

The Brave New World of Social Networking Discovery: What You Should Know

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When I was growing up and probably before Cole was born, the Star Wars movies – the original masterpieces, not the prequels – were becoming part of our American culture. Everyone my age remembers the telepathic advice from Obi-Wan Kenobi to Luke Skywalker just before Darth Vader's Death Star explodes: "Use the force, Luke." Well, you will certainly need the force (and then some) to tackle the issues at play in the brave new world of social networking discovery.

Over the past few years, the use of social networking websites, like Facebook and MySpace, has exploded amongst the general population. However, the use of social networking information in litigation, such as personal injury suits and divorce cases, and the corresponding legal doctrines pertaining to discovery of that information, have unfortunately not kept pace with the technology or popular use of online social networking.

Facebook is by far the most utilized social networking website out there at this moment. As described by the makers of Facebook, it is a social utility that helps people communicate with their friends, family, and coworkers. Facebook develops technologies that facilitate the sharing of information through what it calls the "social graph", or the digital mapping of people's real world social connections. While there were restrictions in the early days of Facebook regarding who could take advantage of its services, today anyone can sign up for Facebook and interact with the people they know in what Facebook at least describes as a "trusted environment."

Consider the following statistics regarding Facebook's users and content: Facebook has more than 750 million active users; 50% of these users log on to Facebook in any given day; An average Facebook user has 130 friends; These folks spend over 700 billion minutes per month on Facebook (talk about a loss of productivity!); There are over 900 million objects that people interact with (pages, groups, events, and community pages) on Facebook; The average Facebook user is connected to 80 community pages, groups, and events, and creates 90 pieces of content each month; and, More than 30 billion pieces of content (web links, news stories, blog posts, notes, photo albums, etc.) are shared by users each month. That's a lot of gigabytes of information!

The foregoing demonstrates, as recognized by a recent law review article on social networking discovery, that "[i]t is likely . . . the average civil litigant not only uses social networking sites, but also does so on a daily basis . . . *In civil lawsuits for damages, especially in the personal injury and insurance litigation context, potentially relevant discoverable information is often abundant on these sites.*" Evan E. North, Comment, Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites, 58 U. Kan. L. Rev. 1279, 1286 (2010).

The subject of social networking discovery has not been addressed by Tennessee courts and very few courts in other jurisdictions throughout the country. Accordingly, a determination

as to the scope of discovery into social networking information "requires the application of basic discovery principles in a novel context," and the issue to be addressed by the courts in this regard is to "define appropriately broad limits . . . on the discoverability of social communications . . . and to do so in a way that provides meaningful direction to the parties." EEOC v. Simply Storage Mgmt., 270 F.R.D. 430, 434 (S.D. Ind. 2010).

Indeed, the scope of allowable discovery pursuant to Rule 26 of the Tennessee Rules of Civil Procedure is quite broad. Rule 26 provides, in relevant part:

[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Tenn. R. Civ. P. 26.01(2); See also, Johnson v. Nissan North America, Inc., 146 S.W.3d 600, 604 (Tenn. Ct. App. 2004) ("Discovery rules are accorded broad and liberal treatment, for mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.") (quoting Hickman v. Taylor, 329 U.S. 495, 507 (1947)).

Commentators – or more often Facebook users – attempt to distinguish information contained on social networking websites from regular old information because they believe an expectation of privacy exists with regard to this type of information. A driver injured in a car accident may not have confided to a Facebook friend that her injuries were not all that serious, for example, if she knew that information might someday become public. Similarly, a father might not post that he was just at Disneyland with his child in a domestic case if he was prohibited from taking the child out of state and he knew this information might come to light.

However, no such expectation of privacy exists in the social networking context, or perhaps even on the Internet as a whole. As one Magistrate Judge in Tennessee recently observed, "Unfortunately, in this modern world, everything posted on the Internet runs the risk of being publicly disseminated." Similarly, a New York State trial court recently noted in Romano v. Steelcase Inc., 907 N.Y.S.2d 650, 657 (N.Y. Sup. Ct. 2010), regarding Facebook's own terms of use:

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You post User Content . . . on the Site at your own risk. Although we allow you to set privacy options that limit access to your pages, please be aware that no security measures are perfect or impenetrable . . . When you use Facebook, certain information you post or share with third parties (e.g., a friend or someone in your network), such as personal information, comments, messages, photos, videos . . . may be shared with others in accordance with the privacy settings you select. All such sharing of information is done at your own risk. Please keep in mind that if you disclose personal information in your profile or when posting comments,

messages, photos, videos, Marketplace listing or other items, this information may become publicly available.

Romano is one of the leading cases in this nascent area of the law. Many commentators, such as Evan E. North, have also advocated for the proposition that there are no reasonable expectations of privacy in social networking.

