

New Media in Consumer Transactions and its Implications for Litigation

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By Ronald L. Burdge, Esq.
Dayton, Ohio
Ron@TheLawCoach.com

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A. Understanding Consumer Transaction Media Methods

1. Names of Social Networking Websites

Digg, YouTube, Upcoming.org, LinkedIn, Last.fm, Technorati, Orkut, MySpace, Wetpaint, Flickr, Twitter, LibraryThing, Facebook, Gather, Mubi, Slide Share, Plaxo, MyBlogLog, Haiku, Focus, Ryze, Tribe.net, GovLoop, WeeWorld, Ziggs, NetParty, Xt3, Zooppa, and many more listed on a wiki social media list page? What is all this stuff? Why do you need to know about it? And what does it mean for your case? Plenty.

2. Data Accumulation by Social Networking Websites

It has been recently reported that two thirds of the world's entire population has access to the internet and visits social networking or blogging sites regularly. One of the co-founders of Twitter recently claimed that one billion tweets are posted in the course of an ordinary week. Social media is

everywhere and people are using it constantly. In the course of that use, they may be unwittingly supplying evidence, opinions, representations, documents, video and other permanent records that can be used against them in court proceedings, both civil and criminal.

In reality, social networking websites have become huge databases of information that is reported and input by the very persons that it compiles it upon. About 70% of all Americans under the age of 30 have posted their personal profile on social networking website, the vast majority of which are on Face book. *Pew Internet & American Life Project*, Feb. 3, 2010, available at PewInternet.org.

Put simply, the fastest and easiest way to investigate basic information about any person in these times is by combing through social network data. And it is cheap to do.

3. Social Networking Defined, Its Concept and Discovery

Social Networking is defined at Wikipedia as a social structure which facilitates communication between a group of individuals or organizations that are related in some way such as a common interest or ideas or ideals, friendship, likes, conflicts or a trade. Essentially, a group of people with a common interest.

A social network service, then, is merely a service that builds and makes available an online community for those persons who share that common interest. In the course of it, the service often provides numerous ways for the users to interact, such as email, list serves, and instant messaging.

More simply put, the concept behind social networking is that a person fills out an online profile, looks for a person they know, and then adds that person as a "friend." Then, each person is connected to the other person's personal network and can see who each person's friends know. Blogging and messaging and group discussions and events can follow very quickly and very easily. The internet, of course, can keep track of all of this. That means that evidence can be gathered from the everyday chronicle of one's life that users post on the social networks that they participate in.

Civil Rule 26, et seq, allows liberal discovery of any nonprivileged matter that is relevant to any claim or defense in a case. When it comes to

social media postings, the discovery of evidence of witness or party inconsistencies can be a gold mine to an opponent and a monumental headache to the person who posted the data. Social evidence can make or break a case and you may not even see it coming at you. In fact, it has become so common-place that some large law firms now employ persons whose job is to browse the social networking sites to research prospective clients, witnesses, parties, attorneys, even judges on their cases.

4. The Commercial Use by Merchants of Social Networking

Merchants are quickly learning to use social media as a subtle, and sometimes not so subtle, selling tool. Many industries now have dozens of social media networks set up just for their professionals to exchange ideas, collaborate, and actively discuss marketing and selling ideas. In addition, businesses are engaging in direct online marketing with consumers, making online and offline representations that may arise to the level of a warranty in addition to running skirting if not outright running afoul of CSPA and OAC prohibitions.

For instance, car dealers have created dealer Facebook pages, they are blogging, they are on Twitter, they have hired professionals to plan and launch social media campaigns, YouTube marketing finds dealers setting up their own “channels” - many are nothing more than commercials ported over to the internet while many are also fine-tuned to appeal to the internet audience, either as a whole or with specific demographics in mind.

With marketing in mind, many businesses are using social media for fundamentally two purposes - to engage in conversation with consumers and to get their advertising message out. They seem to be doing it in two ways also. First, to push the selling-right-now message and, second, to establish a longer range presence of availability. In either event, the fundamental goal of all business social media activity is to generate more storefront business.

To engage with consumers, marketers take different approaches with different media and knowing the basics can be useful in your research efforts.

5. Facebook, Twitter and YouTube as Examples

With Facebook, the goal is to be interesting, show you are informed, post a little business info from time to time (but not much) and to stay

involved with conversations. The theory is that your interaction with your status updates will show up in the News Feeds of the people who like your page and spread outward so that others become aware of you too. You do it by asking questions and offering info or news that others find interesting. Every once in awhile the marketer tosses in a link or “soft” sales message and spices it up with opinions to provoke interaction.

