

**ELECTRONIC COMMUNICATION WITH CLIENTS:
THINGS TO THINK ABOUT BEFORE
YOU HIT “SEND”**

**E-Mail Confidentiality, Social Media and
E-Discovery**

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Discussion Overview

- E-Mail Issues
- Social Media Trends
- Case Law & Ethics
- Challenges Across the EDRM
- Social Media Tips





E-Mail Issues

What do you know about your client's email system?

Have you confirmed with your client that she consents to use of email?

Does your client know that there are risks of waiving the attorney client privilege?

CONFIDENTIALITY

Does your Client Know?

- That she shouldn't send your emails to others
- That he has an obligation to preserve his emails relating to the subject of his dispute
- That her claim or defense can be dismissed or denied if she deletes her email

What about your own E-mails?

- Number of E-mails is Overwhelming.
- Urgency of E-mails is Manufactured.
- How many E-mails do you receive per day?
- How many of them are truly urgent?
- How many of them make you angry?
- How often do you respond hastily and regret it?
- How would you like your email response to be attached as Exhibit A to a motion?

What about the Adverse Party's E-mails?

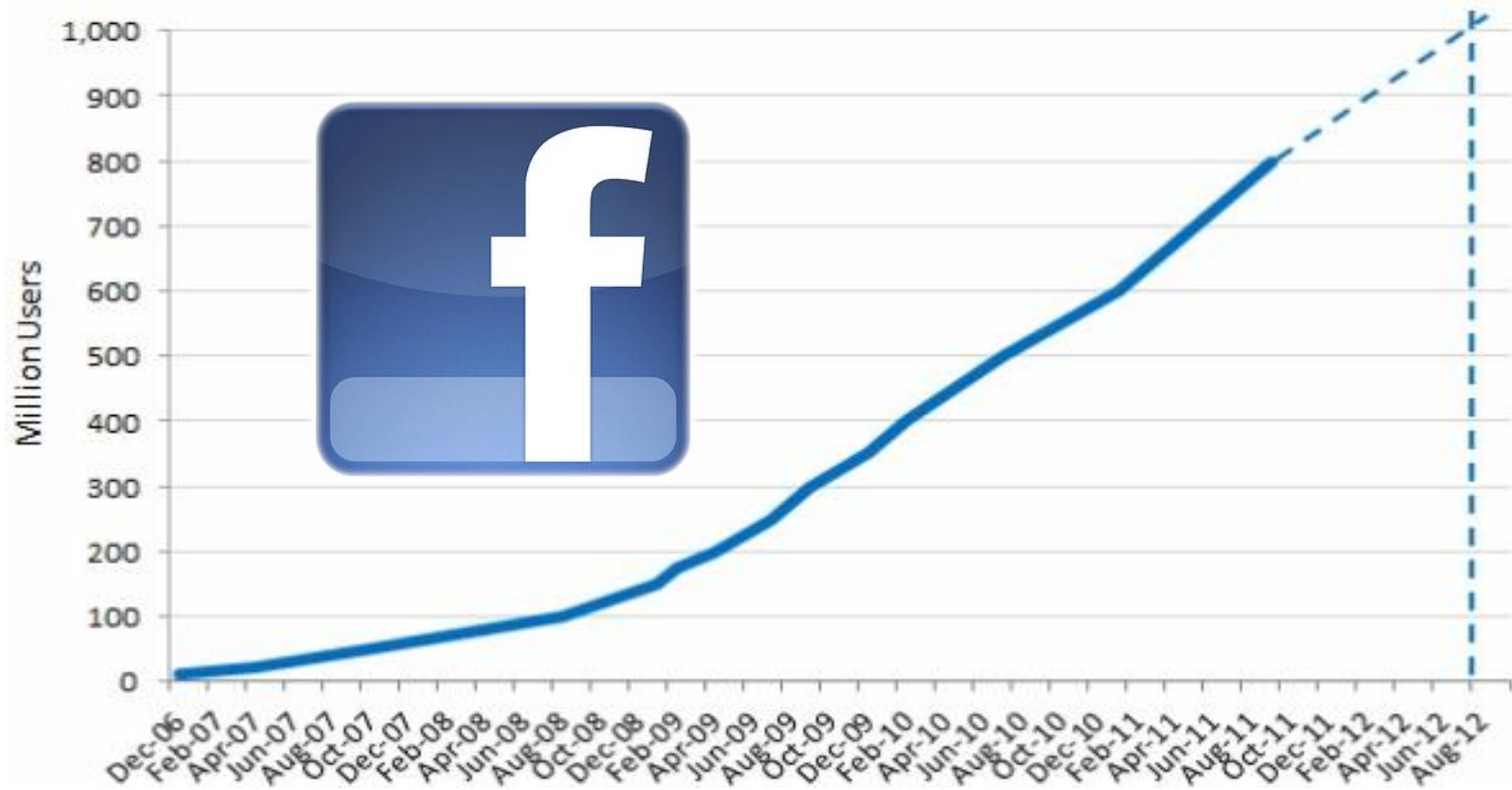
- Be sure to learn about all accounts.
- Ask about deletion/retention policies for corporate parties
- Put opposing counsel on notice to preserve
- Forensically search computers, laptops, smartphones, tablets
- Who are the key custodians?



