New York Law Journal
Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b6e8c46-2d38-4b0f-b339-6b6c355f27b5
A NEW YORK LAW JOURNAL SPECIAL SECTION

An incisivemedia publication

Litigation

WWW.NYLJ.COM

TUESDAY, SEPTEMBER 8, 2009

Savvy Use Of Social Networking Sites

BY DANIEL L. BROWN
AND AIMEE R. KAHN

AS A RESULT of the explosion in popularity of social networking Web sites such as Facebook and MySpace, where members "post" and share information about themselves as never before, attorneys, and particularly litigators, have begun to take note of the potential utility of this new medium.

Indeed, as explained below, some recent court proceedings demonstrate that an adversary's MySpace or Facebook page may sometimes contain the all-important smoking gun, and such sites can potentially be used to serve legal process on an adversary. At a minimum, understanding the potential uses of social networking sites should be considered when preparing for litigation.

However, the ability to use information discovered from a social networking Web site as evidence has not yet been fully tested in courtrooms, and attorneys must understand the evidentiary and ethical implications of seeking and discovering such evidence. In fact, at least one ethics opinion has already addressed issues arising from counsel's potentially unethical use of such a site to discover evidence.

One thing is clear: Attorneys and their clients must become acquainted with the potential usefulness of social networking sites, as well as the potential hazards and limitations.

An Open Universe Full of Information

Social networking sites such as MySpace and Facebook are free-access sites where users create a profile page, which generally includes information about themselves such as date of birth, employment history and city of residence. Users also upload photographs and post real time "updates" to their profiles.

DANIEL L. BROWN *is a partner in the antitrust and business trial practice groups of the New York office of Sheppard Mullin Richter & Hampton.* AIMEE R. KAHN *is an associate in the business trial practice group of the New York office.*

A user's profile, photographs and updates are sometimes available to the public at large or more generally to any other member who is authorized by the first user. Facebook's platform allows users to add such "friends" and send them messages, as well as leave postings on "friends'" profile pages through what are called "comments" and "wall posts."

Users can set different privacy settings by which their profiles will be seen. For example, some users have profile pages that are available to non-members of Facebook and accessible through any search engine, while other users limit access to their profile pages to only members, only friends, or to only a select few.

Given the open nature of social networking sites, and the abundance of information posted by members, litigators are increasingly discovering that properly seeking information for their cases from these sites can be a valuable tool in their arsenal. In fact, some attorneys now make it a regular part of their practice to search social networking sites to discover information about their adversaries, witnesses, and even potential jurors.

But the Rules of Evidence Still Apply

Attorneys seeking to use photographs, comments or connections discovered on an individual's profile page from a site like Facebook or MySpace as evidence in the courtroom must, of course, satisfy the rules of evidence.

Under Rule 401 of the Federal Rules of Evidence (FRE), relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[1] That of course does not mean that any and all information that might be posted to a profile will necessarily be admissible in litigation, as other rules limit the admissibility of relevant evidence in a trial.

For example, FRE 403 prohibits admissibility "if [the potential piece of evidence's] probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..."[2] State evidentiary rules contain similar rules.

As explained below, recent cases have demonstrated that if evidentiary admissibility is satisfied, information discovered on a member's profile page can be extremely useful.

Decisions in Criminal Cases

In *People v. Liceaga*, a Michigan murder trial, the prosecutor sought to admit photographs discovered on the defendant's MySpace page as evidence of intent and planning.[3] Specifically, the defendant's profile Web page contained photographs of himself and the gun allegedly used to shoot the victim, and in which he was displaying a gang sign.[4]

Under Michigan Rule of Evidence 404(b)(1), evidence can be admitted for the limited purpose of proving defendant's intent and to show a characteristic plan or scheme in committing the offense.[5] The appellate court upheld the admission of the MySpace evidence, finding that its probative value was not substantially outweighed by the danger of unfair prejudice.[6]

In *In the matter of K.W.*, a North Carolina court admitted into evidence an alleged child abuse victim's MySpace page as impeachment evidence. Specifically, the court held that the victim's posting of suggestive photographs along with provocative language could be used to impeach inconsistent statements made to the police about her sexual history.[7]