Twitter is a different game. Since each post is very limited (just 140 characters maximum), marketers seem to be using Twitter differently indeed.

With Twitter the goal is to either find a conversation or to start one. To find an ongoing conversation the marketer often does a search for a conversation that they can enter - such as a search for a keyword, such as a product name like “Corvette” or an activity by name, and then seeing what conversations are happening at the moment that the marketer can drop into and participate in. Here the activity is far more conversational and immediate. It is a lot like a social party where you just stroll up to someone in a conversation and join in. When trying to start a conversation, it literally is akin to walking up to someone at that same party and just striking up a conversation except that on Twitter you may not know who will answer or what will be said until it occurs.

With YouTube video and blogging, the objective of the marketer is to attract an audience with content that is interesting and relevant to the viewer and reader. Many marketers and businesses use stories, testimonials, and news and info. With both video and blogging, businesses are advised to show their “personality” in the content they are making available.

6. The Motor Vehicle Retail Sales Industry as an Example

And then there are the social network sites that are dominated in, if not entirely used by, narrow professional groups.

For instance in just one industry, car dealers and their employees, social networking among peers occurs on web sites like www.autodealers.ring.com, www.drivingsales.com, www.autodealerpeople.com, www.dealerrefresh.com (forum), www.automotivedigitalmarketing.com, www.kainautomotiveideaexchange.ning.com, www.internetsalesmanager.org, www.automotive-seo.ning.com, and there are many, many more.

In many instances, the car dealer will post an advertisement directly on a third party web site, such as eBay or AutoTrader or Cars.com or UsedCars.com or Autos.Yahoo.com or CarsDirect.com or any of the literally hundreds, if not thousands, of third party sites. Many times a car dealer will have their inventory posted on their own web site.

Either way, it is important to note that there is a service that attempts to maintain a digital “library” of internet sites as of the date of their existence, called the “Wayback Machine” located on the internet at Archive.org. While copies of cultural data is also maintained there and even more fascinating, the true value of the Wayback Machine for an attorney is its ability to “resurrect” a web site page that was removed from the internet by its author.

Simply type in the “url” of the website on which you want to find the older, removed pages and a calendar will appear showing you the available dates when a “snapshot” was taken of that web site and placed in the Wayback Machine’s archives. Click on the date you want to look at, and there it is. With some websites, however, some data may be so graphically intense that the archived copy not be complete. Still, it may contain very useful information.

It is a small leap from using social networking sites to selling cars on eBay and other online services. Although most sales still occur on a car dealer’s lot, thousands of vehicles are sold retail and wholesale nationally every day through the use of nothing more than email, fax machines, and telephones. The same is true of millions of dollars worth of consumer goods sold through online sales.

Fundamentally, all the internet activity by any merchant or its marketer, can come into play in your Consumer Law practice — in the investigation of parties or witnesses, ex-employees, and current employees or as part of the investigation of a party’s advertising and representations about a specific product or service that may arise to a warranty or misrepresentation that could be actionable under several different legal theories.

7. The Consumer Transaction’s Existence in a Social Networking Setting

At the heart of legal rights in Consumer Law is the existence of a

consumer transaction. The CSPA defines a consumer transaction liberally enough that it can include virtually any kind of transaction between a merchant-supplier and a consumer for primarily personal goods or services.

As a result, an online solicitation of goods or services can constitute a consumer transaction whether the transaction is consummated or not. The ease of interstate transactions over the internet also calls into question local and long arm jurisdiction beyond this paper's discussion. By analogy however, if an out-of-state merchant faxes a signed proposal, i.e., an offer, to a consumer in their Ohio home which can be accepted by the consumer merely signing the document and faxing it back to the merchant, i.e., thereby accepting the offer, the contract may be created at the point of acceptance — thus subjecting the out-of-state supplier to the jurisdiction of Ohio law and the Ohio's courts.

Thus, it may be important for an attorney to investigate the details of the alleged consumer transaction's creation step by step.

