

# SOCIAL NETWORKING WEBSITES AS EFFECTIVE TOOLS OF DISCOVERY

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## Executive Summary

Social networking sites like Facebook and MySpace can be a valuable additional tool in the discovery process. These sites can yield very valuable results with minimal effort, and this information is often better received by juries because it has the same effect but without the taint that sometimes accompanies surveillance. Personal profiles on these sites can contain a great deal of valuable information such as photographs and “blog” entries which detail their recent life experiences. The sites also contain comments posted by an individual’s friends, which invariably provide additional details useful in discovery.

A review of the most common social networking sites should be a standard part of the defense counsel’s investigation of a case.

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Trial lawyers are constantly seeking the truth. The truth about a plaintiff, a defendant, an expert, or a lay witness can quickly turn even the best case on its head if that truth is contrary to an official position taken in court. Historically, litigators enlisted the help of private investigators or other similar research services to compile information for use in a lawsuit. After the initial advent of the Internet several decades ago, a new tool has developed over the past few years which allows unique access into the private lives of those involved in litigation in ways likely not intended. Social networking sites, which now number in the hundreds, allow users to freely share personal and professional information with others accessing the Internet. Much of that information can also prove very useful in lawsuits.

The most commonly used social networking sites today are Badoo, Bebo, BlackPlanet, Buzznet, Care2, Classmates, Facebook, LinkedIn, Muxlim, MySpace, Tagged, and Windows Live Spaces.<sup>1</sup> The number of registered users accessing these sites hovers in the hundreds of mil-

lions. Not to be overwhelmed, you should recognize that many social networking sites are only popular in other countries and, as such, the likelihood of a litigant posting information on Nasza-klasa.pl, a site popular

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with college students in Poland, is low. Rather, focusing your investigation on a shortlist of common American sites will yield the best results. For that purpose, Facebook, MySpace, and LinkedIn can prove to be the most useful.

While many profiles are public, a large number of user profiles are made private, and one must first be added as a “friend” in order to view them fully. On MySpace, Facebook, and other social networks, a user can join another member’s friends list simply by asking. Many people allow new friends without a second thought. Social networking sites vary in what kind of privileges come with friendship. For the most part, it opens virtual doors to all kinds of personal information. A user can subsequently revoke friendships at any point, but many people have long lists of dozens of friends on their Web pages and do not monitor their list of friends all that closely. In the offline world, we know better than to put people from different parts of our lives into one room where they are likely to share the wrong kinds of stories about us. But online, all of the walls come down. Most social networking sites do contain privacy settings, allowing a profile to be set to private and only viewed by approved contacts, but these are not always used. Indeed, one of the big attrac-

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*Once accessed, profiles contain a great deal of personal information, photos (usually of them on a recent vacation, holding a drink, and smiling while sitting on a jet ski), and weblogs, or "blogs," which detail their recent life experiences.*

tions of social networking sites is the large numbers of virtual friends who can be linked from a profile.

Once accessed, profiles contain a great deal of personal information, photos (usually of them on a recent vacation, holding a drink, and smiling while sitting on a jet ski), and weblogs, or "blogs," which detail their recent life experiences. You can also see the date of their last login as well as comments posted by their friends, which invariably provide additional details useful in discovery.

One of the key benefits of social networking sites is that they encourage users to be creative, publishing content rather than being passive consumers. They express themselves with an online personality. That is perhaps the greatest advantage to utilizing these social networking sites in your discovery, *i.e.*, the simple fact that a dangerously large degree of anonymity accompanies the use of the Internet, and users are far less guarded with their personal information when they are blogging at 2:00 a.m. on MySpace than when sitting across the table from you at a deposition.

The use of social networking sites is not limited to high school or college age individuals or even those in their twenties or thirties. On the contrary, many middle age and older adults maintain profiles on websites,

both the traditional social networking sites mentioned above or those dedicated to the newly single who are interested in dating, such as Match.com and eHarmony. For discovery purposes, the former is much more accessible than the latter. Match.com allows a user to immediately search for profiles and pictures, information that will quickly allow you to identify a litigant or witness. The very involved registration process, and inability to identify users by photo prior to paying a registration fee and becoming an actual member, makes eHarmony much less feasible as a discovery tool.

For a more aggressive approach, which could further compromise an opposing party and, for instance, weed out a specious loss of consortium claim or allegation of sexual dysfunction caused by an accident, adult social networking sites can offer unique insight into the very private lives of their users. The most popular site, with a reported 22,000,000 members,<sup>2</sup> most of whom, believe it or not, often use their partial names and post photos showing their faces, can yield results of a lifestyle which may be inconsistent with a particular position being advanced in court through conducting a simple search based upon gender, age range, and geographic location. One important caveat on this final search technique—close your office

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door to spare the rest of your office and let your IT director know ahead of time what you are attempting to do.

Some sites require membership fees, but most do not. As is the case with almost all websites, the cost is borne by the advertisers who know, for instance, that there are approximately 80,000,000 registered users of Facebook, the sixth most trafficked website in the world.<sup>3</sup> Regardless of the type of site, a vast amount of information about a user is available if you only know where and how to look.

