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## *Social Media*

### **Social Media Provides Variety of Information, As eDiscovery Tools Aid Lawyers in New Ways**

**S**ocial media tells unique stories, written by its users. Those stories—told on platforms like Facebook, Instagram, Snapchat and WhatsApp—have been picked through and dissected as part of criminal investigations for awhile.

But now, the process of unearthing those stories—known as social discovery—is proving useful beyond providing incriminating information to law enforcement, particularly for attorneys.

Lawyers, their firms and their clients can leverage social discovery tools to capture large amounts of publicly available information and gain insights into how juries operate (including evidence of misconduct), and even corroborate or impeach witnesses.

**Social Discovery Origins.** Law enforcement and law firms often use social discovery tools either in house or through vendors to preserve social media websites or app information, in anticipation of litigation.

“But in addition to just using those tools for preservation purposes, we can also do searches and analysis of publicly available social media and social media content,” Ignatius Grande, Hughes, Hubbard and Reed in New York City, told Bloomberg BNA Aug. 12.

Grande is senior discovery attorney at his firm, where he advises on how to best leverage the latest technologies and eDiscovery practices. He’s also co-chair of the Social Media Committee of Commercial & Federal Litigation Section of the New York State Bar Association.

Grande pointed to one tool in particular, X1 Social Discovery, which provides more than just the ability to preserve social media content.

“Social discovery tools allow you to do searches based on location,” Grande explained. “You can geostream tweets from a specific area, and then you can search through that content.”

A lot of people may not be aware that these tools and capabilities exist, Grande said, noting the tools aren’t prohibitively expensive.

**Geostreaming.** Howard Williamson, senior vice president and executive director of X1 Social Discovery in Pasadena, Calif., told Bloomberg BNA Aug. 16 that a lot of customers use the social discovery products beyond traditional discovery applications.

“Some clients use it for brand analysis,” Williamson said.

For example, the tool can be used to follow the social media postings or tweets about a specific product, to see what type of attention it has garnered. While companies can use the tool to follow chatter about their products, the tool can also be useful in this capacity for product liability, consumer or class action attorneys who are researching a product at issue.

In addition, Grande said the tool is useful for monitoring online protest chatter by law enforcement.

And then there are those customers who are using the tool to monitor jury misconduct. The tool’s geostream function can be used to investigate and collect tweets that are emanating from near or inside of a courthouse. The tool has been used to discover jurors who are “live-streaming” their jury experience, in violation of the court’s instructions.

**Trial Disruptions.** The use of social media by jurors has been a hot button topic for awhile because of its ability to disrupt trials. Jury instructions often say that the use of social media to research and discuss a case is prohibited.

The issue of trial disruption is even moving officials to craft methods for managing and discouraging social media use.

In February 2016, a bill was introduced in to the California state legislature that would authorize a pilot program allowing judges to impose reasonable monetary sanctions on a juror for misconduct. The introducing assembly member said to Bloomberg BNA in April 2016 that the “almost ubiquitous use of social media is leaking into courtrooms.”

Both houses in the California legislature amended the bill this summer. The amended bill highlights the growing concern about the effect of social media use on the justice system (16 DDEE 195, 4/28/16).

X1 did its own search in January 2016 to see just how many improper juror tweets could be found in a single day. On Jan. 13, the tool uncovered several hundred tweets, including posts commenting on whether the defendant was guilty.

A month later, the tool found a tweet from a juror that said “at jury duty. bout to decide somebodys fate. if theyre white, theyre guilty.”

X1 warns attorneys, however, to heed ethical duties. “Do not fire up Twitter.com and start following jurors,” X1 says in a February 2016 blog post. “They will receive a notice that they’re being followed, which is improper under various legal ethics rules.”

**Social Media Addiction.** Grande told Bloomberg BNA in April 2016 that jury service requires a willingness to sacrifice the use of social media. His committee published a Social Media Jury Instruction Report in Janu-

ary 2016, which explains the importance of providing social media guidance to jurors (16 DDEE 61, 2/4/16).

But tweets that come from courthouses demonstrate the difficulty that many people find with actually giving up social media while serving on a jury. Finding those jurors who stay plugged in during a trial is important to determine if a person is actually getting a fair trial.

“Capturing these tweets is ethical, because they are public postings,” Grande told Bloomberg BNA Sept. 19.

However, if a tweet is captured and there’s reason to believe the posting is disruptive to the case, the attorney has an ethical obligation to disclose that to the court.

In 2014, the X1 team used the tool during a routine product pitch to home in on a courthouse in Seattle. They identified a semi-pro wrestler named Jack Stewart, who was doing jury service that day. Stewart provided the team with a wealth of tweets that qualified as “live-streaming,” as he discussed his jury experience online and broadcasted it to his followers.

**Intelligence Purposes.** Geostreaming and other developments in social discovery are changing how law enforcement—once the pioneers of using social media in investigations—uses the information it finds.

As for intelligence purposes, attorneys and law enforcement can use the tool to follow the “social networks of gangsters or terrorists,” Williamson said.

“A lot of gang members like to post videos of the contraband or guns they are using or have stolen,” Williamson told Bloomberg BNA.

**Witness Corroboration.** The geostreaming function is useful in incidences involving eye-witnesses, as well.

Williamson used the tool to geostream both Twitter and Instagram in the 2015 Paris terrorist attack, as well as the 2009 mass shooting at Fort Hood, Tex.

“I geostreamed that area and collected all the tweets and grams that were on site, and collected the information from the Facebook accounts of the shooter, his wife and his two oldest daughters,” Williamson said.

He offered the data to friends at the base, providing a collection of real-time social media content.

By TERA BROSTOFF

To contact the reporter on this story: Tera Brostoff in Washington at [tbrostoff@bna.com](mailto:tbrostoff@bna.com).

To contact the editors responsible for this story: Jessie Kokrda Kamens at [jkamens@bna.com](mailto:jkamens@bna.com), Carol Eoanou at [ceoannou@bna.com](mailto:ceoannou@bna.com)