B. Common Industry Listing of Social Networking Sites

Just as important, industry-specific social networking sites can lead to valuable investigatory results. Some of the more common social networking sites by industry include:

Motor vehicle Industry -

AutoDealers.ring.com

Auttr.com

DrivingSales.com

AutoDealerPeople.com

DealerRefresh.com (forum)

AutomotiveDigitalMarketing.com

KainAutomotiveIdeaExchange.ning.com

InternetSalesManager.org

Automotive-SEO.ning.com

Accounting - iShade.com

Accounting-Networks.com

Finance & Insurance - LinkedFA.com

Real Estate - Glozal.com
ActiveRain.com
Trulia.com
RealEstateForum.com
Flippa.com

Architects - Architizer.com
Small Business - Biznik.com
Funeral Directors - CDSocial.com
Oil & Gas Industry - TankChat.com

C. Other Jury and Individual Person Online Research Sources

1. Research Sources

Do not forget that you can use online social media investigation to get juror background information, pretrial investigation, locating witnesses, case and party evaluation, defective product investigation, expert witness investigation, and much, much more. See, Karen L. Stevenson, *What's On Your Witness's MySpace Page?*, LITIG. NEWS, Mar. 2008, available at http://apps.americanbar.org/litigation/litigationnews/2008/march/0308_article_myspace.html

Non-social networking website research on general witness, party, and juror characteristics can be found on various other online sources, including:

Zip Code Statistics - <http://www.census.gov/epcd/www/zipstats.html>

Unites States Census Data and Mapping -
http://factfinder.census.gov/servlet/TMGeoSearchByListServlet?ds_name=DEC_2000_SF1_U&_lang=en&_ts=110308266138

Market Segment Data -
<http://www.claritas.com/MyBestSegments/Default.jsp>

2. Spokeo and Aggregation of Data

Person-specific research data can be uncovered at Spokeo.com, in an amazing and possibly disturbing amount of detail - not necessarily all of it

accurate either. Spokeo is a data aggregator - meaning that it combs both the internet and offline sources to gather and compile data on people and aggregate it into one location at Spokeo where any of it can be readily viewed, sometimes for a nominal price.

While Spokeo says that it collects only publicly accessible data from original sources, it contains remarkable detail and adds the considerable convenience of “one stop shopping” to access personal data. It can include phone information, photographs, biographical data, email addresses, an analysis of financial standing, social networking data, username across the internet, and much more.

At this point, since Spokeo gathers data from publicly available sources, it is very likely that merely obtaining data from Spokeo will involve no ethical issues at all.

D. Social Media and Litigation Implications

1. E-Discovery Issues in Conflict

This entire topic brings into focus “e-discovery” (electronic discovery) issues. With the billions of web site pages, constant postings of blogs and video content, nearly uncountable emails and tweets, the odds are that you can do a lot research on the internet and find valuable information that can be used in your case. If there is a problem, it is that you could spend hours and hours sifting through it all to find something useful.

2. List of Social Networking Sites

So where do you begin? A good starting point would be Wikipedia’s list of social networking web sites found online here:

http://en.wikipedia.org/wiki/List_of_social_networking_websites where interactive links to each site are followed by a brief description of the website’s focus area, the date of its creation, the number of last known registered users, if the registration is open to anyone (or not), etc. Notably, there are social networking website that no longer exist. Those can be found on Wikipedia’s list of defunct social networking website found online here: http://en.wikipedia.org/wiki/List_of_defunct_social_networking_websites.

3. Discovery from a Party of Their Relevant Social Networking Data

There is no doubt about the general ability to discover an adverse party's relevant Facebook and Twitter and other social media interaction. Such discovery requests are becoming routine under Rule 26 et seq. Courts have noted that social networking site data is not protected from discovery just because the site "locks" it from public view or labels it as "private." *Equal Employment opportunity Commission v Simply Storage management LLC*, 270 FRD 430 (SD Ind. 2010).

Simply put, a party's statements can be used against them as an admission against interest, to impeach, to impugn credibility of a witness, and any of a hundred other uses. And it isn't private anymore.

Indeed, even deleted information may be discoverable from one's Facebook and MySpace accounts. *Romano v Steel case, Inc.*, 30 Misc.3d 426, 907 N.Y.S.2d 650 (Sup. Ct. 2010). That case involved a personal injury plaintiff who made claims of physical limitations that were belied by her Facebook page.

4. Spoliation Risks for a Party

What is not so frequent and routine yet is the examination of spoliation issues when a party is unable to produce their relevant media-related discovery answers because they were not maintained, since so far only large corporate entities seem to be fully aware of the need to maintain and preserve electronic evidence adequately. Safeguards do not exist for many businesses, let alone individual consumers who may be party to litigation.