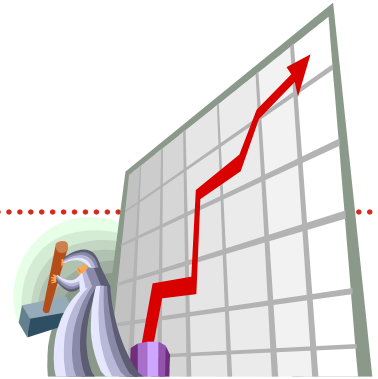
Social Media Trends

Social Media Trends: Facebook

- Projected Users by August 2012: **1 BILLION**



Social Media Trends: Other Sites



■ Social media is on the rise:

- » Twitter reported 500 million total users in February 2012
- » LinkedIn reported 150 million users as of February 2012, with about new 2 members joining per second
- » Tumblr reported 13.4 million users in July 2011, up from 4.2 million users in July 2010



Social Media Trends: Corporate Usage

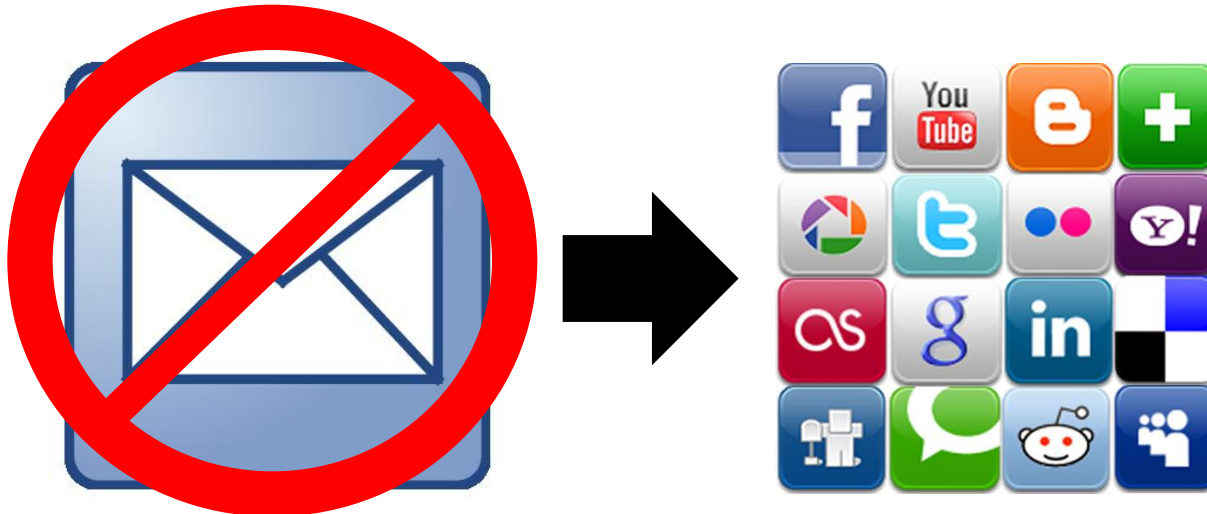
- In 2011, a global survey of companies found:
 - A majority of companies surveyed plan to **increase spending on social media**
- » **More than 80% of companies are using social media** to communicate with potential clients and drive new business



Source: *Corporate Social Media Spent to Increase Among B2B Companies Globally According to Worldcom Survey*, WORLDCOM (May 11, 2011), <http://www.worldcomprgroupemea.com/category/social-media/>.