Similarly, courts in jurisdictions other than New York State have found that there is no reasonable expectation of privacy with respect to the discovery of information on social networking sites. See, e.g., E.E.O.C. v. Simply Storage Mgmt., LLC, 270 F.R.D. 430, 434 (S.D. Ind. 2010) (finding that "person's expectation and intent that her communications be maintained as private is not a legitimate basis for shielding those communications from discovery"). Indeed, a majority of the courts that have addressed the discoverability of a party's social networking information have found that such information is, in fact, properly subject to discovery. See, e.g., Bass v. Miss Porter's School, 2009 WL 3724968 (D. Conn. Oct. 27, 2009) (requiring the production of plaintiff's complete Facebook account); McMillen v. Hummingbird Speedway, Inc., 2010 WL 4403285 (Pa. Com. Pl. Sept. 9, 2010) (ordering plaintiff to provide defendant's his Facebook and MySpace user names and passwords).

While this issue has not been directly addressed by Tennessee courts, the clear trend among the courts in other states is to liberally allow for the discovery of social networking information. This is also true with regard to courts in other countries. For example, in Leduc v. Roman, FN 2009 O.J. No. 681 (O.S.C.J. Feb. 20, 2009), the Superior Court of Justice, Ontario, Canada, opined as follows:

To permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial.

Leduc at p. 8, ¶ 35.

"[Social] networking sites, by their very nature, involve the sharing of personal information." North, 58 U. Kan. L. Rev. at p. 1289. In addition to this type of information maintained by parties in litigation, similar information maintained by third parties, such as witnesses to an accident scene or participants at a college frat party, for example, may be critical to the discovery process because of the technical features of social networking websites, especially Facebook.

In Evan E. North's Comment, for example, he identified the importance of relevant third-party content discovery, setting forth the following hypothetical:

The "legal right to obtain" interpretation of the possession, custody, or control standard likely encompasses all manners of third-party social-networking content, including relevant photos, wall posts, and status messages. As such, any relevant content that

a user could access on Facebook, regardless of the original uploading user, should be discoverable through a civil discovery request.

....

Third-party-generated content often may be relevant to an action. Take, for example, the common instance of a user who uploads photos from a house party to her access-limited Facebook profile. The user can tag someone who appears in a photo by indicating the portion of the photo where the person appears, and upon the tagged user's consent, a link will associate the user's name and profile with the photo. Depending on the user's privacy settings, the photo may be integrated seamlessly with the tagged user's profile as if the tagged user uploaded it personally. For purposes of discovery, it should not matter whether a party uploaded a photo directly or was tagged in a photo by a third party. In either case, the photo would be within the party's possession, custody, or control. The photo may remain under the control of the user who uploaded it – who alone has the ability to completely remove the photo from the site – but tagged users have the legal right to obtain access to the photo.

North, 58 U. Kan. L. Rev. at p. 1303.

The foregoing example involving photograph "tagging" by third parties elucidates the importance of discovering social networking information. It also demonstrates that social network website users are so intertwined in their online communications and content sharing – amongst their hundreds, if not thousands, of online friends – that there simply cannot be any reasonable expectation of privacy in the content of these online social networks by anyone, regardless as to whether they are a party or witness to events at issue in litigation.

All of this is very interesting information, especially for legal nerds like us. However, at this point you are probably asking yourself: What can I do?

First, keep in mind that anything you post on the Internet or through social networking websites like Facebook might be disclosed to the public at some point. This piece of advice has been provided by smarter lawyers than us and even the President of the United States, who also happens to be a lawyer by the way. Moreover, if you find yourself the subject of litigation or are thinking about filing a lawsuit, keep in mind that the other side might request for you to produce social networking information as part of the suit. This is especially important in personal injury and divorce cases, as has been demonstrated in this paper.

More importantly, talk with your lawyer about these matters. Always disclose to your legal counsel whether you use social networking sites like Facebook or MySpace even if they may contain information that might be embarrassing or potentially harmful to your case. Don't

forget about search engines like Google, Bing, or Yahoo!. One of our standard practices when we are retained in a new lawsuit is to not only Google our adversary, but to also assist our client in recalling information they may have posted on the Internet by Googling them.

Hopefully, this information will help you as we all enter the brave new world of social networking discovery. As Obi-Wan Kenobi said: "May the force be with you."



Ben M. Rose is a partner at Cornelius & Collins, LLP. As a general practitioner, Ben has focused over the last several years on practice areas which include business, administrative, and civil litigation. He has had the pleasure of representing parties involved in active litigation and also consulting with clients on how to avoid lawsuits and grow their businesses.

A native of Seymour, Tennessee, Ben obtained his law degree from the University of Tennessee, College of Law, where he was the recipient of the Charles H. Miller Award for Excellence in Civil Trial Advocacy and a member of the College Of Law Speaker Series, where he served as the Vice-Chair for Speakers. Prior to attending law school, Ben obtained his Bachelor of Arts degree in political science and communications from The American University in Washington, D.C., where he graduated *cum laude*.



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Cole received his law degree from the University of Tennessee, College of Law, where he served on the Editorial Board of the Tennessee Law Review. He obtained his undergraduate degree from the University of Tennessee at Knoxville, graduating *magna cum laude* with a Bachelor of Science in Business Administration, majoring in Accounting.

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