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Digging Up Dirt On Facebook

Social networking site becomes valuable tool in litigation

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Over the last several years, Facebook has become the leader among social networking web sites, surpassing the former king of the hill, MySpace, in both global and U.S. users.

A typical Facebook user posts pictures and videos, tells people what they are doing through "status updates," sends comments and messages to friends, and plays games.

But Facebook is not all fun and games. It has litigation value, too.

Personal injury attorneys claim to have successfully defended exaggerated injury claims using pictures that plaintiffs themselves posted on Facebook. Likewise, employment lawyers can verify disability claims; divorce lawyers can see who is cheating on whom; and litigators of all sorts can find out if the opposing party is talking about the case.

In short, Facebook can be a valuable litigation tool for obtaining relevant information about your case.

A recent decision in a case before Judge Janet Bond Arterton in the U.S. District Court of Connecticut highlights the point. In *Bass v. Miss Porter's School,* the plaintiff claimed that the defendant school failed to adequately prevent her from being harassed by other students. The defendant served discovery on plaintiff, seeking documents related to plaintiff's claims that she was teased and taunted on Facebook. Plaintiff objected, claiming that the school's decision to disconnect her e-mail address and cut off her Internet access prevented her from logging on to Facebook and complying with defendant's request. Plaintiff then subpoenaed Facebook, seeking information associated with her account. Facebook provided plaintiff with approximately 750 pages of documents, consisting of wall postings, messages, and pictures. Plaintiff produced about 100 of those pages to the defendant.

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After an in camera review, Judge Arterton ordered the plaintiff to turn over all 750 pages to the defendant, finding "no meaningful distinction" between the documents produced and the documents withheld.

The *Bass* case demonstrates that the trend in litigation is likely to be an increase in discovery aimed at obtaining a party's social networking history. Just as it has become standard practice to request information related to a party's e-mail accounts, it will become standard practice to ask about a party's social networking activity. As people become more comfortable with the technology, they will inevitably become more prone to letting their guard down and saying or doing something on Facebook that will contradict their litigation interests.

As Judge Arterton pointed out, "Facebook usage depicts a snapshot of the user's relationships and state of mind at the time of the content's posting."

When a party is taking one position in litigation, and evidence on Facebook contradicts that position, the information relevant. Bass is an indication that judges are starting to agree.

Fighting Subpoenas

In some respects, however, *Bass* is an outlier. Unlike most cases, the plaintiff in Bass needed the information to prove her case, but could no longer gain access to her own account.

The federal act that protects electronic communication, the Electronic Communications Privacy Act (ECPA), permitted Facebook's disclosure because the ECPA contains an exception for information provided with the lawful consent of the author or recipient. Title II of the ECPA, however, in large measure forbids a third party from obtaining the same information directly from the service provider.

Unless the third party falls within a narrow, statutorily-defined exception (e.g. a prosecutor with a search warrant), it is crime for the service provider to produce the stored information. Civil subpoenas are not one of the exceptions.

Facebook takes the ECPA seriously. In September, it fought a subpoena issued by Colgan Air in *Hensley v. Colgan Air Inc.,* a workers' compensation case in Virginia. The subpoena sought photos posted by one of Colgan's employees, which the company hoped would demonstrate that the back injury that she reported was not as bad as she claimed.

Citing the ECPA, Facebook refused to comply, claiming that "users…rely on Facebook to protect their data and vigorously enforce the privacy decision they make on Facebook." The deputy commissioner hearing the case agreed.

Although he had originally found Fa-

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cebook in contempt and imposed a $200 a day fine, he later reversed himself, finding that the ECPA protected the information sought.

So, with the subpoena arrow largely taken out of the discovery quiver, what can a party seeking Facebook information do?

One option is to do what the Bass defendants did and ask for the information directly from the opposing party. The problem, of course, is that such a request requires the opposing party to actually turn over all of the relevant information. What is or is not relevant is, in Judge's Arterton's words, "in the eye of the beholder." A diligent party will want to double check that the 100 pages produced is truly the universe of relevant information.

One simple double check is to perform a public search. Some user information is available to everyone. For instance, a search for an individual's name will reveal the person's name, gender, city of residence, and friends list. Sometimes this information may be all you need. For example, if the issue is whether one individual has communicated with another, checking out the person's "friends list" is a good place to start.

Most of the time, however, the limited public information will not be enough. And, for most users, this is all you can get. Most users' privacy setting require you to be their "friend" before you can see their photos and videos, read their status updates, or view their comments.

Finding Information

To gain full access to a person's page you have two options—join their network or become their friend. The network option, however, has been significantly curtailed. Previously, regional networks allowed users living in the same area full access to each other's profiles regardless of whether they were friends. Now, networks are limited to work, college, and high school.

To be a member of a network, you need an e-mail address affiliated with the group (e.g. uconn.edu or lawtribune.com). Presumably, this makes it harder to gain backdoor access to a person's profile.

The last option is to become the person's "friend," but that too is a dicey proposition. The ethical rules involving communication with persons known to be represented by counsel make any attempt by an attorney to become a "friend" of the opposing party an ill-advised strategy.

Hiring a private investigator to "friend" the person may (or may not) avoid the ethical implications, but is also not foolproof. Not everyone accepts friend requests from strangers and private investigators do not come cheap.

In the end, the fact that a party seeking social networking information is required to do so directly from the opposing party may be exactly what Congress intended. Congress chose to protect electronic communication, because most people have an expectation that the information sent will be kept private unless they say otherwise.

Although an argument can be made that the expectation of privacy is less on Facebook – where the information is intended to be shared with a wider audience – than it is for personal e-mail, the distinction does not appear to be meaningful for the purposes of the ECPA.

For now, parties seeking social networking history will have to rely on the standard discovery tools to obtain the information, or get creative and see who their real friends are. ■