Social Media Trends: Growth & Evolution

- Social media is predicted to replace e-mail as the dominant form of communication by 2014



Source: *Gartner Reveals Five Social Software Predictions for 2010 and Beyond* (Feb. 2, 2010)
<http://www.gartner.com/it/page.jsp?id=1293114> .

Social Media Trends: Why Should Lawyers Care?

- Social Media impacts all aspects of the practice of law and representation of clients:
 - **Discovery** – Social media data can be fully discoverable.
 - **Trial** – Social media data can be admissible as evidence.
 - **Ethics** – Dealing with social media raises unique ethical issues.

Social Media Trends: Why Should Lawyers Care?

- **Policy Development** – Corporations are looking to lawyers to help with social media policies.
- **Privacy** – Because of the personal, yet public, nature of social media, diverse privacy concerns exist.
- **Licensing** – A lawyer's individual conduct on social media sites can impact admission and standing in the Bar.



Case Law & Ethics

Discoverability of Social Media

- Fed. R. Civ. P. 26(b)(1) permits discovery of electronically stored information (ESI) “regarding any non-privileged matter that is relevant to a any party’s claim or defense.”
 - **Information contained on social media is ESI, and therefore generally discoverable**
 - “Private” is still public



Discoverability of Social Media

Courts are Beginning to Order the Production of Social Media



- Court ordered production of data from Facebook and MySpace account: privacy is “wishful thinking”

• *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (N.Y.Sup. Sept. 21, 2010).



- Plaintiff ordered to preserve existing information on MySpace and Facebook: provide user names and passwords to opposing counsel

• *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD (C.P. Jefferson Sept. 9, 2010).



- Court ordered production of user names and passwords: private portions of social media accounts are “fair game”

• *Zimmerman v. Weis Markets, Inc.*, No. CV-09-1535 (C.P. Northumberland May 19, 2011).



Discoverability: Stored Communications Act

Does the Stored Communications Act prohibit production of social media?

- Prohibits:
 - Electronic Communication Service (ECS) and
 - Remote Computing Service (RCS) providers
- From:
 - *knowingly* divulging the contents of
 - a communication
 - it stores
- *Unless* the divulgence is:
 - to an intended recipient of such communication or
 - express permission from the sender is obtained



Discoverability: Stored Communications Act

United States District Court,
C.D. California.
Buckley H. CRISPIN, an individual, Plaintiff,
v.
CHRISTIAN AUDIGIER, INC.

