

THE USE OF INFORMATION POSTED ON FACEBOOK AND MYSPACE IN LITIGATION

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Over the past five years, social networking websites such as MySpace¹ and Facebook² have boomed in popularity. MySpace has 125 million users³ and Facebook⁴ has a staggering 200 million users.⁵ Initially intended for college-aged students, social networking websites are now open to the public and attract a plethora of subscribers, ranging from teenagers to grandparents.⁶

Social networking websites function like virtual yearbooks. Participants form a "profile page," which contains up to forty pieces of information, including name, age, birthday, hobbies, interests, pictures, and videos.⁷ On both Facebook and MySpace, users can secure the privacy of their pages so that their pages are only accessible to website "friends."⁸ However, if the user does not secure the access to his or her profile, the profile remains unrestricted, and available for public viewing.

FACEBOOK IN THE LITIGATION PROCESS:

As social networking websites grow in popularity, attorneys are utilizing these services in both criminal⁹ and civil litigation. Because social networking profiles reveal an array of personal information, these sites can be invaluable resources for attorneys looking to gain insight into parties involved in litigation. Jurors also gravitate to MySpace and Facebook.¹⁰ In addition, "MySpace, Facebook, and blogs can also be beneficial when preparing to take or defend depositions, or when hiring experts."¹¹

USING INFORMATION POSTED ON SOCIAL NETWORKING WEBSITES TO UNDERMINE PENDING LITIGATION

Social networking website profiles can contain information that corroborates or undermines a plaintiff's case. In 2006,

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1. MySpace Home Page, <http://www.Myspace.com> (last visited Aug. 6, 2009).
2. Facebook Home Page, <http://www.Facebook.com> (last visited Aug. 6, 2009).
3. Ryan Nakashima, *MySpace to cut 30% of workforce*, Usatoday.com, June 16, 2009, http://www.usatoday.com/tech/news/2009-06-16-myspace-cuts_N.htm?loc=interstitialskip.
4. See Jessi Hempel, *How Facebook is taking over our lives*, Cnnmoney.com, Feb. 19, 2009, http://money.cnn.com/2009/02/16/technology/hempel_facebook.fortune/index.htm (noting that Facebook grows by five million users per week).
5. Nakashima, *supra*.
6. Hempel, *supra* (recognizing the "college and post-college crowd the site [Facebook] originally aimed to serve (18- to 24 -year olds) now makes up less than a quarter of users.>").
7. Facebook About, <http://www.facebook.com/facebook?ref=pf>.
8. Facebook Privacy, <http://www.facebook.com/policy.php?ref=pf>; MySpace Privacy Policy, <http://www.myspace.com/index.cfm?fuseaction=misc.privacy>.
9. See *United States v. Ebersole*, 263 F. App'x. 251, 253 n.4 (3d Cir. 2008) (noting defendant's MySpace page was admitted into evidence); *Michigan v. Liceaga*, No. 280726, 2009 Mich. App. LEXIS 160, at *11-12 (Mich. Ct. App. Jan. 27, 2009) (holding trial court did not erroneously admit evidence of MySpace photographs, which supported State's contention that the trial court properly found defendant committed second degree murder and was in possession of a firearm during the commission of a felony).
10. See *United States v. Fumo*, No. 06-319 (E.D. Pa. July 9, 2009), available at <http://www.paed.uscourts.gov/documents/opinions/09D0800P.pdf> (denying defendant's motion for a new trial due to juror posting trial-related information on Facebook and Twitter during jury deliberations).
11. Karen L. Stevenson, *What's On Your Witness's MySpace Page?*, ABAnet.org, Mar. 2008, http://www.abanet.org/litigation/litigationnews/2008/march/0308_article_myspace.html.

three fraternity brothers appearing in the movie *Borat* sued the movie's producers.¹² The brothers' complaint alleged that producers told them *Borat* "would not be shown in the United States and would not disclose [the brothers'] names or names of their fraternity or University."¹³ The brothers further contended they were heavily intoxicated when they signed the waiver release.¹⁴

The Smoking Gun website, famous for publishing entertainment industry information, procured the brothers' names and linked their names to particular MySpace pages.¹⁵ One brother's page contained many pictures of him consuming alcohol.¹⁶ This page significantly undermined the brother's contention that alcohol inhibited his ability to understand the waiver.¹⁷ Ultimately, the Los Angeles Superior Court dismissed the case¹⁸ under California's Anti-SLAPP statute, "which is designed to allow for the dismissal of lawsuits that attempt to silence legitimate speech."¹⁹

