

Home » Member Services » The Bencher » Previous Articles »
Electronic Discovery and Social Networki...

Electronic Discovery and Social Networking Sites (The Bencher—November/December 2010)

By Francis G.X. Pileggi

Social networking Web sites are nearly ubiquitous and increasingly prevalent as a business tool that has become an important aspect of doing business for many industries and individuals. With more than 500 million users on Facebook, 70 million users on LinkedIn, and 190 million users on Twitter, now more than ever people and businesses are interacting and connecting with each other through social networking Web sites. Broadly defined, social networking Web sites allow users to create online profiles where they can choose to display their business and personal information to be accessed by other users in order to “make friends” and interact with the online community.¹ For instance, users of Facebook typically post their personal and/or business interests, contact information, photographs, and videos to share with their friends and/or prospective business contacts. Twitter users interact by posting “tweets”, short 140 character messages.²

Many advertisements now include the icons for Facebook and Twitter to encourage customers to interact with the company online. Given the breadth of these online communities and the wealth of information to which they provide access, it is no surprise that lawyers are using information gathered on these sites in business litigation and other types of legal disputes.

Recent Court Decisions

Photos, postings, e-mails, and other information from social networking Web sites are increasingly becoming the subject of formal discovery requests. In *Barnes v. CUS Nashville, LLC*,³ in order to expedite a Facebook subpoena, the magistrate judge offered to create a Facebook account in order to “friend” plaintiffs and gain access to the photographs, captions, and comments subject to the subpoena. In *Treat v. Tom Kelley Buick Pontiac GMC, Inc.*,⁴ plaintiff sued her employer for wrongful termination and sexual harassment. The sexual harassment allegation was based upon an allegedly inappropriate sexual story told to plaintiff by her superior. To corroborate her version of the facts, plaintiff produced during discovery a printout of a “less graphic” version of the story posted by her superior on his MySpace page.⁵



[Home](#)
[General Information](#)
[Events and News](#)
[Join An Inn](#)
[Create An Inn](#)
[Awards](#)
[Forms and Links](#)

 [find an inn near you](#) ▶

 [request information](#) ▶

Email address

Password

Don't know password?

Remember Me

[Login Instruction](#)

Generally, courts allow discovery of personal information posted on a social networking Web site if it is relevant to the litigation and the discovery request is narrowly tailored.⁶ The Federal Rules of Civil Procedure allow for a broad scope of discovery such that “any nonprivileged matter that is relevant to any party’s claim or defense” is discoverable.⁷ As with any case, relevance is fact specific. In many cases information on social networking Web sites may be relevant,⁸ in others evidence of online connections may not be relevant. For instance, in *Quigley Corp. v. Karkus*⁹ the court held that Facebook “friends” status of the co-defendants held no significance in the litigation, which involved allegations that shareholders of a corporation violated the Securities and Exchange Act by refusing to disclose their relationship.¹⁰

Although communications and posted data on social networking Web sites may be relevant, parties may not compel requests for overly broad discovery of such information. In *Mackelprang v. Fidelity National Title Agency of Nevada, Inc.*,¹¹ plaintiff alleged she had been sexually harassed by her employer. Hoping to reveal plaintiff was having an extra-marital affair, defendant sought all records, including private e-mail messages, on plaintiff’s MySpace page. Denying defendant’s motion to compel, the court noted the broad discovery request (i.e., all communications) and refused to allow defendant to engage in a fishing-expedition. Defendant was barred from obtaining “private e-mail messages between Plaintiff and third persons regarding allegedly sexually explicit or promiscuous e-mails not related to Plaintiff’s employment with Fidelity.”¹² The court, however, did not prohibit defendant from obtaining relevant communications by serving narrowly tailored discovery requests.

Other courts are more reluctant to allow discovery of private e-mail messages on social networking Web sites, than they are profile information. In *Crispin v. Christian Audigier, Inc.*,¹³ the Central District of California granted in part plaintiff’s motion for reconsideration of third-party subpoenas of social networking Web sites. Defendants served subpoenas *duces tecum* on four social networking Web sites, including Facebook and MySpace, seeking plaintiff’s subscriber information and all communications relating to the lawsuit.¹⁴ Finding social networking Web sites to be electronic communication services (“ECS”) providers and private messaging on such Web site to be ECS under the Stored Communications Act,¹⁵ the court quashed the Facebook and MySpace subpoenas to the extent they sought private messaging.¹⁶

Of course, as *U.S. v. Drummond*¹⁷ points out, admissibility of such information is subject to the Rules of Evidence. In

Drummond, the court considered defendant's motion to exclude from evidence photographs from his MySpace page. The photographs at issue depicted the defendant holding large quantities of cash and/or pointing a gun at the camera.¹⁸ Defendant, who was facing drug trafficking charges, argued that these photographs were prejudicial. The court found the photographs relevant and prejudicial, but required more information in order to determine if the probative value of the evidence outweighed the danger of prejudice, and reserved ruling on admissibility.¹⁹

Rules of Civil Procedure

In addition to the rules governing relevancy and prejudice, information on social networking Web sites are subject to the rules governing electronically stored information. Federal Rule of Civil Procedure 34 provides that a party may request any electronically stored information that is within the "possession, custody, or control" of the responding party.²⁰

As discovery of information on social networking Web sites becomes more prevalent, litigators must become savvy about the techniques used in searching and preserving personal information on these Web sites. Print-outs of screen shots are an archaic means of preserving data, especially when people are constantly updating their Facebook pages, both adding and deleting information. Third-party providers sell lawyers the tools to effectively archive, manage, and produce information from these ever evolving social networking Web sites.²¹ These companies employ new technologies in order to monitor and recover information posted on the sites.²² For instance, video cameras are used to monitor personal Web pages; "capturing software" records a user's Internet activities; web-based tools provide access to information posted on Web sites in the past, but since deleted; and advances in search engines will provide greater searchability of personal information posted on social networking Web sites.²³

More and more litigators are recognizing that Facebook, Twitter, and similar online communities are significant sources of information. Lawyers and investigators are using social networking Web sites to investigate parties, witnesses, potential jurors, judges and opposing counsel. Lawyers are conducting searches via Google and Bing as well directly on the social networking Web sites themselves. And, as lawyers are going straight to the source, they are in turn raising legal ethics issues.