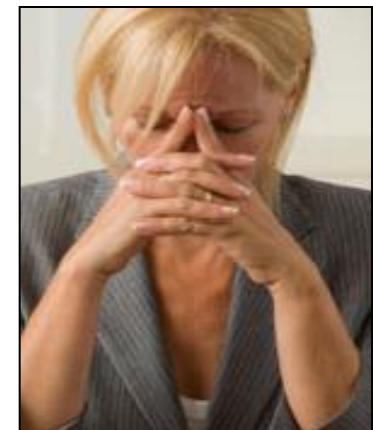
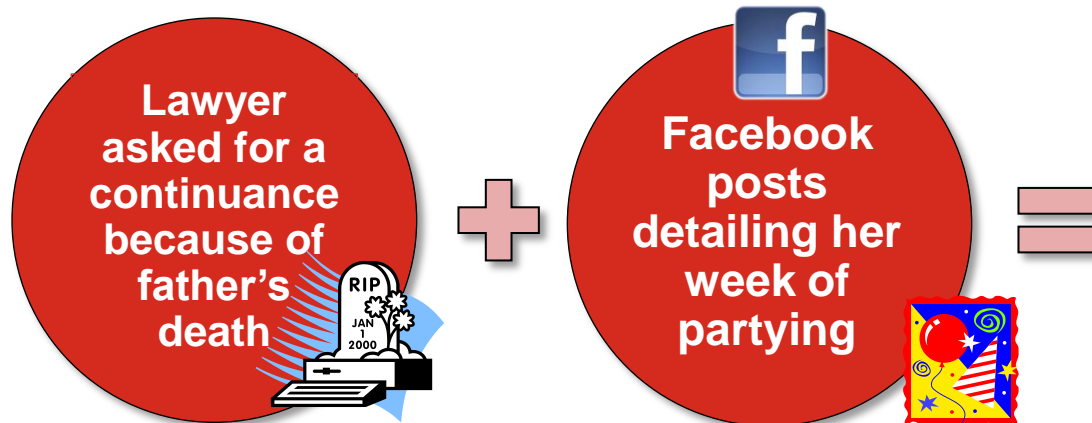
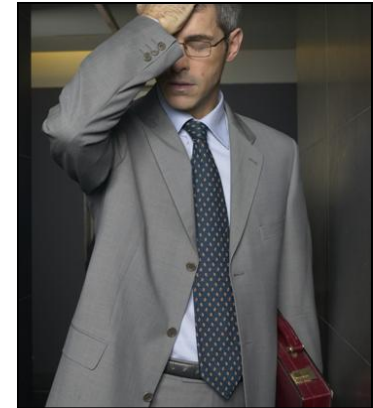
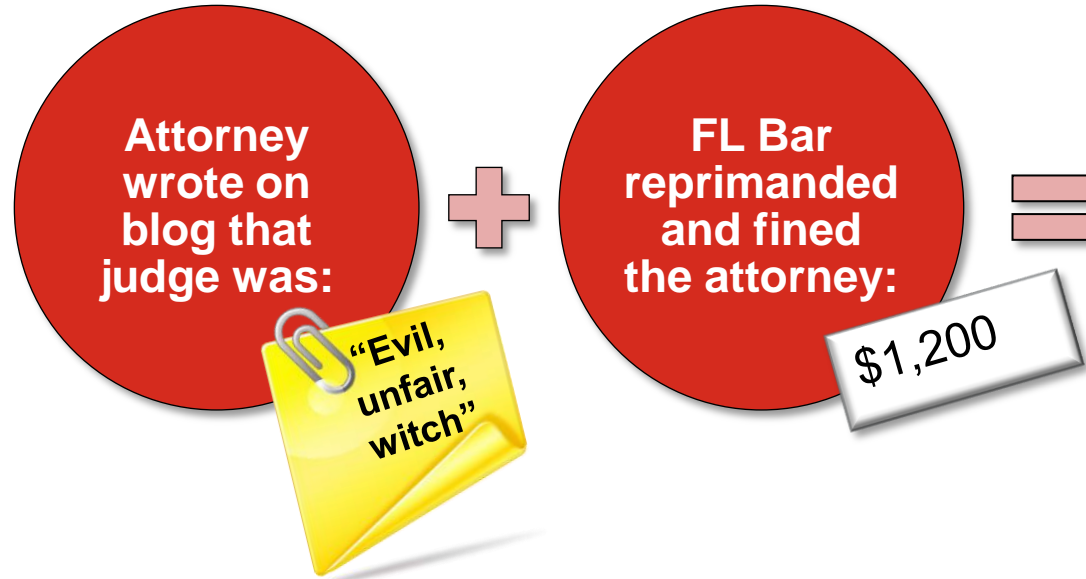
- Plaintiff moved to quash subpoenas for private information and communications contained on his social networking site accounts.
- Court found that with respect to private messages, **social networking sites acted as both ECS and RCS providers, and the SCA prohibited disclosure of privately stored information.**
-*Crispin v. Audigier, Inc.*, 2010 WL 2293238 (C.D. Cal. May 26, 2010).