DISCOVERABILITY OF INFORMATION POSTED ON FACEBOOK OR MYSPACE

Increasingly, attorneys are filing discovery motions to obtain Facebook and MySpace information; however, there is ambiguity surrounding the permissibility of this strategy. The ambiguity is magnified "because specific rules governing the discoverability of online personal information have not kept pace with new opportunities for online expression, which are being developed faster than regulations can be revised or promulgated."²⁰

Contradictory decisions by courts that have addressed the issue have added to the confusion. Some courts take the view that information posted on social networking websites is discoverable. In *Beye v. Horizon Blue Cross Blue Shield of New Jersey*,²¹ the plaintiffs, parents suing in the names of their minor children, argued that the defendant insurance company wrongfully refused to cover medical costs associated with their children's eating disorders.²² The defendant petitioned for access to the children's social networking websites, alleging the websites contained information pertinent to the pending litigation.²³ The plaintiffs argued the information was irrelevant and that releasing the information would be harmful to the children.²⁴ The United States District Court for the District of New Jersey agreed with the defendant, and ordered the plaintiffs to produce information posted on their daughters' Facebook and MySpace pages.²⁵ The court emphasized "both the idea of individual responsibility when using social networking sites and a lowered expectation of privacy where the person asserting a right to privacy is the same person who made the information public in the first place."²⁶

The court in *Mackelprang v. Fidelity National Title Agency*²⁷ reached a similar conclusion as the court in *Beye*. In *Mackelprang*, the court recognized the defendants were "entitled to discover information relevant to [p]laintiff's alleged emotional distress and her mental condition, which she [had] placed at issue in [the] case."²⁸ However, the court denied the defendants' motion to compel production of

12. *John Doe 1 v. One Am. Prods., Inc.*, No. SC091723 (Cal. App. Dep't Super. Ct. Nov. 8, 2006), available at <http://www.slate.com/id/2153647>.

13. *Id.*

14. *Id.*

15. The Smoking Gun, *Bamboozled By Borat?*, Nov. 13, 2006, <http://www.thesmokinggun.com/archive/1113061borat1.html>.

16. Rebekah Jennings, *Frat Brothers Lash Back at 'Borat'*, The GW Hatchet, (Nov. 6, 2006), available at <http://media.www.gwhatchet.com/media/storage/paper332/news/2006/11/20/UWireDcBureau/Frat-Brothers.Lash.Back.At.borat-2506367-page2.shtml>.

17. *Id.*

18. Peter Lattman, *Legal Learnings of America: California's Anti-SLAPP Statute*, Wall St. J. Law Blog, Mar. 7, 2007, <http://blogs.wsj.com/law/2007/03/07/legal-learnings-of-america-californias-anti-slapp-statute/>.

19. *Id.*

20. Ronald J. Levine & Susan L. Swatski-Lebson, *Are Social Networking Websites Discoverable?*, Law.com, (Nov. 13, 2008), available at <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202425974937&hbxlogin=1>.

21. See *Beye v. Horizon Blue Cross Blue Shield of N.J.*, 568 F. Supp. 2d 556, 579 (D.N.J. 2008) (denying in part, and granting in part, defendant's motion to dismiss plaintiff's complaint).

22. *Id.* at 559.

23. Brief for Plaintiff, *Beye v. Horizon Blue Cross Blue Shield of N.J.*, 568 F. Supp. 2d 556 (FSH)(PS) (D. N.J. 2008).

24. *Id.*

25. Levine & Swatski-Lebson, *supra*.

26. *Id.*

27. No. 2:06-cv-00788-JCM-GWF, 2007 U.S. Dist. LEXIS 2379 (D. Nev. Jan. 9, 2007).

28. *Id.* at *24-25.

plaintiff's MySpace messages without prejudice, because the defendants merely speculated that the plaintiff's account contained relevant information.²⁹ The court indicated that if the defendants properly served the plaintiff with a request for "relevant email communications,"³⁰ the deficiency would be overcome.³¹

Other courts, however, take the alternative view, holding that information on social networking websites is private and should be protected from discovery. In *T.V. v. Union Township Board of Education*, the court held that the information on the plaintiff's Facebook and MySpace pages was protected because "the student's privacy interests prevailed, absent a particularized showing of relevance . . ."³² Nevertheless, the court did leave "open the possibility that ongoing discovery might provide a basis to change [its] mind."³³

INVASION OF PRIVACY SUITS STEMMING FROM INFORMATION POSTED ON FACEBOOK OR MYSPACE

Since "traditional tort law does not recognize invasions of privacy that occur in public, [arguing] that information posted on social networking sites should not be discoverable because it is 'private' is an uphill battle."³⁴ Successful privacy violations require the plaintiff demonstrate he or she had a subjective expectation of privacy at the time of the invasion.³⁵ Proof of this expectation is difficult to demonstrate, because "the inherent nature of the profile . . . works against any notion of an expectation of privacy."³⁶ Accordingly, there is a

presumption that an individual who posts information to a social networking website does not have a reasonable expectation of privacy in the information he or she posts.

