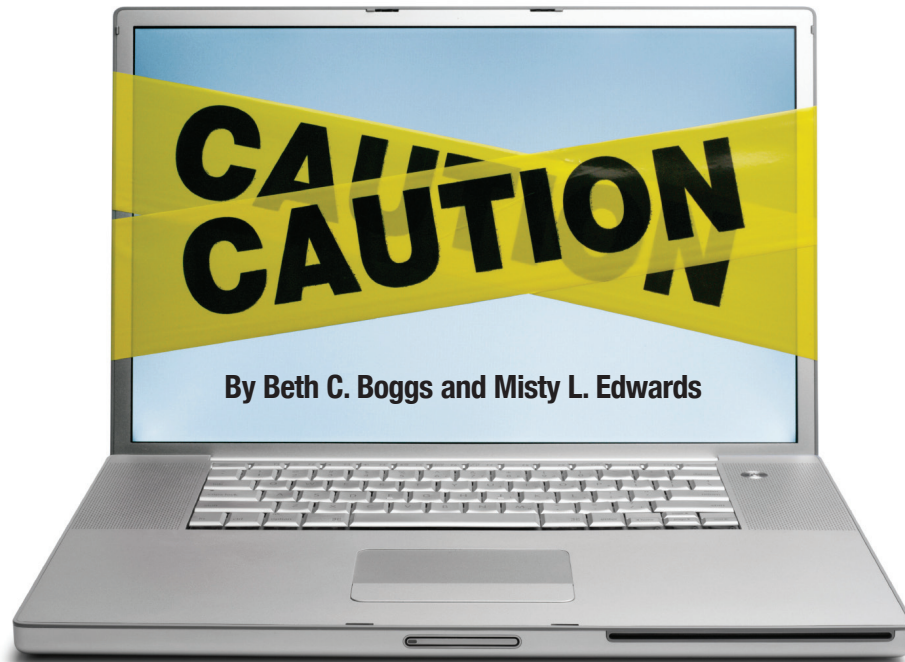


Does What Happens on facebook Stay on facebook?

Discovery, Admissibility, Ethics, and Social Media



Increasingly, lawyers are mining social networking sites like Facebook for information about litigants, witnesses, jurors, and more.

What are the limits on discovery and admissibility of content gathered on social media sites? What legal-ethics issues do these sites raise? This article looks at the emerging case law.

As the popularity of social networking sites like Facebook, LinkedIn, Twitter, and MySpace grows, so does their importance in litigation. More and more attorneys use these rich archives of personal information to investigate the backgrounds of parties, witnesses, opposing counsel, jurors, and even judges.¹ They also look for information that either corroborates or undermines their client's case.²

1. See Sean P. O'Donnell, *The Use of Information Posted on Facebook and MySpace in Litigation, Subrogation and Recovery Alert*, Oct 19, 2009, available at <http://www.cozen.com/cozendocs/outgoing/alerts/2009/subro101409.pdf>; Karen L. Stevenson, *What's On Your Witness's MySpace Page?*, ABAnet.org, March 2008, available at www.abanet.org/litigation/litigationnews/2008/march/0308_article_myspace.html.

2. O'Donnell, *The Use of Information* (cited in note 1).

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Increasingly, attorneys use discovery to seek information on social networking sites.³ However, the law governing discovery of online personal information is hardly clear cut,⁴ and few courts have directly addressed the issue.

This article looks at what kind of information lawyers search for, how they conduct discovery, whether and when the information they gather is or isn't admissible, and what legal-ethics issues they face in the social-media world.

While case law on discoverability and social media sites is just emerging, most courts have allowed discovery of relevant information posted to Facebook and other sites.

Mining social media for information about parties, witness, and jurors

Investigating parties and witnesses. Lawyers use social networking sites to investigate the background of parties and witnesses, both to assess their credibility and to help determine how the jury or judge will perceive a witness. A surprising number of people are shockingly candid when posting to their public profile on a social networking site. A random search of public profiles reveals photos of people drinking, using illegal drugs, and engaging in other risky (and risqué) behavior. Site users discuss drinking, doing drugs, having sex, getting arrested, and the like.