5. Ethical Issues in Obtaining Social Media Data

Lawyers need to be aware of the potential ethical pitfalls of online investigations but should not shy away from the vast array of online resources available for cost-effective and expedient research. Witnov, Shane, *Investigating Facebook: The Ethics of Using Social Networking Websites in Legal Investigations* (May 20, 2011). *The Santa Clara Computer and High Technology Law Journal*, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=1852649>.

The journal article deals with the Model Rules of Professional Conduct and its regulation of deception by an attorney to obtain restricted information by “friending” a witness or others to gain access to otherwise-restricted online information and ultimately concludes that the rules are unclear in this area. Model Rule 8.4, which has been adopted by nearly every state, declares it to be misconduct for a lawyer to engage in any conduct that involves dishonesty or misrepresentation.

Thus misrepresenting one’s identity for instance, in order to gain access to otherwise-restricted social data, would be a violation of at least one Model Rule as well as the Terms of Use of virtually all social networking websites. It would also likely violate Model Rule 4.1 since it would involve knowingly making a false statement of material fact to a third person and the definition of “material” is merely that it could influence the hearer. Thus, what is said and done to gain access to non-public information can make all the difference in the existence of an ethical violation. On the other hand, there is very likely no ethical violation by the mere accessing of publicly available information on a social network site.

6. The Terms of Use Limitation

Part of the issue here arises from the use of many “Terms of Use” limitations imposed by numerous website and which attempt to place a restriction on the web site visitor’s ability to interact with the web site and its other users. In essence, these are contractual terms of the social networking website that are impliedly agreed to by the mere use of the site and which place limitations on how the site and its data may be accessed or used. They generally are enforceable by federal anti-hacking laws. Courts have noted that a web site’s Terms of Use page can constitute a contract the breach of which may affect the legal rights of the web site user. *MacDermid v Discovery Financial Services*, 342 Fed.Appx. 138, CA 6 (Tenn.), 2009.

Where the use of a website is subject to a Terms of Use limitation published on the website, the breach of that limitation results in the use being unauthorized. If otherwise-private information is obtained on the website in the course of such unauthorized use, there is a viable argument that it is an actionable invasion of privacy and a civil and/or criminal violation of the Computer Fraud and Abuse Act (see section 6 below).

Regardless of the Terms of Use limitation that may, or may not, exist on a website, if information posted to a social network account contradicts

what a party has testified to, it is very likely discoverable.

7. Can Web Site and Social Networking Site Data Be Subpeoned?

Often a party may subpoena the social site itself and the site may oppose the production. As a general rule a post to a social media site is controlled by the Store Communications Act, 18 USC 2701 et seq, which regulates how private information can be disseminated in a non-criminal matter. Generally, the site does not have to turn over a user's personal data.

As a result, counsel sometimes will go to the court on a motion to compel and obtain an order directing the opposing party to sign a consent form which is then attached to a subpoena and sent to the social media site. The consent form gives the site permission to turn over printouts of the private portions of the site data. Combined with a subpoena, many web sites will not give it a second thought at that point.

At the root of the motion to compel must be the usual elements to prevail on the motion, i.e., a discovery request asking for relevant information that is refused by the party. Thus, relevancy, as always, is the key to obtaining social network data, whether that data is in the control of the party or a third party.

Similarly, the data posted and removed from any web site can be subject to subpoena for discovery purposes in any civil case. The owner or operator of any website can be identified through "WhoIs" lookup at many web site url registration pages on the internet, including WhoIs.com. Typically the name and address and phone number and email address of the actual website registrant will appear, along with the creation and expiration dates for the website url and the administrative contact for the website owner. If the registrant is within the subpoena reach of your jurisdiction, it then is a simple matter to submit a subpoena for the desired web site data.

8. Is There an Expectation of Privacy on a Social Networking Site?

In one Pennsylvania personal injury case the court found that the expectation of privacy on Facebook and MySpace was unrealistic and noted the policies of those sites warned that personal data might be disclosed "if the

operator deems disclosure to be appropriate.” With no protection afforded by the site terms, and no expectation of privacy or confidentiality, the court had no difficulty ordering the personal data produced. *McMillen v. Hummingbird Speedway, Inc.*, 2010 WL 4403285 (Pa. Com. Pl. Jefferson, Sept. 9, 2010). The resulting internet cry that “anything you post on Facebook may be held against you” is probably not far from the truth at all.

