Do Companies Actually Preserve Social Media?

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Since 2004, Fulbright and Jaworski L.L.P. has released a survey titled "Litigation Trends," which tracks the current trends in litigation for corporate counsel. The 2011 survey gathered input from 405 in-house counsels, including 275 U.S. respondents, and provided some useful insight for e-discovery practitioners. Here are some of the findings in regards to issues involving e-discovery:

- *The Money Situation: Expected Budget Increases: E-discovery tops the budget list, with nearly one-fifth of all respondents — and one-quarter of large-caps — expecting budget increases in that area;*

- *Cloud Computing: More than one-quarter of all respondents say their companies are using cloud computing (48% of the tech sector uses it). Nearly one-quarter of U.S. respondents say they expect to move software to the cloud. Of those using cloud computing, 31% of U.S. respondents had to preserve and/or collect data from the cloud in connection with actual or threatened litigation;*

- *Privacy and data protection issues arose most frequently in the context of collecting data from company equipment used by employees (57% of all respondents encountered an issue) and employees' personal equipment (50% of all respondents encountered an issue);*

- *Social Media: Nearly 20% of all respondents report that in the previous year their companies had to preserve or collect data from an employee's personal social media account. Meanwhile, 13% of all respondents have had to produce, as part of discovery, electronic information stored on a social media site in the past 12 months;*

- *Mobile Devices: Ninety-one percent of U.S. respondents reported that they allowed their employees to conduct business on mobile devices. Given the prevalence of mobile devices in the U.S., it is interesting to see that only 30% of respondents had to preserve or collect data from them for a litigation or investigation. The biggest challenge in conducting discovery from mobile devices was that they were widely distributed and disconnected (53% of respondents). Of those concerned about litigation arising from their employees' use of mobile devices (34%), the majority are worried about the loss of customer or proprietary data.*

Fulbright and Jaworski 2011 Litigation Trends Survey: A Little Less Litigation; More Regulation, available at http://www.businesswire.com/news/home/20111018005080/en/ Fulbright-Jaworski-2011-Litigation-Trends-Survey-Litigation.

So, what does this mean for e-discovery practitioners? Put frankly, it seems that attorneys continue to not recognize the importance of preserving electronically stored information. More specifically, in the social media realm, employers are either unaware of the potential risk involved with employees who use social media at work (especially absent a social media policy), or they simply refuse to recognize how a simple "tweet" can change the outcome a case. Either way, the survey exemplifies our growing concern with how the use of ESI during litigation will continue to grow substantially.