In addition, people in litigation often post either information about the case they are involved in or photographs that conflict with their claims. For example, in a forcible rape case in Oregon, a teenager told the police she would never willingly have had sex.⁵ The defense attorney viewed her MySpace page, where she talked about parties, drinking, and "getting some" and posted provocative pictures of herself.⁶

Based on what the attorney had read, she could see how the teenager would be perceived by jurors. She called her as a witness, and the grand jury dismissed the charge.⁷

In Canada, a Vancouver woman claimed she was unable to enjoy her favorite activities.⁸ Her testimony was that her injuries prevented her from dancing, hiking, and cycling.⁹ Photos from her Facebook profile showed her cycling and hiking after her injury.¹⁰

Uncovering juror misconduct. Jurors also undermine cases by using social media and other Internet sites to conduct research and communicate.

In the Maine case *Wilgus v Sirius*, a juror sent the plaintiff's attorney an e-mail after a trial, asking whether he knew the plaintiff advocated binge drinking and using mushrooms and marijuana, facts he learned from Facebook.¹¹ The court questioned both the juror who sent the e-mail and the jury foreperson, then denied the motion for a new trial.¹² The juror was adamant that he conducted the research after the trial, and the jury foreperson stated there was no mention of the Facebook page during deliberations.¹³

In a Florida federal drug case, after eight weeks of trial, a juror admitted to the judge he had been doing research on the case on the internet.¹⁴ When the judge questioned the remaining jurors, he discovered eight other jurors had been doing the same thing, and the judge declared a mistrial.¹⁵

In an Arkansas court, in a products liability suit, the defendant attempted to get a \$12.6 million jury verdict overturned because a juror used Twitter to send updates during trial.¹⁶ One post stated, "oh and nobody buy Stoam. Its bad mojo and they'll probably cease to Exist, now that their wallet is 12m lighter."¹⁷ The juror stated that his messages were sent after the trial, and the appeal was unsuccessful.¹⁸

In Maryland, the attorney for Mayor Sheila Dixon is seeking a mistrial in the mayor's conviction for embezzlement.¹⁹ In that case, while the trial was ongoing, five of the jurors became "Facebook friends" and chatted on the social networking site, despite the judge's instructions not to communicate with each other outside the jury room.²⁰ Dixon's attorney stated that the "Facebook friends" became a clique that altered jury dynam-ics.²¹

Service of process. In Australia, Facebook has been used for service of process of court documents. In December 2008, after several failed attempts at service, a lawyer won the right to serve a default judgment by posting the terms of the judgment on the defendant's Facebook wall.²²

Discovery and social media

While case law on discoverability and social media sites is just beginning to emerge, most courts have allowed discovery of relevant information posted to Facebook and other sites.

In *Mackelprang v Fidelity National Title Agency*,²³ a case from Nevada, the plaintiff alleged that the defendant sexually harassed her and caused her emotional distress. She alleged that one employee sent her sexually explicit e-mails. She claimed another coerced her into having sex with him under the threat her husband would be fired and made inappropriate and explicit remarks to her on a regular basis.²⁴

She complained of the sexual harassment to human resources, who allegedly

3. Id.

4. Id.

5. Stephanie Francis Ward, *MySpace Discovery, Lawyers are mining social networks for nuggets of evidence*, 93 ABA J 34 (Jan 2007), available at <http://www.abajournal.com/magazine/article/next/>.

6. Id.

7. Id.

8. Pamela Pengelley, *Can Facebook Information Be Used in Court*, April 8, 2009, available at <http://turnerstips.wikidot.com/can-facebook-in-court>.

9. Id.

10. Id.

11. *Wilgus v F/V Sirius*, 665 F Supp 2d 23, 24 (D Me 2009).

12. Id at 26.

13. Id.

14. John Schwartz, *As Jurors Turn to Web, Mistrials are Popping Up*, The NY Times, March 18, 2009, available at <http://www.nytimes.com/2009/03/18/us/18juries.html>.

15. Id.

16. Id; Christopher Danzig, *Mobile Misdeeds: Jurors With Handheld Web Access Cause Trials to Unravel*, Inside Counsel, June 1, 2009, available at <http://www.insidecounsel.com/Issues/2009/June-2009/Pages/Mobile-Misdeeds.aspx>.

17. Id.

18. Danzig, *Mobile Misdeeds* (cited in note 16).

19. See Andrea F. Siegel, *Judges Confounded by Jury's Access to Cyberspace*, Dec 13, 2009, available at http://articles.baltimoresun.com/2009-12-13/news/bal-md.ar.tmi13dec13_1_deliberations-period-florida-drug-case-jurors; Debra Cassens Weiss, *Jurors' Wikipedia Research, Friending at Issue in Two Md Cases*, Dec 14, 2009, available at http://www.abajournal.com/news/article/jurors_wikipedia_research_friending_at_issue_in_two_maryland_cases/.

