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LegalTECH

Social Networking Websites: How to Reap the Benefits and Avoid the Hazards, Part II


John J. Cord & Robert K. Jenner

Discoverability of Electronic Communication

Aggressive defense counsel are now seeking discovery of social networking sites of plaintiffs and witnesses. Formal discovery permits defendants several options to obtain that information.

Written Discovery to Plaintiff

Defendants may serve interrogatories requesting that plaintiff provide his username and log-in code for specific social networking sites, allowing defendant to perform a virtual home invasion. These requests should be objected to as overbroad, unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff should refuse to provide this information except under court order, and should argue that these requests represent a fishing expedition that can only succeed in wholly violating plaintiff's personal privacy. Court opinions on the issue are unfortunately divided.

Less brazen than requesting usernames and passwords are requests for production of documents that seek print-outs of the pages from social networking sites. These requests may be narrowly tailored to the case, or may be broad. You should lodge objections to these, as well.

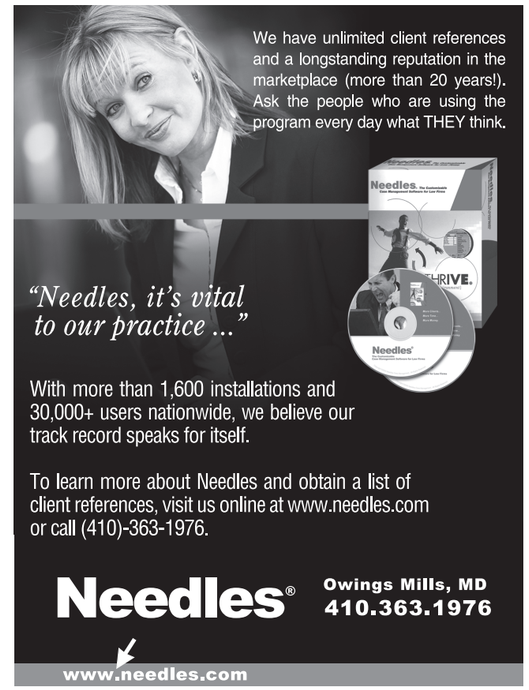
In one recent Connecticut federal case, *Bass v. Miss Porter's Sch.*, the court found that plaintiff's entire Facebook account, reduced to 750 pages, was discoverable.[1] In that case, defendant asked plaintiff to provide Facebook information narrowly related to plaintiff's allegations (plaintiff received his Facebook information by subpoena).[2] The plaintiff objected to those requests as irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.[3] The court ordered production of all 750 pages after an *in camera* review, ruling that plaintiff's decision to provide only 100 pages was too limited. "[P]roduction should not be limited to Plaintiff's own determination of what maybe [sic] 'reasonably calculated to lead to the discovery of admissible evidence.'"[4] This is a worrisome ruling for plaintiffs, as it permits the very fishing expeditions that the discovery rules are designed to prevent.[5]

However, a Nevada court reached a contrary conclusion in *Mackelprang v. Fidelity Nat'l Title Agency of Nev., Inc.*, ruling that the defendant was only entitled to serve "properly limited requests for production of relevant e-mail communications."[6] There, plaintiff was not obliged to produce all social networking communications.

Request to Plaintiff to Sign Authorization

In light of the reluctance of many social networking websites to comply with subpoenas, many defendants will attempt to force plaintiff to sign an authorization allowing disclosure of information from the websites.[7] This is exactly

1 *Bass v. Miss Porter's Sch., et al.*, No. 3:08cv1807, 2009 U.S. Dist LEXIS 99916, at *4 (D. Conn. Oct. 27, 2009).
2 *Id.* at *1-2.
3 *Id.* at *2.
4 *Id.*
5 *See also* the consolidated cases of *Beye v. Horizon Blue Cross Blue Shield of N.J.*, No. 06-5337, (D. N.J. Dec. 26, 2006) and *Foley v. Horizon Blue Cross Blue Shield of N.J.*, No. 06-6219, (D. N.J. Dec. 26, 2006 (court ordered disclosure of e-mails and writings "shared with other people").
6 No. 2:06-cv-00788-JCM-GWF, 2007 U.S. Dist. LEXIS 2379, at *25 (D. Nev. Jan. 9, 2007).
7 See "Subpoenas to Hosts of Social Networking Site," *infra.*



what the *Ledbetter* defendant did when its subpoenas to three social networking websites failed.[8] It requested the court to order plaintiffs to sign an authorization allowing the third-party sites to release the requested information. Despite arguing that the proper course of action was to attempt to force the third-party sites to provide the information, and arguing that the authorizations contained waivers of liability that plaintiffs were not comfortable signing, the court ordered plaintiffs to execute the consents so that defendant could obtain the information.

