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Discovery of Social Media: Coming soon to a court near you

*by Raymond P. Ausrotas**

Several courts in sister jurisdictions have recently analyzed the discoverability of information and communications that parties have posted, personally, on various popular "social media" sites (such as FaceBook, Twitter and MySpace). Often, parties have objected to the production of information they have intended to be maintained as "private" or confidential under the host network settings, where disclosures are typically only limited to designated "friend" users. These efforts to resist discovery have largely been unsuccessful.

For example, in *Romano v. Steelcase Inc.,* 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010), a plaintiff claimed to have "sustained permanent injuries as a result of [an] incident [such] that she can no longer participate in certain activities or that these injuries have effected her enjoyment of life." *Id.* at 653. The defendant, by reviewing the plaintiff's "public" MySpace and Facebook pages found photographs showing that "she has an active lifestyle and has traveled to Florida and Pennsylvania during the time period she claims that her injuries prohibited such activity." *Id.* The defendant further uncovered a "page" on Facebook that showed the plaintiff "smiling happily in a photograph outside the confines of her home despite her claim that she has sustained permanent injuries and is largely confined to her house and bed." *Id.* at 654.

At deposition, the plaintiff refused to provide information concerning her MySpace and Facebook accounts, and subsequently refused to execute authorizations allowing the defendants to access her online social networks. *Id.* at 653. The primary bases for the plaintiff's objections to the production of information maintained under her "private" settings were that the material was not relevant to the case, *id.*, and that she was entitled to an expectation of privacy as to records she attempted to maintain as confidential. *Id.* at 657. The court (surveying both Canadian and U.S. decisional law, as well as the online network privacy policies) squarely rejected both arguments, stating "[s]ince Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy" and acknowledged commentators whose analysis showed that "given the millions of users, '[i]n this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking.' " *Id.* The court ordered the plaintiff to provide a consent and authorization to the defendant granting full access to all of her Facebook and MySpace records (including any that had been deleted). *Id.*

Similarly, in *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, reprinted at *2010 Pa. Dist. & Cnty. Dec. LEXIS 270* (Pa. Ct. Common Pleas - Jefferson Cty., Sept. 9, 2010), a plaintiff alleged "substantial injuries,

including possible permanent impairment, loss and impairment of general health, strength, and vitality, and inability to enjoy certain pleasures of life" due to being rear-ended during a cool-down lap driving at a stock car race. *Id.* at *1. During discovery, the defendant asked interrogatories inquiring whether he was a member of any "social network computer sites and, if so, that he provide the name of the site(s), his user name(s), his login name(s), and his password(s)." *Id.* The plaintiff objected to this disclosure on the grounds of "confidentiality", and the defendant responded that no such privilege was recognized under applicable state evidentiary law. *Id.* The defendants in the case subsequently noticed "comments about [the plaintiff's] fishing trip and attendance at the Daytona 500 race in Florida" in the "public portion" of his Facebook account. *Id.* at *2, and moved to compel the plaintiff to provide "user names, log-in names, and passwords, contending that those areas to which they did not have access could contain further evidence pertinent to his damages claim." *Id.*

The court rejected the plaintiff's assertion of privilege, stating "Facebook, MySpace, and their ilk are social network computer sites people utilize to connect with friends and meet new people. That is, in fact, their purpose, and they do not bill themselves as anything else." *Id.* at 5-6. Reviewing the user policy of Facebook, the court noted that "Facebook users are … put on notice that regardless of their subjective intentions when sharing information, their communications could nonetheless be disseminated by the friends with whom they share it, or even by Facebook at its discretion." *Id.* at 7. The court ordered the plaintiff to allow read-only access (to the defendants' attorneys only), and further that the plaintiff could not "take steps to delete or alter existing information and posts on his MySpace or Facebook account." *Id.* at *13. See also *EEOC v. Simply Storage Mgmt.*, 270 F.R.D. 430, 436 (S.D. Ind. 2010) (over EEOC's objection, defendants allowed access to social network sites' postings made by discrimination claimants "that reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state" as well as third party communications and photographs); *Bass v. Miss Porter's Sch.*, No. 3:08-cv-1807 (JBA), reprinted at, 2009 U.S. Dist. LEXIS 99916, * 4 (D. Conn. Oct. 27, 2009) (where minor brought claim against school over "taunting," objection to production of her entire Facebook printout was overruled by court, stating that the "relevance of the content of Plaintiff's Facebook usage as to both liability and damages in this case is more in the eye of the beholder than subject to strict legal demarcations," and that the "production should not be limited to Plaintiff's own determination of what maybe 'reasonably calculated to lead to the discovery of admissible evidence' ").

An additional consideration is that -- although likely dependent on the language of user agreements with their online provider -- communications and records that have been parked at an online network could readily constitute electronically stored information under a party's control which would be explicitly discoverable under the 2006 amendments to the federal rules. Should a client wish to alter or change such records while they are aware of a likely claim, they should be advised that this conduct will be ripe for a spoliation argument by an opposing party in a lawsuit.

In short, parties here in Massachusetts should be well aware that just because their records may be "in the cloud" does not mean they are going to blow away!

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