Abstract

Your Opponent Does Not Need A Friend Request To See Your Page: Social Networking Sites And Electronic Discovery

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The law, which is by nature slow and deliberate, struggles to keep pace with contemporary life. It should then be no surprise that it provides little guidance on how we are to deal with some of the newest sources of evidence: social networking sites, such as the ubiquitous, and some would say pernicious, Facebook. I will do my best to pose the questions that should be asked when parties seek, or seek to protect, the contents of a Facebook or social networking page, such as:

1. Are the contents of a social networking page ESI and thus subject to the laws of discovery and spoliation?
2. Must a social networking site, like Facebook, comply with a valid subpoena?
3. How should the law change to balance a litigants' right to access the potentially rich sources of evidence stored on an individual's social networking page with an individual's right to privacy?

1. Your Facebook Page Is ESI.
2. Social Networking Sites Provide Fertile Ground For Harvesting ESI.
4. It Is Unclear Whether Social Networking Sites Must Comply With All Valid Civil Subpoenas.

4.1. The Federal Stored Communications Act May Prohibit Enforcement Of Civil Subpoenas Requesting Someone Else's Social Networking Page Information.

4.2. Civil subpoenas from individuals seeking ESI from their own social networking sites are however enforceable.

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4.3. Governmental Entities Can Enforce Subpoenas Served On Social Networking Sites If They Relate To A Criminal Matter Or Investigation.

5. Suggestions & Conclusions

5.1. Until the law is clear, individuals and businesses should take all reasonable steps to preserve the potentially relevant contents of any social networking pages for which they are responsible.

5.2. The courts should interpret the federal Stored Communications Act, or the legislature should amend the Act, to allow social networking sites to divulge information pursuant to a valid civil subpoena.

5.3. Social networking sites should be required to enact a procedure and create a mechanism through which an individual user can institute a litigation hold on his or her page and all historical versions of the page still stored by the social networking site.
Your Facebook Page Is ESI

- ESI is "any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored in any medium from which information can be obtained. . . ." Fed. R. Civ. P. 34.

- The contents of social media sites are ESI. See Sharon R. Nelson, Capturing QuickSilver: Records Management for Blogs, Tweeting & Social Networks, 52 Wyoming Lawyer 55 (June 2009) (Tweets are ESI); Ledbetter v. Wal-Mart, 2009 WL 1065018 (D. Colo., April 21, 2009) (information from Facebook and MySpace were properly within a Rule 45 subpoena).

Your Facebook Page Is ESI

- Web 2.0 social networking sites generate massive amounts of discoverable information.
  - Facebook
  - Twitter
  - LinkedIn
  - Webmail applications
  - The next big thing . . .
Social Media Sites Are Fertile Grounds For Discovery

- Social media sites contain:
  - Biographical information
  - Statements & Admissions
  - Photos
  - Emails
  - Instant Messages
  - Contacts
  - Metadata
  - Links
  - Tags
  - Trackbacks
  - Postbacks
  - Any linked and/or shared metadata can establish what a user knew or saw on another web page or what others saw on the user's page.

Social Networking Sites Are an eDiscovery Treasure Trove

- Users are informal because electronic communication has a spontaneity that makes it seem permanent and casual. Sarah Perez.
- This informality is encouraged by the false sense of security created by "private" pages.
- Recently a New York Times article reported that because Facebook offers a "slice of privacy controls, ... you'll never have to worry." Sarah Perez. 5 Easy Steps to Stay Safe and Private on Facebook, N Y Times (Sept. 16, 2009) (electronically dated).
So, You Must Preserve & Produce The Contents Of Your Page

- Because the contents of a social media site are indeed ESI, then the rules of preservation, production and spoliation apply.
- This could have far-reaching implications in litigation.
- This could mean that if you update your Facebook page when you know that it may be potentially relevant to foreseeable litigation, you are spoliating evidence.


- Defendant in a sexual harassment case subpoenaed emails from a MySpace page allegedly created by the plaintiff.
- MySpace refused to fully comply.
- The court held that the requesting party could not establish that the emails were even from an account created by the plaintiff or that, if produced, the information would be relevant.

However, the court held that if the defendant could prove that the MySpace accounts did belong to the plaintiff using discovery served on plaintiff, not a third-party.

Then, the plaintiff's failure to provide emails from the MySpace account "could be grounds for imposing sanctions," Mackelprang at *8.

This is remarkable, because the court:

1) indirectly holds that contents of social networking sites can be discoverable ESI, and,
2) seems to put the duty on the account holder to preserve and produce the contents of their social networking page or face sanctions.
So, until the law is clear, take all reasonable precautions to preserve your social networking page when it becomes relevant to a foreseeable lawsuit.

If you are the producing party, what should you do?

- Send a formal written request (email should do) to the social networking site requesting a "preservation order". Use common sense in determining whether a preservation order is necessary.
- Send Communications 18 USC 2703(a) notice only if allowed for exceptions and has not been applied to social networking sites.
- Even if they don't comply, you have helped to protect yourself from spoliation claims.
- For individuals:
  - Print all pages from your Facebook page, or
  - Take screen shots and save them.
  - Try to have the web page as some other file and store it somewhere on your computer.
- For corporations:
  - Have a computer forensic expert capture each version of your company's Facebook or Twitter page using a forensically sound technique.
  - Create and follow a policy for updating these pages so that all versions are captured.

The problem is that much of your page is not in your control.

- Although a Facebook, LinkedIn or Twitter user can post messages, change content and modify their page regularly, the contents of the page are saved on the website's servers.
- There is no easy way to archive your Facebook page and its many versions (which can change daily).
- Further, information about who is viewing your page, who you visited, and other metadata is only held by Facebook.
The Problem Is That Much Of Your Page Is Not In Your Control

Presumably, only the social networking site itself retains copies of your old pages. 
But, even that, is unclear:
This case suggests that Facebook and others have internal data preservation procedures. In re Sherry, 2009 WL 109729 (N.D. Cal. April 20, 2009) (stating that Facebook informed the petitioner that it was "creating a preservation order to keep his page's contents")
However, other social networking sites maintain the right to keep copies of your past page, but do not obligate themselves to do so or provide a mechanism for instituting a "preservation hold" on your own pages.

The Social Networking Site May Not Even Keep Your ESI

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The Social Networking Site May Not Even Keep Your ESI

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If You Are the Requesting Party, What Should You Do?

- Depending on strategy, send preservation letters to both the producing party and the social networking site as soon as possible.
- Serve detailed Rule 34 requests on the defendant (or the state law equivalent).
- Serve ESI directly from Facebook, LinkedIn, etc.

   - Do not forget to ask for information that cannot be controlled by your opponent (metadata and viewing history).
- Your argument to recover from a third-party is stronger if the producing party had not preserved the information.
- Stored Communications (38 USC 7001) and MAX apply but allow for exceptions and have not been applied to Social Networking Sites.