Ethical Challenge: “False Friending”



- A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent
 - NY State Bar Association – Formal Opinion 2010-2
- An attorney must disclose his true intentions when attempting to access social media, noting other ethical rules prohibit attorneys from engaging in dishonesty, fraud, deceit or misrepresentation
 - Philadelphia Bar Association Professional Guidance Committee – Ethics Opinion No. 2009-02

Ethics: Lawyers are Social Creatures

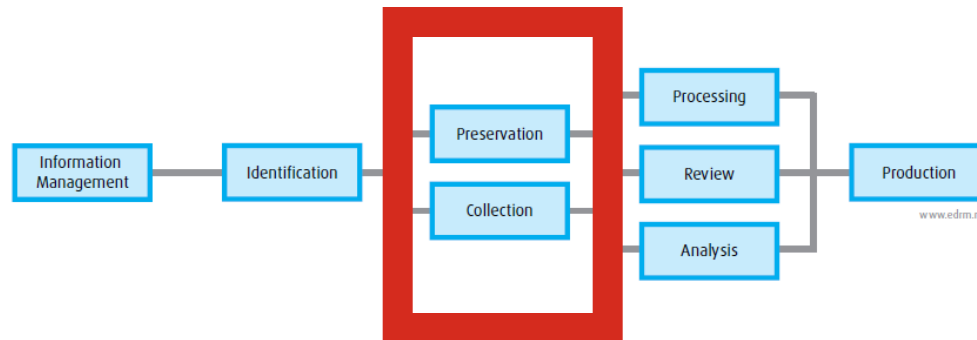




Challenges Across the EDRM

Challenge: Preservation

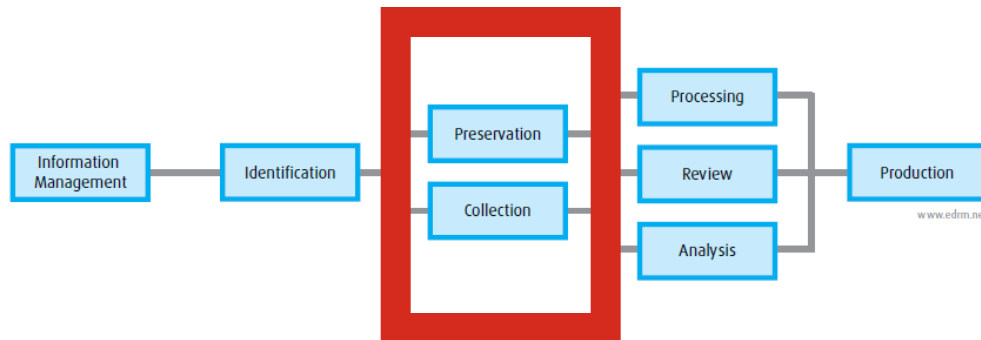
- With social media data, all the standard discovery obligations apply, including the duty to preserve
- Problems...
 - Changes very frequently
 - Stored on third-party servers
 - Security and privacy settings block access
 - Few reliable technologies available for social media preservation



Challenge: Preservation



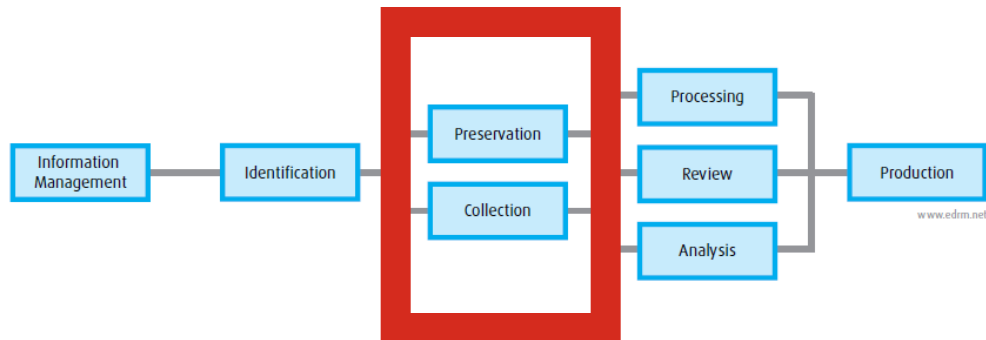
- How do you preserve social media stored in the cloud?
 - » When litigation is anticipated, *immediately* issue litigation holds to third-party cloud service providers so that the evidence can be preserved