Few invasion of privacy cases have arisen from the improper use of information posted on Facebook and MySpace. In *Moreno v. Hanford Sentinel, Inc.*,³⁷ the plaintiff, Cynthia Moreno, posted an article on her MySpace page that contained disparaging remarks about her hometown Coalinga, California.³⁸ The principal of Coalinga High School obtained the article and forwarded it to the town newspaper for publication.³⁹ After the article was published, Moreno and her family received scores of negative reactions from community members, eventually resulting in the closing of her family's business.⁴⁰ Moreno and her family sued the newspaper's publishers for invasion of privacy.⁴¹

A successful invasion of privacy claim requires the plaintiff to have a reasonable expectation of privacy in the "public disclosure of *private facts*."⁴² The court in *Moreno* noted, however, that information posted on a public social networking profile is open to the "public eye," and thus, an individual who posts the information cannot have a reasonable expectation of privacy in that information.⁴³ Additionally, the court recognized that the right to privacy "is purely personal" and "cannot be asserted by anyone other than the person whose privacy has been invaded."⁴⁴ Because Moreno's MySpace page was not secured, the court held that neither Moreno nor her family could assert a successful right to privacy claim.⁴⁵

29. *Id.*
30. *Id.* at *25-26.
31. *Id.*
32. Mary Pat Gallagher, *MySpace, Facebook Pages Called Key to Dispute Over Insurance Coverage for Eating Disorders*, New Jersey Law Journal (Feb. 1, 2008), available at <http://www.law.com/jsp/article.jsp?id=1201779829458>; see also Henry Gottlieb, *MySpace, Facebook Privacy Limits Tested in Emotional Distress Suit*, N.J. Law Journal (June 14, 2007), available at <http://www.law.com/jsp/article.jsp?id=1181725536838> (recognizing the court in *T.V.* held: "Without a particularized showing that the [MySpace and Facebook] texts are relevant, the plaintiff's privacy interests prevail").
33. Gallagher, *supra*.
34. Levine & Swatski-Lebson, *supra*.
35. *Id.*
36. *Id.*
37. 172 Cal. App. 4th 1125 (Cal. Ct. App. 2009).
38. *Id.* at 1128.
39. *Id.* at 1128-29.
40. *Id.* at 1129.
41. *Id.*
42. *Id.* at 1130.
43. *Moreno*, 172 Cal. App. 4th at 1130.
44. *Id.*
45. *Id.*

SURF WITH CAUTION

Until courts address the issues surrounding the use of social networking websites in litigation, the penalties for doing so remains unclear. Attorneys and others using social networking websites as a litigation tool would be wise to “surf the web” carefully.

If an attorney accesses a social networking profile through deceptive tactics, the attorney could violate state privacy and tort laws.⁴⁶ Additionally, a Philadelphia Bar Association (“PBA”) opinion letter recognizes that it is unethical for an attorney to surreptitiously access a social networking profile page of any party involved in litigation.⁴⁷ The Opinion notes that accessing witnesses’ profile pages through deceptive conduct violates the Pennsylvania Rules of Professional Conduct.⁴⁸ The PBA’s opinion mirrors other states’ interpretations.⁴⁹

Although information from social networking websites has been used sparingly in litigation thus far, the use of these websites in court likely will increase as even more individuals subscribe to them. The law in this area will continue to develop, hopefully providing clearer guidance for attorneys and others seeking to use social networking websites in litigation.

46. See Ian Byrnsie, *Six Clicks of Separation: The Legal Ramifications of Employers Using Social Networking Sites to Research Applicants*, 10 Vand. J. Ent. & Tech. L. 445 (2007) (discussing ramifications for employers accessing employees’ social networking websites).

47. Philadelphia Bar Ass’n. Comm. on Prof’l Guidance, Opinion 2009-02 (2009).

48. *Id.*

49. *Id.*