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Social networks in personal injury litigation

The use of social networking sites has in a short period of time become a ubiquitous feature of our society. Facebook, which made its appearance in 2004, now boasts 500 million members[FOOTNOTE 1] and its growth curve has been an exponential, rather than a linear one. MySpace, Twitter, LinkedIn, commercial dating sites, and limited membership blogs have also experienced explosive growth and it is the rare individual under the age of 30 who is not a participant in some way, shape, or form. Issues involving information exchanged via social networks have assumed a prominent role in litigation involving family law, criminal law (including cases involving identity theft, as well as the sentencing aspects of just about any type of crime), defamation, intellectual property, and right of publicity, and, in an indirect way, have touched on the discovery aspects of cases in a variety of other substantive disciplines as well.[FOOTNOTE 2]

Their presence has not been limited to uncovering information about litigants, but has created ethical issues for attorneys involving gag orders,[FOOTNOTE 3] whether an attorney may solicit the assistance of a third party (or investigator) to "befriend" a litigant,[FOOTNOTE 4] and even whether the basis for an adjournment request before the judiciary was legitimate.[FOOTNOTE 5] Information developed from social networking sources has not only been used in connection with substantive positions, but has been utilized to form the basis for service of process in substituted service situations.[FOOTNOTE 6]

In the personal injury arena, information derived from social networking sites is most frequently sought or employed to contest a claim of physical limitation or emotional suffering, although it has, on occasion, been used by a plaintiff against a defendant as an alternative to more traditional website information in connection with representations concerning professional capabilities, inappropriate comments made by the professional[FOOTNOTE 7] or, in a case involving a University of Texas fraternity, the initiation activities posted by a fellow student which resulted in a student's death.[FOOTNOTE 8]

RELEVANCE AND PRIVACY

Around the time of the release of the film "The Social Network," the case of *Romano v. Steelcase Inc.*, [FOOTNOTE 9] was decided by Justice Arlen Spinner in Suffolk County. Although *Romano* is a lower court's decision relating to discovery, the decision received wide notoriety. [FOOTNOTE 10] *Romano* held that information contained in the "private" settings portion of a Facebook profile was discoverable since the "public" portion of the profile contained information suggesting that plaintiff was engaged in activities inconsistent with her claimed injuries.

While it is well settled that private e-mails are credited with an expectation of privacy, courts have questioned whether there is a greater expectation of privacy in the "private" portion of a social network profile. [FOOTNOTE 11] One could easily see how information contained on a social networking site might be relevant to a variety of issues, but the concept that seems to have given some courts hesitation in terms of requiring exchange of such information is the notion that such information is labeled "private." The issue that has been examined is whether information placed on such a site and labeled "private" really is intended or expected to be private.

Canadian courts seem to have examined this issue quite thoroughly. In *Murphy v. Preger*, [FOOTNOTE 12] the court noted that while the information was contained in the "private" portion of the profile, the plaintiff had 366 "friends" who had access to that portion of the site, not to mention that each of those "friends" had the ability to further disseminate aspects of the information to others. While Facebook controls encourage an expectation of privacy, they simultaneously warn the public that "users should understand that information may be reshared or copied by other users." [FOOTNOTE 13] Thus, a network profile is hardly akin to a personal diary.

Most social networking sites provide a viewer the ability to disseminate the identity of an (unwilling) participant whose photo has been posted and tagged even if the photo is of a person who is not a participant in the network. In such a case, the reduced expectation of privacy might be found in complicity in terms of permitting the photo to be taken, rather than in voluntarily disseminating it to anyone. For the most part, the cases hold that it is an objective expectation of privacy rather than the participant's subjective expectation of privacy that controls. [FOOTNOTE 14]

One would think that the age and sophistication of the user might be relevant to this analysis, but this has not as yet been the focus of most courts' decisions. While employers in the United States have utilized social networks to screen applicants, [FOOTNOTE 15] there have been decisions in other countries limiting an employer's ability to use such sites to unearth information about a prospective employee, [FOOTNOTE 16] and one could envision similar support for limiting its use by colleges in terms of the application process. [FOOTNOTE 17]