A different result in *Mackelprang* favored the plaintiff. There, plaintiff sued her employer for sexual harassment.[9] The defendant filed a motion to compel plaintiff to execute consent forms to obtain e-mail communications from two MySpace accounts allegedly set up by Plaintiff.[10] The court agreed that "Defendant is engaging in a fishing expedition since, at this time, it has nothing more than suspicion or speculation as to what information might be contained in the private messages."[11] The court examined the relevance and discoverability of evidence in sexual harassment lawsuits, and determined that intrusion into Plaintiff's privacy did not warrant wholesale production of messages where there was no indication of relevance, and no indication that the messages contained sexually related communications between plaintiff and co-employees.[12]

8 *See Ledbetter v. Wal-Mart Stores, Inc., et al.*, n.14, *infra.*
9 *See* n.7, *supra.*
10 *Id.* at *4.
11 *Id.* at *7.

12 *Id.* at *19.
13 Order Denying Plaintiff's Motion for Protective Order, docket entry 179, *Ledbetter v. Wal-Mart Stores, Inc.*, et al., No. 1:06-cv-01958-WYD-MJW, (D. Colo. Apr. 21, 2009).
14 *Id.* The court denied the motion for protective order, opining that plaintiffs' privacy rights were sufficiently protected by an earlier stipulated confidential order that precluded public dissemination of private information.

Subpoenas to Hosts of Social Networking Site

Defendants' subpoenas directly to the social networking companies will oftentimes be unsuccessful because the site administrators fiercely object to providing this information. In *Ledbetter v. Wal-Mart Stores, Inc., et al.*, the U.S. District Court for the District of Colorado denied plaintiffs' motion for protective order from defendant's subpoenas of Facebook, MySpace, and Meetup.com.[13] There, plaintiffs filed a suit alleging permanent physical and psychological treatment. While the parties were battling over the plaintiffs' motion for protective order, some of the social networking administrators refused to play ball.[14] Though the Court went so far as to conclude that "the information sought within the four corners

You cannot adequately represent your clients in the 21st century unless you have some working knowledge of online social networking.

of the subpoenas . . . is reasonably calculated to lead to the discovery of admissible evidence as it is relevant to the issues in this case," defendant faced another hurdle.[15] Some of the social networking sites refused to comply, stating that there was no authority for defendant to subpoena the requested information.[16] Agreeing with the third-party sites, who cited the Stored Wire and Electronic Communications Act, 18 U.S.C. 2702 *et seq.*, defendant admitted that it was effectively "stymied in its efforts to discover the information."[17]

Facebook tends to resist subpoenas, and only provides publicly available information absent consent from the account holder.[18] However, the options for on-line social networking expand every day, and each company will have its own policies and procedures for dealing with subpoenas and court orders. Furthermore, even those companies that have resisted subpoenas, like Facebook, may reverse their stated policies at any time.

Other Methods to Obtain Discovery

Defendants may seek to depose plaintiff's on-line friends, and may further request that they provide access or hard copies of plaintiff's social networking pages, to the extent available to them.

Importantly, social networking users sometimes do not let the user engage full privacy settings on their sites; that is, the information posted on the site is available to everybody on the internet. Anything generally accessible is probably discoverable, and defendants do not need formal discovery procedures to point and click.

Social Networking at Trial

Communication Devices

Most courts appear to be dealing with the reality of social networking on a very reactive basis. Given the relatively recent popularity of networking sites, courts and rules committees have not yet addressed networking in the courtroom. Judges are being forced to impose restrictions with very little guidance.[19][20] The principal issue presented to judges is whether to allow lawyers, witnesses and jurors access to their cell phones that almost universally permit text messaging, if not internet access. With internet access, the user has direct access to read and post messages on sites like Twitter and Facebook.

Some courthouses ban cell phones in the building, which may prevent many problems from arising in simple one-day trials.[21] Even so, unless a jury is restricted from accessing their cell phones during lunch or breaks, or unless the jury is sequestered in multiple day trials, social networking problems are certain to arise.[22] Attorneys should be aware of and plan for that eventuality.

15 *Id.*
16 Motion to Compel Production of Content of Social Networking Sites, docket entry 185, *Ledbetter v. Wal-Mart Stores, Inc., et al.*, No. 1:06-cv-01958-WYD-MJW, (D. Colo. May 26, 2009). *See also Mackelprang*, n.7 (Facebook likewise refused to comply with a subpoena for private account information). This appears to be Facebook's current position on the matter.
17 *Ledbetter, supra*, Motion to Compel, n.19.
18 See, e.g., Declan McCullagh, *Facebook fights Virginia's demand for user data photos* (Sept. 14, 2009) <http://news.cnet.com/8301-13578_3-10352587-38.html?tag=newsLeadStoriesArea.1>.