9. Can Social Networking Data Be Used as Evidence?

Social media data can be used as evidence, as an employment lawsuit illustrates in *TekSystems, Inc. v Hammernik*, 2010 WL 1624258 (D. Minn. Mar. 16, 2010), where LinkedIn was used by an ex-employee to contact the former employer’s clients in violation of a non-compete employee agreement.

As always though, it can only be admissible by employment of one or more Rules of Evidence standards, i.e., relevance, authenticity, admission against interest, etc.

10. Can the Court Itself Conduct and Consider Social Networking Evidence?

Attorneys need to also be aware that courts may themselves go outside the norm to find support for their opinions and decisions, such as *Purvis v Commissioner of Social Security*, 2011 WL 741234 (D. N.J. Feb. 23, 2011) where an administrative law judge supported the Commission’s denial of disability based on internet research by the court that impugned the credibility of a party because of inconsistent postings by the party on their Facebook page.

Although it may be doubtful that a non-administrative judge would conduct such internet research and allow it to influence a decision being made in a civil or criminal court process, there simply are no established standards directly on the point at this time so the practitioner should be cautious in this area.

11. Download it All, Please

It is notable that some social networking websites make it very easy to obtain a copy of their data. For instance last fall Facebook added a “Download Your Information” setting for all accounts so that any user can easily obtain a

complete copy of their Facebook wall posts, photographs, videos, messages, friend lists and other more complete personal data. With a simple click it can all be compiled and zipped into a simple file that can be downloaded quickly and simply. Needless to say, it will make it easier for the website itself to comply with a subpoena and the user can no longer argue that providing the requested data would be objectionably burdensome.

12. Further Research Sources

CyberControls.com has a number of informative white papers on its website for further reading and research on the issues presented by electronic evidence. Law Technology News, at Law.com, also has done informative background work in this area.

E. How to Subpoena Facebook and MySpace Data

Facebook and MySpace are the proverbial elephants in the social networking room so obtaining otherwise unpublished data from them can be crucial to turning up information about witnesses and parties that may prove useful to a litigator. Knowing the mechanics of how to subpoena that data is just as important as knowing what to get.

Notably, the subpoena has to be issued through the court system of the state that the business is in or at least has a statutory agent in, so an Ohio court subpoena will not get you the out of state response you may desire. Facebook and MySpace are both in California. Thus, for an Ohio attorney in an Ohio state court the subpoena process will mean filing a discovery action in California to obtain the data.

Lawyerist.com author Sam Glover has done some work to make it easier to subpoena data from Face book and summarizes the steps here: <http://lawyerist.com/subpoena-facebook-information/>, including the address and needed information to provide them in order to preserve information and get it from Facebook. His article is extremely worthwhile and provides specific details on the process.

Glover's companion article deals with getting subpoenaed data out of MySpace and is also a very worthwhile read here: <http://lawyerist.com/subpoena-myspace-information/> where he provides the

same information and resources for MySpace social data.

F. Relevant Statutes and Ethics Opinions

Computer Fraud and Abuse Act, 18 USC 1030, et seq, essentially says that whoever intentionally accesses a computer without authorization or exceeds authorized access and thereby obtains information from any protected computer if the conduct involved an interstate or foreign communication can be subject to criminal and civil penalties.

Electronic Communications Privacy Act, 18 USC 2510, et seq, deals with wiretapping and accessing stored communications and transaction records.

Stored Communications Act, 18 USC 2701, et seq, regulates when an “electronic communication service provider” (such as a social network site) can disclose the contents of and other information about a customer’s emails and other electronic communications to private parties. The law was passed to create some assurance of privacy in electronic communications where there is a legitimate interest in the confidentiality of those communications. Notably, it specifically does not apply to an electronic communication that is “readily accessible to the general public.”

ABA Standing Comm. On Ethics and Prof. Resp. Op. 10-457 (2010) notes that lawyers must not include misleading information on website and be mindful of the expectations created by a website, among other things.

Ass’n Bar City of NY Comm. On Prof. Ethics Op. 2010-2 more pointedly says that a lawyer is not allowed to attempt to gain access to a social networking website of an unrepresented witness under false pretenses, either directly or through an agent.

NYS Bar Ass’n Comm. On Prof. Ethics Op. 843 (2010), on the other hand, says that a lawyer representing a client in a pending case may access the public pages of another party’s social networking website for the purpose of obtaining possible impeachment material for use in the litigation.