Challenge: Collection



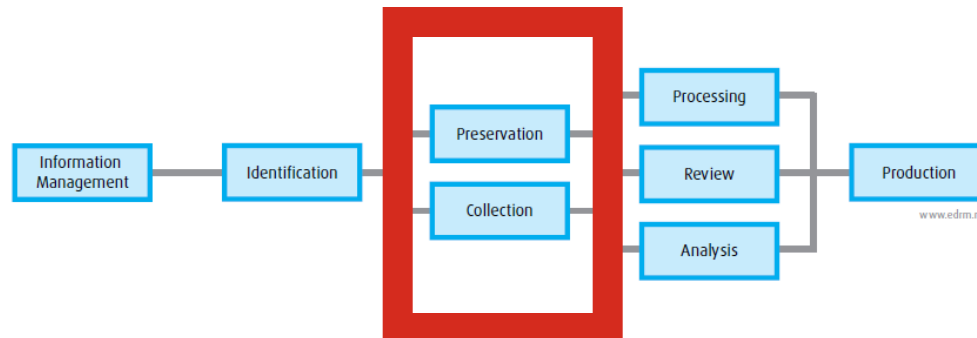
- Other than what might be located in browser cache files, social media data is retained by the social media service provider
 - If you try to get it without the consent of the owner (e.g. found password?) your actions may violate wiretapping laws



Challenge: Collection



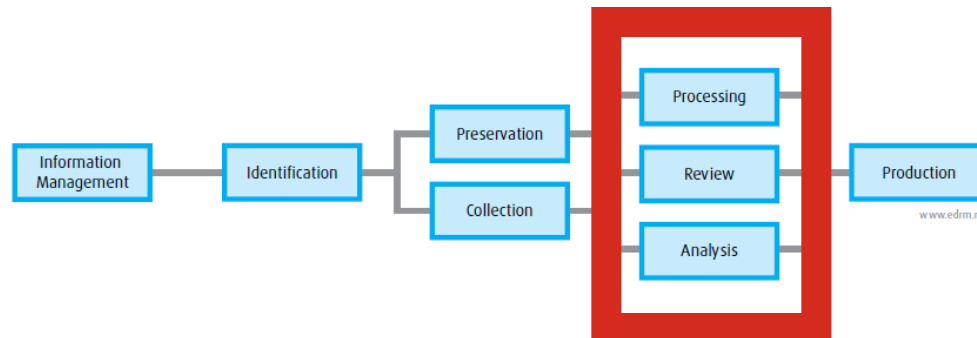
- Capture publicly viewable information
 - Investigators can freely search and extract information from an open, public page
 - Capturing software is preferred method in recording user's internet activities by investigators
- Enlist the help of an investigator or service provider



Challenge: Review



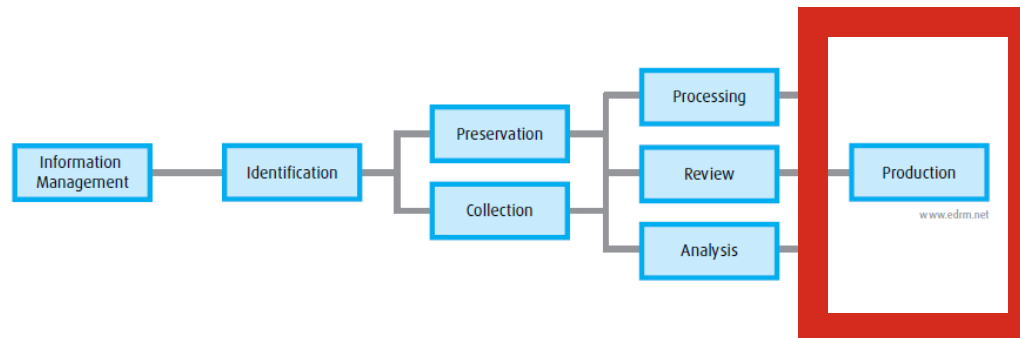
- How do you arrange for processing and review of social media data?
 - » Discuss with your service provider how to structure the collection and processing to allow for the most seamless review possible...*may need to review natively*



Challenge: Production



- As case law shows, courts are beginning to order to production of social media data in response to discovery requests
 - » In any case, be sure to analyze the applicability of the Stored Communications Act (SCA)





Parting Thoughts & Questions

Parting Thoughts

- Make sure your client communications are confidential
- Use good judgment with your own email
- Stay updated on social media—it will only continue to expand
- Pay attention to case law, new legislation, and ethical guidance
- Address social media challenges at every stage of the EDRM
- Balance is key when it comes to social media usage policies