19 During author John Cord's most recent trial in Baltimore County Circuit Court, Judge Judith Ensor advised the jury in opening statements that they were not to discuss or research the case in any fashion, including exploration of television, print or online media, and that they were not allowed to "post messages, texts or tweet, or anything else like that, and you [jurors] know what I am talking about—no funny business." *Buechler v. Mapp*, No. 03-C-08-007338 (Aug. 26, 2009).
20 Finding that reporters could not use Twitter at trial, one federal Georgia judge recently held that Rule 53 of the Federal Rules of Civil Procedure precludes the "broadcast" of live-action tweets during trial. His ruling was directed at reporters, but could be interpreted to apply to lawyers, witnesses and parties. Martha Neil, *Federal Judge Calls Courtroom Tweets Banned Broadcasts Under Rule 53* (Nov. 9, 2009) <http://www.abajournal.com/news/article/federal_judge_calls_courtroom_tweets_banned_broadcasts_under_rule_53/> (link to order included).
21 Posting of Marcia Oddi to Indiana Law Blog, *Ind. Courts – Still More On: Managing the Electronic Communication Revolution in the Indiana Courtroom*, http://indianalawblog.com/archives/2009/08/index.html (Aug. 11, 2009). The Southern District of New York is testing a rule allowing preauthorized counsel to bring in electronic devices, and requiring all other attendees (including witnesses and jurors) to check their devices in the lobby. *Id.*
22 American Assoc. for Justice, *Texts and "tweets" by jurors, lawyers pose courtroom conundrums* (Aug. 1, 2009) <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/10049.htm>. The Michigan Supreme Court recently banned all electronic communication by jurors while in the jury box and during deliberations. Id.

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There is no uniform rule on electronic communications in Maryland's state courts. A recent proposed rule would have provided some consistency, but it was rejected, leaving the administrative judges to craft rules specific to their courthouses, and individual judges to issue orders controlling their courtrooms.[23]

The rule on electronic communication devices in Maryland's federal courts is that "[c]ell telephones, pagers, portable electronic games, portable laptop computers, Palm Pilots, etc., are permitted in the courthouse, but MAY NOT be used in courtrooms or jury rooms. These items are subject to a security inspection."[24] There is no official provision for lawyers' use of these devices during trial, so a practical approach would be to request permission from the judge.

Lawyers

Lawyers can use social networking and electronic communications during trial to prosecute their case. By having a laptop and a broadband card (or with a telephone call to the office), a lawyer can perform quick research on potential jurors during *voir dire*, and on the paneled jury after the close of jury selection. Lawyers should check to see if those jurors belong to groups or are "fans" of any organization that might reveal more about opinions or beliefs that may influence their decision-making process in the trial.

Lawyers would be wise to check up on website and social networking posts of the opposing party[25] and opposing counsel periodically during the trial to ensure that they are not attempting to prejudice the jury improperly. The jury may see those sites, so counsel must be vigilant to protect the purity of the jury.

However, lawyers should be wary of posting information about the case on their social networking sites and websites immediately before or during trial. Those posts may raise concerns about tainting the jury given the likelihood that some jurors are likely to defy the court's instructions against researching the case or the lawyers. Lawyers should ensure before trial that their website does not contain any objectionable content.

Witnesses

At least one court has dismissed a case because of text messaging to the witness stand. In a civil fraud case in the Circuit Court of Miami-Dade County, Florida, the plaintiff's employees were sending text messages during the testimony of one of the employees.[26] The judge's dismissal order noted: "Nothing this judge has seen holds a candle to plaintiff's egregious and deliberate attempts to subvert our justice system. . . . This case emphasizes the need for judges and attorneys alike to be vigilant." Again, counsel must be vigilant, and must pay attention to the actions and movements of witnesses, parties, and counsel in their cases.

Jurors

Jurors may be tempted to use internet searching,[27] social networking and electronic communication at multiple times during the course of their jury service. A San Francisco Superior Court judge recently dismissed an entire *venire* of 600 jurors after discovering that many of them had researched the case.[28] Particularly for high-profile cases, would-be jurors may receive notice of case facts via social networking sites

In the Missouri state court case of *Gessling v. Ford Motor Co., et al.*, members of the jury used electronic communication devices during deliberations to access a press release issued the day before by Ford, the defendant, that publicized its fourth quarter loss of nearly $6 billion. The jury held that the wrongful death and personal injuries of a husband and wife were caused by the defendant driver, but allocated no fault against Ford in plaintiffs' claims of a defective roof. Counsel's conversations with jurors after the verdict revealed that nine of the 12 jurors refused to find Ford culpable, because of its substantial losses.[29]

