000 pages that would require hundreds of hours to redact according to the client's specifications.

To avoid the cost of redacting the spreadsheets in TIFF format, LeClairRyan's Discovery Solutions Practice (DSP) developed a procedure for redacting them in their native format, using the software in which they were created (in this case, Microsoft Excel). This procedure took into account the significant differences between spreadsheets in native format versus TIFF or PDF format. Unlike the static versions, a spreadsheet in native format may contain a significant amount of dynamic content, including formulas for calculations and external data references, pivot tables, data-drive charts and graphs, and other embedded content. By using a combination of purpose-built Excel macros and defined processes for handling different types of spreadsheet content, DSP found it could substantially reduce the time required to redact any given spreadsheet.

Using the new DSP native redaction procedure, the review team was able to redact the 10 spreadsheets in approximately 20 minutes, an almost one thousand-fold reduction in the amount of time it would have taken without the new technique. The client realized an almost 50 percent savings on the cost of the redaction review and an approximate 25 percent savings on the cost of the document review as a whole. Native redaction, particularly for spreadsheets, is a tool that DSP now leverages across all document review projects to deliver cost savings to its clients.

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