On the other hand, the contention that a court should permit access to such information for impeachment purposes or as a shield to prevent a fraudulent or embellished claim seems to be a more persuasive argument and, indeed, has gained wider acceptance.[FOOTNOTE 18]

THE NEW SURVEILLANCE

DiMichel v. South Buffalo Ry. Co., [FOOTNOTE 19] subsequently codified by CPLR 3101(i), requires a defendant to disclose surveillance tapes as part of the discovery process in an effort to further the truth seeking process. One might question whether disclosure of surveillance tapes actually furthers the truth seeking process or merely prevents the commission or embellishment or fraud by an unsuspecting plaintiff. The practical effect of disclosure of surveillance materials is to permit the subject of the videos to reconcile the video information with his or her claims. In contrast, the distinct advantage of social networking profile information is that since the material was voluntarily posted by the user, it is more difficult to minimize as a practical matter, and may also constitute prior inconsistent statements.

Moreover, the statements, photos, and even linked videos often tend to embellish activities and emotional state in a positive way since outside the context of a personal injury suit most people on a social networking site tend to place their best foot forward. An additional benefit of obtaining information from such a source is that since it was created by the litigant, it is not subject to a claim of surprise or lack of notice and arguably need not be disclosed during discovery. Finally, information obtained from this type of source does not bear the same invasion of privacy stigma as does similar material obtained via surveillance.

INTERESTS OF THE PROVIDER

As a general proposition, ownership of information in general and ownership of a social networking site in particular are not relevant to discoverability.[FOOTNOTE 20] While the release of such information may be subject to the Stored Communication Act or the Electronic Privacy Act, courts have held that these acts should not be interpreted to preclude the release of discoverable information in the context of a lawsuit where it has been judicially determined that such information is relevant.[FOOTNOTE 21] While the owner of such a site might oppose the release of this type of information, as it might tend to make the site less attractive to users, this is probably not an interest that would be credited by a court in deciding a relevance/privacy issue between litigants.

PRACTICAL, EVIDENTIARY ISSUES

In *Leduc v. Roman*, [FOOTNOTE 22] a Canadian Court provided a viable procedural

framework for the request and release of information from a social networking site. While the Canadian discovery system is somewhat different than ours, the court, as did the *Romano* court, held that the burden is initially on the requesting party to demonstrate relevance via questions at a deposition or via access to the public aspect of the account. In *Leduc* further questioning was permitted concerning the "private" aspects of the profile. A stricter standard relating to relevance at trial, rather than the discovery standard of reasonably calculated to lead to relevant information would, of course, apply.

On occasion, authenticity and hearsay issues regarding material obtained from a social networking site have arisen.[FOOTNOTE 23] Authenticity in the context of electronic communications requires testimony concerning knowledge of the party's address and social network name, coupled with testimony that a printout appears to be an accurate record of a conversation or posting. Of course, information required to be provided by an adversary during discovery would likely be an admission and would not require such a showing.[FOOTNOTE 24] As a practical matter in New York, the "public" profile section of a litigant's social network information could be requested as part of routine discovery requests interposed at the time of the answer. An approach perhaps better calculated to develop an inconsistency might be to perform a Google search to determine the existence of participation in such a network and then elicit deposition testimony concerning the litigant's limitations and, thereafter, inquire into and develop information concerning membership and participation on such networks against which claims of limitation could be measured.

Because of the possibility that information may have been deleted from a profile, it is advisable to not just request information from the litigant, but to also obtain an authorization or subpoena for deleted information from the site. In connection with the issue of deleted information, several cases addressing the issue of spoliation have arisen.[FOOTNOTE 25] Suffice it to say that efforts to alter or delete profile information in the context of a lawsuit have not been countenanced by the courts.

