



This Week's Feature

Use of Social Media in Litigation

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"In this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking."—Dana L. Flemming and Joseph M. Herlihy

Facebook has over 500 million active users—more than the entire population of the United States. Over five billion photographs are posted on Facebook. No matter what type of case you are handling, Facebook, MySpace and other social media sites may hold a wealth of information that can support your defense. Social media sites include photographs, videos, message threads, "status" updates and more. So how do we obtain this information? Is it even discoverable? As the district court judge noted in *Equal Employment Opportunity Commission v. Simply Storage Management, LLC*, "discovery of [social networking sites] requires the application of basic discovery principles in a novel context."

If a plaintiff, witness or juror provides open access on his or her social media page to the public at large, defense counsel should be free to view and utilize it in the same manner as any other document or information obtained during discovery or voir dire. The courts have generally held that no expectation of privacy exists under those circumstances. The difficulty arises, however, if a profile page is "locked" and only viewable by the user's "friends." The degree to which a user's page may be protected varies, depending upon the chosen privacy settings. Notably, the courts have held that simply locking or making one's site "private" does not necessarily shield it from discovery.

Social media is protected under federal law by 18 U.S.C. § 2701 *et seq.*, the Stored Communications Act, which prevents sites like Facebook or MySpace from producing information in the absence of consent from the account owner. Therefore, the only way to obtain the information directly from the site is to obtain authorization from the plaintiff, which, of course, will rarely be done voluntarily. Attorneys have apparently been creative in obtaining this information, but possibly to their detriment. The State Bar of New York recently issued an advisory opinion that defense counsel "friending" a plaintiff without the plaintiff's consent is improper and unethical. Presumably other states will follow suit, as such conduct would likely be considered direct contact with a represented party.

There are methods beyond the deceptive or voluntary by which we may obtain information from social media. Trial courts in Georgia have granted requests for inspection and enforced requests for production of documents issued to plaintiffs for the purpose of obtaining information posted on a plaintiff's social media page. The breadth of the issues in a case should dictate the scope of the requests. Careful consideration should be given before making an "anything and everything" request. Courts in Georgia, New York, Connecticut and Indiana have held that Facebook and other social media are discoverable, but they have not given defendants carte blanche to view everything on a person's website. The courts seem to allow more latitude when a plaintiff's mental state is at issue in the case, such as a claim for emotional distress, as just about anything posted on a social media site arguably reveals something about one's emotional state.

In two federal cases out of Georgia, *Bryant v. Perry* and *Kimble v. Smeed*, the court ordered the plaintiffs to permit the court to view plaintiffs' pages via the court's own Facebook page for an *in camera* review. Although better than nothing, this method is susceptible to spoliation, as plaintiffs can easily delete relevant information before accepting the court's "friend request." The better practice may be filing a motion to compel, seeking an order requiring the plaintiff to execute an authorization form. This would allow the information to come directly from the site provider, including information that has been "deleted" from the plaintiff's page. Moreover, information produced by the provider may include message threads that would no longer be visible on the plaintiff's page. The scope of the records produced would, of course, depend upon the scope of the authorization. Sites like Facebook have their own authorization forms that include various selections for the types of information being sought.

Courts have granted motions to compel plaintiffs to execute such authorizations. In *Romano v. Steelcase, Inc.*, a New York trial court found that a personal injury plaintiff's Facebook and MySpace pages were relevant to her claim that "she can no longer participate in certain activities or that [her] injuries have affected her enjoyment of life." Despite her claim that she was largely confined to her house and bed, her profile pictures showed her "smiling happily outside the confines of her home." The court ordered the plaintiff to execute an authorization form for both Facebook and MySpace, specifying that the production include "records previously deleted or archived," thus eliminating the possibility that the plaintiff could sanitize her pages prior to production.

Information obtained from social media may be invaluable to mounting a defense, either at trial or during negotiations. Social media appears to be most often used to impeach a plaintiff as to injuries and damages. Photographs posted on social media essentially amount to plaintiffs inadvertently conducting surveillance on themselves—giving away the nature and extent of their everyday activities. From postings about the difficulty of their morning workout to photographs taken at the top of a ski lift, social media has the potential to gut a plaintiff's credibility. Of course, social media is a double-edged sword. As prudent attorneys, we should peruse our clients' own pages before opening this virtual can of worms.

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