20. Id.

21. Id.

22. Pengelley, *Can Facebook Information Be Used in Court* (cited in note 8).

23. 2007 WL 119149 (D Nev 2007).

24. Id at* 1.

said it would be taken care of but that if she brought it up again she would be fired.²⁵ Since leaving her employment, she was diagnosed with post-traumatic stress disorder, major depressive disorder, and panic disorder stemming from the work environment she was subjected to.²⁶ She also attempted suicide on several occasions.²⁷

The defendant sought to obtain e-mail communications on the plaintiff's MySpace accounts. A subpoena was served on MySpace, and MySpace produced public information about the accounts but not private e-mails. The plaintiff had two accounts, one on which she identified herself as a 39-year-old single female and said "I don't want kids," another where she described herself as a 39-year-old married female who loves her six children.

The defendant filed a motion to compel the e-mail communications, alleging that the private communications may contain evidence that the plaintiff engaged in consensual sexually related e-mail communications with other persons on MySpace, including the defendants. The court denied the motion to compel, reasoning that the defendant had no more than speculative information about the persons with whom the plaintiff exchanged messages or the content of the e-mails.²⁸

The court wrote that if the defendants developed some basis beyond mere speculation to support a reasonable belief that the plaintiff engaged in sexual e-mail communications with former co-employees it would reconsider its decision.²⁹ The court did allow discovery of any e-mail communications relevant to assessing the credibility of her emotional distress claims.³⁰

Unlike the court in *Mackelprang*, a federal court in California did not allow the discovery of any private e-mail messages on Facebook, MySpace and another social networking site.³¹ In *Crispin v Christian Audigier, Inc. et al.*, the plaintiff filed a motion to quash the subpoenas directed to Facebook, MySpace, and Media Temple for profile information and private e-mails regarding any agreement made between the parties in a breach of contract action.³² The magistrate denied the plaintiff's motions.³³

On appeal, the court found that the private e-mail messages were protected by the Stored Communications Act and reversed the magistrate's decision denying the motions to quash with respect to the private e-mail communications.³⁴ The court remanded the case to determine

whether the portions of the subpoenas relating to the Facebook wall postings and MySpace comments would also need to be quashed.³⁵

In *Beye v Horizon Blue Cross Blue Shield of New Jersey*,³⁶ the plaintiff alleged that the defendant, an insurance company, wrongfully refused to pay health benefits for children's eating disorders. The insurance company contended the disorders of the children were non-biologically based mental illnesses and thus not covered under the insurance policy. The defendant sought information on the children's MySpace or Facebook pages.

The court ordered the plaintiffs to turn over the children's e-mails, diaries, and other writings that were "shared with other people" about their eating disorders, including entries on MySpace or Facebook, noting the lower expectation of privacy where the person asserting the privacy right made the information public in the first place.³⁷

In *Ledbetter v Wal-Mart Stores, Inc.*,³⁸ two Colorado electricians were severely burned when the electrical system they were working on shorted out. They brought suit for their injuries, and one wife brought a claim for loss of consortium.

During discovery, the defendant sent subpoenas to Facebook, MySpace, and Meetup.com, and the plaintiffs contended the items requested should be protected. The court held that a protective order entered earlier in the case would protect such information, that the plaintiffs put the confidential facts in issue (including the extent of injuries and nature of the consortium), and that the request was reasonably calculated to lead to the discovery of admissible evidence.³⁹

In *TV v Union Township Board of Education*,⁴⁰ however, a New Jersey court reached the opposite conclusion. In *TV*, a teenager was sexually assaulted by a fellow middle-schooler and claimed that the school failed to adequately supervise, which made the attack possible and contributed to her emotional distress.

The court held that the information on the plaintiff's MySpace and Facebook pages was protected because "the student's privacy interests prevailed, absent a particular showing of relevance."⁴¹ The judge stated the defense had not undertaken enough discovery to show it needed the messages to defend the school board

adequately.⁴² Additionally, the court said, the defense must use traditional discovery to determine who might testify on the plaintiff's behalf and perhaps interview those people to see what they know about the plaintiff's mental state.⁴³

Overall, with the exception of the New Jersey case *TV*, where the court said the minor's privacy interests prevailed, the courts have allowed discovery of social networking site information relevant to the case at hand. Though courts are more reluctant to allow discovery of e-mail messages than the actual profile, several courts have allowed the discov-

ery of social-media e-mails if they are relevant.