In the highly publicized corruption trial of former Pennsylvania state senator Vincent Fumo, one juror posted updates on his Twitter and Facebook page, including "stay tuned for a big announcement on Monday everyone!" The juror was questioned, but allowed to deliberate after the judge found his testimony credible that he had not received any outside influences.[30] Similarly, in an Arkansas defective product case, a juror posted a comment on Twitter a few days before the verdict was rendered, including one that the defendant corporation would "probably cease to exist, now that their wallet is $12 million lighter."[31] The judge denied defendant's motion to set aside the verdict, noting that there was no indication that the juror was influenced by outside information, and did not appear to be partial to either party before deliberations.[32]

The San Francisco Superior Court has proposed a rule that would include a cover sheet on juror questionnaires with the warning: "You may not do research about any issues involved in the case. You may not blog, Tweet, or use the internet to obtain or share information."[33] In one San Diego case, a judge required jurors to sign declarations under the penalty of perjury before and after service attesting that they would not and did not use "personal electronic and media devices," including cell phones, and computers, to research or communicate about any aspect of the case.[34]

Conclusion

Regardless of whether you embrace technology, you cannot adequately represent your clients in the 21st century unless you have some working knowledge of online social networking. Your clients use it. The witnesses use it. Opposing counsel uses it. You have to protect your clients by making sure they understand the possibility that their on-line posts will be used, and you must do your best to use the posts of others, including the opposing party and jurors, to maximize your client's chances at trial. If you are still stumped or overwhelmed by the e-world of social networking, just ask a 13 year old. ❋

Biography

John J. Cord, *Miller & Zois, LLC*, graduated from the University of Colorado School of Law. He concentrates his practice on assisting victims of automobile negligence, medical malpractice, and defective products. He is licensed to practice in Maryland, the District of Columbia, Pennsylvania, Georgia and Minnesota. He is a member of the American Association for Justice and is a former chair of the MAJ Technology Committee. Read his blog at www.drugrecalllawyer.com, and follow him on Twitter at @johnjohncord.

Robert K. Jenner is a principal in the Baltimore, Maryland law firm of *Janet, Jenner & Suggs*. He has 25 years experience representing consumers against the manufacturers of dangerous pharmaceutical drugs and defective medical devices. Rob has been honored by his peers for inclusion in the Best Lawyers in America® the Maryland Superlawyers®.

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23 Proposed Rule 18-XXX can be found at http://www.mdcourts.gov/rules/agenda/agenda.pdf.

24 United States District Court for the District of Maryland, Court Security http://www.mdd.uscourts.gov/courtinfo/security.asp (last visited Nov. 24, 2009).

25 Even corporations have social networking pages. For example, Ford, Delta Airlines, Johns Hopkins and Howard County, Maryland all have active Twitter pages.

26 Laura Bergus, *Texting to the Witness Stand is an "Egregious and Deliberate Attempt to Subvert Our Justice System"* (Aug. 18, 2009) <http://socialmedialawstudent.com/social-media/texting-to-the-witness-stand-is-an-egregious-and-deliberate-attempt-to-subvert-our-justice-system/>. The dismissal occurred just weeks after a magistrate judge reprimanded another employee of the plaintiff for passing a note to a witness during a deposition.

27 Twitter and Facebook status updates may soon be obtainable by a simple Google or Microsoft Bing search. *See* Caroline McCarthy, Report: *Bing nails search deals with Twitter, Facebook* (Oct. 21, 2009) <http://www.pcworld.com/article/174050/microsoft_bing_strikes_major_search_integration_deals_with_twitter_facebook.html>.

28 Josh Camson, *Courts Cracking Down on Jurors* (Sept. 17, 2009) <http://socialmedialawstudent.com/featured/courts-cracking-down/>.

29 *Gessling v. Ford Motor Company, et al.*, Case No. 04-CV-167401 (Mo., Boone County Circ. Ct.). Counsel for plaintiffs raised the issue of the "untimely" press release with the judge, but to no effect.

30 *U.S. v. Fumo*, No 06-CR-319-03 (E.D. Pa., Jun. 17, 2009).

31 *Deihl & Nystrom v. Stoam Holdings*, (Ark., Wash. County Circ. Ct).

32 Martha Neil, ABA Journal, "Juror Tweets in $12.6M Case Teach Lawyer a Lesson: Ask About Web Use," 4/8/09, http://www.abajournal.com/news/article/sweet_news_for_plaintiff_in_12.6m_case_jurors_tweets_wont_change_verdict

33 See n.38, *supra*.

34 *Id.*