Ethical Considerations of Social Network Discovery

Increasingly, because businesses are marketing to other business and consumers through social networking Web sites,

company policies governing electronic communications must evolve along with the technology, keeping an eye toward litigation and preservation issues.²⁴ Target, Coca-Cola, Vanguard, Disney, Calvin Klein and many other major companies all have thousands of fans on Facebook. And, consumers can follow more and more companies on Twitter, such as Carnival Cruise Lines, Apple, Amazon.com, M&Ms, and The New York Times. Just as companies and business litigators face discovery preservation issues with company Web sites, e-mail correspondence and electronic documents, so too must companies be prepared to preserve and produce information on social networking Web sites they control, in order to prepare for potential litigation.

In addition, companies should be wary of what their employees are posting on the Internet, especially when discussing the company or its competitors, as the employer may be held liable and/or face significant backlash. In 2007, it was revealed that using a pseudonym, John Mackey, CEO of Whole Foods, had been posting disparaging remarks about Wild Oats Markets, Inc., a natural foods store, and competitor of Whole Foods.²⁵ These postings raised SEC-related issues because Whole Foods was a publicly-held company.

To paraphrase Kevin O'Keefe, an expert on the use of the Internet by lawyers: "social media is here to stay."²⁶ Electronic data discovery (EDD) is a necessary part of a complete litigation strategy due to the large amount of electronically stored information (ESI) that is never printed in hard copy. So much ESI is now created on social media Web sites—which may not be available elsewhere, that a complete EDD plan must consider potentially relevant and useful ESI on social media Web sites that may help (or hurt) one's case.

Francis G.X. Pileggi is the founding partner of the Wilmington, Delaware, office of Fox Rothschild LLP. He writes a blog at www.delawarelitigation.com that summarizes all the key decisions on corporate and commercial law from Delaware's Court of Chancery and Supreme Court. He also writes the ethics column for every other issue of The Bench.

© 2010 Francis G.X. Pileggi, Esquire. This article was published in the November/December 2010 issue of The Bench, the flagship magazine of the American Inns of Court. Inquiries about this article should be directed to the American Inns of Court.

1 Aaron Blank, *Comment, On the Precept of E-Discovery: Can Litigants Obtain Employee Social Networking Web Site Information Through Employers?*, 18 **COMMLAW CONSPLECTUS** 487 (2010).

2 See *id.*

3 No. 3:09-cv-00764, 2010 WL 2265668, *1 (M.D. Tenn. June 3, 2010).

4 No. 1:08cv173, 2010 WL 1779911 (N.D. Ind. Apr. 30, 2010).

5 See *id.* at *5.

6 See Beth C. Boggs and Misty L. Edwards, *Does What Happens on Facebook Stay on Facebook?: Discovery, Admissibility, Ethics, and Social Media*, **ILL. BAR JOURNAL** (Vol. 98), at 366 (July 1, 2010).

7 See Fed. R. Civ. Pro. 26(b)(1).

8 See e.g., *Beye v. Horizon Blue Cross Blue Shield of New Jersey*, 568 F.Supp.2d 556 (D.N.J. 2008); *Ledbetter v. Wal-Mart Stores, Inc.*, 2009 WL 1067018 (D. Colo. April 21, 2009).

9 No. 09-1725, 2009 WL 1383280, at *3-5 (E.D. Pa. May 15, 2009).

10 See *id.* at *5, n.3.

11 No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149, *1 (D. Nev. Jan. 9, 2007).

12 See *id.* at *8.

13 No. CV 09-09509 MMM (JEMx), 2010 WL 2293238, *1-2 (C.D. Cal. May 26, 2010) (Motion granted in part, reversed in part, vacated in part, and remanded).

14 See *id.* at *1.

15 18 U.S.C. § 2701(a)(1).

16 See *id.* at *10, *16.

17 No. 1:09-cr-00159, 2010 WL 1329059 (M.D. Pa. Mar. 29, 2010).

18 See *id.* at *1.

19 See *id.* at *2 (citing Fed. R. Evid. 403).

20 Fed. R. Civ. Pro. 34(a)(1)(A).

21 Kroll Ontrack Web site, available at <http://www.krollontrack.com/about-us/>.

22 *From the Investigator's Notebook: Social Media Data Collection Best Practices* (June 2010), available at

http://www.krollontrack.com/ii-article-0610/?news=US_InvIns_Jun_10.

23 See *id.*

24 See H. Christopher Boehning and Daniel J. Toal, *Social Networking Data Presents New Challenges*, 241 N.Y.L.J. 5 (June 30, 2009).

25 See David Kesmodel and John R. Wilke, *Whole Foods CEO Hid on Message Board*, **WALL STREET JOURNAL** (July 12, 2007), available at <http://www.smartmoney.com/breaking-news/smw/?story=20070712105705>.

26 See Kevin O'Keefe, *Real Lawyers Have Blogs* (August 31, 2010), available at: <http://kevin.lexblog.com/2010/08/articles/social-media-1/social-networking-use-exploding-in-age-groups-targeted-by-law-firms-for-business-development/>.