CONCLUSION

Social network profiles are a fertile source of information concerning a litigant's physical and emotional condition and recent activities. While privacy concerns may be set forth as a basis for objection to disclosure, the very nature and intent of networking activities tend to belie this position. While social networks have become a rapidly expanding and increasingly entrenched aspect of our society, the law in this area is still developing. Given what is known about human nature, it is hard to imagine that court decisions requiring disclosure will provide a significant deterrent to the users of these networks. Absent some type of legislation, it would appear that these sites will continue to enjoy unbridled popularity, occasionally at the expense of a litigant's personal injury claim.

FOOTNOTES

- FN1 Zuckerberg, Mark (2010-07-21). "500 Million Stories," Facebook, retrieved 2010-10-13.
- FN2 Nemet-Nejat, "Hey, That's My Personal!: Exploring the Right of Publicity for Blogs and Online Social Networks," 33 Colum J.L. & Arts 113 [Fall 2009]; Grimmelmann, "Notes From the New World: The Future of the Internet: The Internet Is a Semicommons," 22 Regent U.L. Rev. 1[2009-2010].
- FN3 Id.
- FN4 Phila. Bar Assoc. Prof. Guidance Committee Opinion 2009-02 [March 2009].
- FN5 McDonough, "Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches," A.B.A.J. [July 31, 2009].
- FN6 Brown and Kahn, Savvy "The Smoking Gun in an Adversary's Network," NYLJ, S2, col.1 [Sept. 8, 2009].
- FN7 Lockette, Timothy: "Future Doctors Share Too Much on Facebook, UF Researchers Say," University of Florida News, July 10, 2008.
- FN8 Minotti, "The Advent of Digital Diaries: Implications of Social Networking Web Sites for the Legal Profession," 60 S.C.L. Rev. 1057, Summer 2009 at 2.
- FN9 *Romano v. Steelcase Inc.* 2010 WL 3703242 (N.Y.Sup. Suffolk Co. 2010).
- FN10 Walder, Noeleen "Judge Grants Discovery of Postings on Social Media," NYLJ, [Sept. 24, 2010].
- FN11 *Mackelprang v. Fidelity Nat'l Title Agency of Nev. Inc.*, CV-S-00788-JCM GWF, 2006 U.S. Dist. Ct. Motions LEXIS 29843 (D. Nev. 11/27/06).
- FN12 *Murphy v. Preger*, Oct. 3, 2007, Court File 45623/04, unreported.
- FN13 Id.
- FN14 *Guest v. Leis*, 255 F.3d 333 (6th Cir. 2001).
- FN15 Parker, K. "Web Warning for Youths: Employers Are Watching." Real Clear Politics, March 9, 2007.
- FN16 Jolly, D. Germany Plans Limits on Facebook Use in Hiring, NYTimes.com, accessed 10/13/2010.
- FN17 Hechinger, J., "College Applicants, Beware: Your Facebook Page Is Showing," WSJ.com, accessed Oct. 13, 2010.
- FN18 *In re K.W.*, 666 S.E. 2d 490 (N.C. Ct. App. 2008).
- FN19 *DiMichel v. South Buffalo Ry. Co.*; 80 N.Y.2d 184, 604 N.E.2d 63 (1992).
- FN20 Boehning and Toal, "Social Networking Data Presents Challenges," NYLJ, Vol. 241, p. 5, Col.1 [June 30, 2009].
- FN21 *Romano v. Steelcase Inc.* 2010 WL 3703242 (N.Y.Sup. 2010).
22. *Leduc v. Roman*, 2009 Can LII 6838 (ON S.C., 2009).
- FN22 S.C.L.Rev. 1057, supra at fn. 1.
- FN23 *State v. Bell*, 882 N.E. 2d 502, 511 (Ohio Ct. Com. Pl. 2008).
- FN25 North, E. "Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites," Kansas L. Rev. Vol. 58 June 2010.

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