Lawyers may get into trouble for posting information about clients, opposing counsel, or the court.

Admissibility

Assuming information from a social networking site is discoverable, the question becomes whether it is admissible. The

25. Id.

26. Id.

27. Id.

28. Id at *2.

29. Id at *6 FN1.

30. Id at *8.

31. *Order Granting Plaintiff's Motion for Review of Magistrate Judge's Decision Re Plaintiff's Motion to Quash Subpoena*, No 09-09509 (CD Cal 2010), available at <http://lawyersusaonline.com/wp-files/pdfs/2/crispin-v-christian-audigier-inc.pdf>.

32. Id at 3-4.

33. Id at 4.

34. Id at 36-37.

35. Id.

36. 568 F Supp 2d 556 (D NJ 2008).

37. Ronald J. Levine and Susan L. Swatski-Lebson, *Are Social Networking Sites Discoverable?*, Law.com, Nov 13, 2008, available at www.law.com/jsp/legaltechnology/PubArticleFriendlyLT.jsp?id=1202425974937.

38. 2009 WL 1067018 (D Colo 2009).

39. Evan Brown, *Court Allows Wal-Mart to subpoena Facebook and Myspace*, Internet Cases, April 26, 2009, available at <http://blog.internetcases.com/2009/04/26/court-allows-wal-mart-to-subpoena-facebook-and-myspace/>.

40. UNN-L-4479-04 (NJ Super Ct, Dec 22, 2004).

41. O'Donnell, *The Use of Information* (cited in note 1); Henry Gottlieb, *MySpace, Facebook Privacy Limits Tested in Emotional Distress Suit*, NJ Law Journal (June 14, 2007), available at <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=90000555723> (recognizing the court in *TV* held: "Without a particularized showing that the [MySpace and Facebook] texts are relevant, the plaintiff's privacy interests prevail.")

42. Gottlieb, *MySpace* (cited in note 41).

43. Id.

decisions thus far indicate that if information is relevant, courts will allow it in as they would any other piece of evidence.

For example, in *Telewizja Polska USA, Inc v EchoStar Satellite*,⁴⁴ the defendant sought to admit copies of an archived Web site of a skinhead organization that posted the name, address, and picture of the victim, along with a call to attack him. The Illinois-based federal district court rejected the objection that the pages were hearsay, holding they were merely images and text showing what the web page once looked like, were an admission by a party-opponent, and were admissible.⁴⁵

In *State v Gaskins*,⁴⁶ the defendant in an Ohio statutory-rape case sought to introduce evidence that the victim held herself out as an 18-year-old on her MySpace page. The trial court admitted photographs of the victim that were posted on the page.⁴⁷

In the Missouri case *State v Corwin*,⁴⁸ the defendant was convicted of attempted forcible rape. He was appealing his conviction based on the judge's refusal to enter entries of the victim's Facebook profile to impeach her testimony.

The entries referred to drinking and partying by the victim, pictures of the victim dancing with young men, and an entry stating, "I had a pretty rough night and I have the bruises to prove it." The court stated that none of the information was legally relevant to the fact that the defendant was charged with attempted forcible rape of the victim.⁴⁹ The quote the defendant tried to introduce was nine months after the incident in question.⁵⁰

Legal ethics and social media

Ethics and other peoples' pages. While information from social media sites may be both discoverable and admissible, ethical strictures can limit a lawyer's freedom to access a party's social networking page.⁵¹

The Philadelphia Bar Association Professional Guidance Committee addressed whether an attorney could direct an investigator to become "Facebook friends"⁵² with a non-party witness.⁵³ The committee stated that doing so would be inherently deceitful and unethical, even if the investigator used his own name.⁵⁴

In addition, most jurisdictions have professional conduct rules regarding contact with an opposing party if that party is represented by counsel.⁵⁵ An in-

itation to become friends on Facebook and thereby gaining access to personal information about one another would likely be impermissible direct contact.⁵⁶ It may also violate the rule providing that a lawyer may not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.⁵⁷

Ethics and a lawyer's own page or blog. Ethical issues may also arise when attorneys post information on their Facebook or MySpace page (and on their blogs, which are not social media sites in the strict sense but raise many of the same issues). Lawyers may get into trouble for posting information about clients, opposing counsel, or the court.