Courts have also permitted information gathered on a person's social networking site to be used as evidence at the sentencing stage of a criminal proceeding. In *United States v. Villanueva*, the court found that post-conviction images on the defendant's MySpace page of the defendant holding an AK-47 with a loaded clip taken after the defendant had been convicted of a violent felony could be used as evidence to enhance sentencing.[8]

Social networking sites are also being relied upon to gather data about potential jurors in both civil and criminal proceedings, as trial consultants

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b6e8c46-2d38-4b0f-b339-6b6c355f27b5

and litigators are adding Facebook and MySpace to their inventory of places to search to find useful information during the juror selection process.[9]

Rulings on the Civil Side

Although there have not yet been many reported civil cases in the United States concerning the benefits of social networking sites for litigators, some possibilities can be seen in cases appearing in foreign jurisdictions.

For example, even the amount of time that one spends on such a site might be discoverable. In *Bishop v. Minichiello*, a British Columbia court found that a plaintiff's late-night computer usage on Facebook, as maintained in log in/log out records on his hard drive, was relevant evidence to his personal injury claim against his employer.[10] The court ordered the plaintiff to produce his computer hard drive, because, inter alia, the information sought was relevant to his claim for damages, and the value of production was not outweighed by the plaintiff's confidentiality or rights to privacy.[11]

The utility to litigators of social networking sites is not limited to discovery. For example, in Australia, where a plaintiff demonstrated that no other method of service was feasible, and that service via Facebook was reasonably likely to be successful, a judge permitted the plaintiff to serve a default judgment on a non-appearing defendant via Facebook because Australian law permits a party to request substitute service.[12]

Similarly, in the United States, substitute service is generally available under certain state statutes when the serving party can show that ordinary service is impracticable and that the substitute service will reach the party and effect notice. For example, Rule 308(5) of New York's Civil Practice Law and Rules allows for service "in such manner as the court, upon motion without notice, directs, if service is impracticable" under the personal service provisions as set forth in CPLR §308.[13]

Notably, in at least two reported decisions, courts have permitted a party to employ some type of electronic service combined with other methods intended to provide notice. For example, in *Hollow v. Hollow*, where the plaintiff demonstrated that the defendant, who was employed in Saudi Arabia, could not practically be served, the court permitted service by e-mail, along with standard and registered international mail.[14]

In *Snyder v. Energy Inc.*, the court permitted alternative service by e-mail, as long as the plaintiff also mailed the summons and complaint to defendants' last known addresses and notified one of them on his cellular phone how service was being effectuated.[15]

Given the foregoing, at least in New York, it is foreseeable that service of process via social networking Web sites may soon be tested as an acceptable form of substitute service of process.

The Limitations

While there are obvious benefits to utilizing social networking sites in connection with litigation, the use of Facebook and MySpace profile pages as a source of valuable evidence is not without limitations.

Among other things, gathering evidence on a person's profile page poses Fourth Amendment privacy concerns, because the Web site member may claim that he or she has a reasonable expectation of privacy for the information posted on his or her profile page, or on a "friend's" profile page. Therefore, one must consider:

(1) whether there is a reasonable expectation of privacy on a social networking site accessible to the public at large; and

(2) whether there is a reasonable expectation of privacy on a social networking site that has been secured by some form of privacy protection, the later creating greater concern.[16]

Moreover, in addition to having to satisfy the evidentiary standard for "relevance," discussed above, evidence gathered on a social networking site must also be properly authenticated and may be inadmissible for numerous evidentiary reasons such as hearsay if, for example, a third party "wall post" or "comment" is offered into evidence. While these areas have not yet been developed by case law, they must be carefully considered.

Indeed, a recent ethics opinion dictates that attorneys must be careful when gathering evidence from a person's social networking profile page. In Ethics Opinion No. 2009-02 (Opinion) the Philadelphia Bar Association Professional Guidance Committee (Committee) addressed the propriety of an attorney discovering information from another person's Facebook profile page.[17]

> Attorneys and their clients must become acquainted with the **potential usefulness** of social networking sites while remaining aware of the sometimes substantial **hazards** and **limitations**.

In that case, in order to discover information contained on an adverse witness' Facebook profile page, the attorney asked someone to send a "friend request" to that witness in order for the attorney to discover impeaching information.