Once you have located the information, how do you best use it? For starters, you are still precluded from doing anything on a social networking site that you would not otherwise do with regular email, the telephone, or in person. A plaintiff or defendant is still a represented party protected by MRPC 4.2. Any contact beyond information that a person posts for public consumption can easily violate your professional obligations. Arguably, asking to become a friend, even though you are not contacting them directly, still constitutes contact in violation of the rules.

Downloading, printing, or saving posted information, though, is no different from reading an article written by or about someone in a newspaper and can be offered into evidence at trial using the same techniques. Blog

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entries posted by a litigant are by definition, not hearsay, and should be deemed an admission by a party opponent under MRE 801(d)(2). Information posted on a website which may otherwise implicate the hearsay rule can be argued to constitute present sense impressions; excited utterances; then existing mental, emotional, or physical conditions; recorded recollections; or records of regularly conducted activity. Photographs are perhaps the easiest proofs for which to lay a foundation and have admitted into evidence, assuming they are deemed to be relevant. In the event that any of this evidence is ruled to be not relevant, you should still mark the proofs and preserve them as part of the overall record in the event of an appeal.

What do you do in the predictable situation where a person, in anticipation of litigation, has changed or deleted the content of their pages or, worse yet, canceled their account and taken down the postings? The simple answer usually lies within the Terms of Use and Privacy Policy of the social networking site. To illustrate, Facebook's user agreement reads as follows:

## Facebook Terms of Use

*When you post User Content to the Site, you authorize and direct us to make such copies thereof as we deem necessary in order to facilitate the posting and storage of the User Content on the Site.* By posting User Content to any part of the Site, you automatically grant, and you represent and warrant that you have the right to grant, to the Company an irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide license (with the right to sublicense) to use, copy, publicly perform, publicly display, reformat, translate, excerpt (in whole or in part) and distribute such User Content for any purpose, commercial, advertising, or otherwise, on or in connection with

the Site or the promotion thereof, to prepare derivative works of, or incorporate into other works, such User Content, and to grant and authorize sublicenses of the foregoing. *You may remove your User Content from the Site at any time. If you choose to remove your User Content, the license granted above will automatically expire, however you acknowledge that the Company may retain archived copies of your User Content.* (emphasis added).

## Facebook Privacy Policy

When you use Facebook, you may set up your personal profile, form relationships, send messages, perform searches and queries, form groups, set up events, add applications, and transmit information through various channels. We collect this information so that we can provide you the service and offer personalized features. *In most cases, we retain it so that, for instance, you can return to view prior messages you have sent or easily see your friend list. When you update information, we usually keep a backup copy of the prior version for a reasonable period*

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*of time to enable reversion to the prior version of that information.*

*You understand and acknowledge that, even after removal, copies of User Content may remain viewable in cached and archived pages or if other Users have copied or stored your User Content.*

*We share your information with third parties only in limited circumstances where we believe such sharing is 1) reasonably necessary to offer the service, 2) legally required or, 3) permitted by you.*

*We may be required to disclose user information pursuant to lawful requests, such as subpoenas or court orders, or in compliance with applicable laws.* We do not reveal information until we have a good faith belief that an information request by law enforcement or private litigants meets applicable legal standards.

Access and control over most personal information on Facebook is readily available through the profile editing tools. *Facebook users may modify or delete any of their profile information at any time by logging into their account. Information will be updated immediately. Individuals who wish to deactivate their Facebook account may do so on the My Account page. Removed information may persist in backup copies for a reasonable period of time but will not be generally available to members of Facebook.* [Emphasis added.]

In short, if a person alters or removes content from their page, you can subpoena the social networking site directly and seek copies of their back up or archived information.

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accompany surveillance. More than one juror has commented after a trial how, while they were swayed by surveillance of a litigant, they were also somewhat put off by the intrusive nature of, for instance, following someone who was out boating with their minor children, etc. Discovering videos, photographs, or written accounts of the very same activities on the person's own social networking site tips the scale back in your favor. In the end, you were just clever enough to find what they freely made available to the entire world.

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## Endnotes

1. Wikipedia List of Social Networking Sites, Registered Users. *See also, Facebook Passes MySpace*, Grand Rapids Press, June 29, 2008; *Elevator Pitch: Why Badoo Wants to be the Next Word in Social Networking*, Guardian.co.uk, March 5, 2008; *Bebo Talking with Mobile Portals*, The Australian, December 3, 2007; *BlackPlanet Parent Community Connect Sells to Radio One for \$38 Million*, Silicon Valley Insider, April 11, 2008; *Buzznet Information Page*; *Care2.com Homepage*; *Classmates IPO Tries to Cash in on Social Networking Craze*,

TechCrunch, November 26, 2007; Facebook Reported Statistics; LinkedIn Reported Statistics; Muxlim Reported Statistics; *Social-Networking Sites Going Global*, USA Today Online Edition, February 10, 2008; Tagged Reported Statistics; Windows Live Spaces Fact Sheet.

2. *Adult Dating Sites Flourish As People Seek Sex Over Love*, The Wall Street Journal, March 1, 2006.
3. Facebook Press Room.



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