In Florida, an attorney was mad at a Fort Lauderdale judge and decided to blog about her, calling her an "evil, unfair witch" and questioning her motives and competence.⁵⁸ He ended up getting a reprimand and fine for his blog.⁵⁹

In Illinois, an assistant public defender was blogging about her clients, using either just their first name or their jail identification number.⁶⁰ For example, she wrote:

#127409-This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because he's no snitch. I managed to talk the prosecutor into treatment and deferred prosecution, since we both know the older brother from prior dealings involving drugs and guns. My client is in college. Just goes to show you that higher education does not imply that you have any sense.

She also wrote as follows:

Dennis the diabetic whose case I mentioned in Wednesday's blog post, did drop as ordered, after his court appearance Tuesday and before allegedly going to the ER. Guess what? It was positive for cocaine. He was standing there in court stoned, right in front of the judge, probation officer, prosecutor and defense attorney, swearing he was clean and claiming ignorance as to why his blood sugar wasn't being managed well.⁶¹

She lost her job and is facing disciplinary action.⁶²

An attorney in California caused a criminal conviction to be overturned because of his blog postings.⁶³ While serving as a juror in a felony trial in 2006, he posted details of the trial on his blog.⁶⁴ The attorney received a 45-day suspension, two years probation, paid \$14,000 in legal fees, lost his job, and was required to take the MPRE within one year.⁶⁵

Judges may also get into trouble using Facebook. A North Carolina judge was

reprimanded for "friending" a lawyer in a pending case, for posting and reading messages about the litigation, and accessing the Web site of the opposing party.⁶⁶

Conclusion

As social networking sites become more popular and attorneys become more knowledgeable about their potential, courts will address more cases about the discovery, admissibility, and ethics of accessing information on social networking sites.

One thing is certain: attorneys should check to see if their clients and opponents have a profile on a social networking site. Counsel should also be addressing the issue with jurors to warn them against posting during trial. ■

44. Case No. 02C3293, 2004 WL 2367740 (ND Ill 2004), available at <http://cyberlaw.stanford.edu/packets/echoStar.pdf>.

45. Carol Levitt and Mark Rosch, *Making Internet Searches Part of Due Diligence*, Los Angeles Lawyer, Feb 2007, available at <http://www.lacba.org/Files/LAL/Vol29No12/2349.pdf>.

46. 2007 WL 22964454 (Ohio App Aug 13, 2007).

47. Stevenson, *What's On Your Witness's MySpace Page?* (cited in note 1).

48. 295 SW3d 572 (Mo App SD 2009).

49. Id at 579.

50. Id.

51. Robert S. Kelner and Gail S. Kelner, *Social Networks and Personal Injury Suits*, NY L J, Sept 24, 2009, available at www.law.com/jsp/nylj/PubArticleFriendlyNY.jsp?hubtype=&cid=1202434026615.

52. In order for a person to become a "Facebook friend," that person has to send a friend request to the other person. Then, the person receiving the friend request must confirm the person is actually their friend. Once confirmation is complete, they are "Facebook friends" and have access to each other's profile page.

53. Id; See also Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02 (Mar 2009), available at http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf.

54. Id.

55. Kelner and Kelner, *Social Networks* (cited in note 46).

56. Id.

57. Id.

58. John Schwartz, *A Legal Battle: Online Attitude vs Rules of the Bar*, The NY Times, Sept 13, 2009, available at www.nytimes.com/2009/09/13/us/13lawyers.html?_r=3&ref=us.

59. Id.

60. Id.

61. Id; See also Complaint, In the Matter of: Kristine Ann Peshek, available at www.iardc.org/09CH0089CM.html.

62. Schwartz, *A Legal Battle* (cited in note 58).

63. Id.

64. Id.

65. Id; Mike Frisch, *Lawyer-Juror-Blogger Sanctioned in California*, Aug 3, 2009, available at http://lawprofessors.typepad.com/legal_profession/2009/08/lawyerjuror-blogger-sanctioned-in-california.html.

66. Debra Cassens Weiss, *Judge Reprimanded for Friending Lawyer and Googling Litigant*, ABA Journal, June 1, 2009, available at www.abajournal.com/news/judge_reprimanded_for_friending_lawyer_and_googling_litigant.