According to the Opinion, an attorney must disclose his or her true intentions when attempting to access a member's profile page. The Committee cited to its rule of professional responsibility regarding non-lawyer assistants, which provides that lawyers are responsible for the actions of third party non-lawyer assistants.[18] The Committee also noted that other ethical rules prohibit attorneys from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation."[19]

Based on the foregoing, the Opinion holds that an attorney cannot use a third party to send a "friend request" to an adverse witness to search for impeaching evidence on the witness' otherwise private Facebook profile page.[20] The Committee said that such actions would "omit[] a highly material fact, namely, that the third party who asks to be allowed access to the witness' pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness."[21]

The Committee disagreed with the argument that such conduct is akin to the practice of videotaping a personal injury plaintiff because "the videographer does not have to ask to enter a private area to make the video," and stated that "[d]eception is deception, regardless of the victim's wariness in her interactions on the Internet and susceptibility to being deceived."[22]

As demonstrated above, social networking sites can potentially contain a plethora of information useful for litigation, but attorneys must understand the ethical and evidentiary rules associated with discovering such evidence.

Finally, attorneys themselves must also be careful about their own profile pages, because even judges are turning to MySpace and Facebook to gather "impeachment" evidence to use against attorneys appearing in their courtrooms. For example, recently, a state court judge in Texas used Facebook to discover information and to admonish attorneys appearing in front of her.[23] The attorney in question had asked for a continuance from the judge due to a death in the family, but was later sanctioned by the judge when it was discovered that the attorney's Facebook profile page revealed a week full of drinking and partying.[24]

In conclusion, Facebook could potentially be a very useful tool for litigators and their clients but, at the same time, both attorneys and clients must understand the potential perils of participating in, and searching, social networking Web sites.

1. See Fed. R. Evid. 401.
2. See Fed. R. Evid. 403.
3. *People v. Liceaga*, No. 280726, 2009 Mich. App. LEXIS 160, *7 (Mich. Ct. App. Jan. 27, 2009).
4. See id.
5. See Mich. R. Evid. 404(b)(1).
6. *Liceaga*, No. 280726, 2009 Mich. App. LEXIS 160 at *7.
7. See id. at *9. Although the appellate court found the trial court to have erred in not admitting this evidence, it found the error harmless. See id. at *10.
8. *United States v. Villanueva*, No. 08-12911, 2009 U.S. App. LEXIS 3852, *7 (11th Cir. 2009).
9. See Molly McDonough, "Trial Consultants Add Facebook/MySpace to Juror Research Toolbox," A.B.A. J., Sept. 29, 2008, available at http://www.abajournal.com/news/trial_consultants_add_facebook_myspace_to_juror_research_toolbox/.
10. See Pamela Pengelley, "Spend Long Hours on Facebook? Claim You Can't Work and You're on the Hook!", Res Ipsa Loquitur, April 22, 2009, http://canadianlaw.wordpress.com/2009/04/22/spend-long-hours-on-facebook-claim-you-cant-work-and-youre-on-the-hook/, (citing *Bishop v. Minichiello*, B.C.J. No. 692 (S.C.J.) (2009)).
11. See id.
12. See Martha Neil, "In Seeming First, Aussie Court Says Default Judgment Can Be Served on Facebook," A.B.A. J. Dec. 15, 2008, available at http://www.abajournal.com/news/in_seeming_first_aussie_court_says_default_judgment_can_be_served_on_facebo/.
13. See N.Y. C.P.L.R. §308(5) (McKinney 2001); see also N.Y. C.P.L.R. §311(b) (regarding service on corporations).
14. *Hollow v. Hollow*, 193 Misc.2d 691, 696 (N.Y. Sup. Ct. 2002).
15. *Snyder v. Energy Inc.*, 19 Misc.3d 954, 963-64 (N.Y. Civ. Ct. 2008).
16. See id. at 1234.
17. The Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02 (March 2009).
18. See id.
19. Id.
20. Id.
21. Id.
22. Id.
23. See Molly McDonough, "Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches," A.B.A. J., July 31, 2009, available at http://www.abajournal.com/weekly/facebooking_judge_catches_lawyers_in_lies_crossing_ethical_lines_abachicago.
24. Id.

Reprinted with permission from the September 8, 2009 edition of the NEW YORK LAW JOURNAL© 2009 Incisive US Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 070-09-09-18