DRI The Voice of the Defense Bar

Sponsored by Westlaw
View a demo of Westlaw

June 8, 2010 Volume 6 Issue 5

DRI Resources

In The Whisper

Featured Articles

A Guide to Navigating the Discovery of Facebook Records Within the Boundaries of the Electronic Communications Privacy Act

by Marie Trimble

Facebook surpassed Google as the most visited website in the United States for the week ending March 13, 2010. Although Facebook had surpassed Google for one-day periods, such as Christmas Eve, Christmas Day, and New Year's Day, this was the first time in its history that Facebook had more visitors than Google over the course of a week.

Facebook now has more than 400 million users who post status updates, view pictures, and write messages. As a Facebook user, I view Facebook as a way to keep in touch with old friends and connect with colleagues. However, as an attorney, I view Facebook as a gold mine of information about plaintiffs and potential witnesses. My protocol for new cases includes (1) reading the complaint, (2) Googling the plaintiff, and (3) searching to see whether the plaintiff has a Facebook account. But here's the catch – how do attorneys ethically access information about plaintiffs and witnesses from Facebook?

"Friending" the Plaintiff

The Philadelphia Bar Association Professional Guidance Committee issued an opinion letter addressing this issue in March 2009. *See* Opinion 2009-02. In the case presented to the Philadelphia Bar Association, an attorney asked whether it was ethical to use a third party to "friend" the witness. The third party would only provide truthful information (*i.e.*, his or her real name), but would not reveal any connection to the attorney. The third party would then collect information from the witness's Facebook page for use in litigation.

The Philadelphia Bar Association opined that the attorney "plainly is procuring the conduct, and, if it were undertaken, would be ratifying it with full knowledge of its propriety or lack thereof…. Therefore, he is responsible for the conduct … even if he is not himself engaging in the actual conduct that may violate a rule." The Philadelphia Bar Association further stated that the conduct was not

Committee Leadership

Committee Chair
Cynthia P. Arends
Halleland Lewis Nilan & Johnson
(612) 305-7525
carends@halleland.com

Committee Vice Chairs
Laurie K. Miller
Ellis & Winters
(919) 865-7001
laurie.miller@elliswinters.com

Robert Craig Mayfield
Hill Ward Henderson
(813) 221-3900
cmayfield@hwhlaw.com

Click to view entire Leadership

Seminars

Young Lawyers
Eden Roc 4525 Collins Avenue
Miami Beach, FL 33140
6/17/2010 - 6/18/2010

DRI Publications

Young Lawyer Drug and Medical Device Primer 2008 CD

entirely truthful, as "it omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit…." Consequently, the Philadelphia Bar Association advised that the proposition was unethical, stating that "deception is deception."

Ethical Means of Discovery

The Philadelphia Bar Association provides guidance on what not to do. As a result, there appears to be only two ethical means of securing the information: (1) by subpoena, and (2) through discovery. However, even these methods have proven difficult.

If you have ever tried to subpoena Facebook records, then you are well aware of the Electronic Communications Privacy Act ("ECPA"). The ECPA states that an "entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service…." 18 U.S.C. § 2702(a). Facebook provides "an electronic communication service," and therefore, is covered under this Act.

The courts have held that the ECPA "lacks any language that explicitly authorizes a service provider to divulge the contents of a communication pursuant to a subpoena or court order." *Flagg v. City of Detroit*, 252 F.R.D. 346, 350 (E.D. Mich. 2008); *see also In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606, 611 (E.D. Va. 2008).

However, the ECPA does allow Facebook to produce documents "with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service…." 18 U.S.C. § 2702(b)(3). It is through this exception that traditional discovery methods come into play.

In *Flagg* the court refused to allow the ECPA to serve as a "sweeping prohibition against civil discovery of electronic communications." The court pointed to the language of the Federal Rules of Civil Procedure, Rule 34(a)(1), stating that "a party may request the production of documents and various other categories of items that are 'in the responding party's possession, custody, or control." The court further stated that "the items that may be sought under the Rule include 'electronically stored information'… which plainly encompasses both electronic communications and archived copies of such communications that are preserved in electronic form."

The key word here is "control." The court stated that "as the language of the Rule makes clear, and as the courts have confirmed, a request for production of documents need not be confined to documents or other items in a party's possession, but instead may properly extend to items that are in that party's 'control.'" *See e.g., Cooper*

Industries, Inc. v. British Aerospace, Inc., 102 F.R.D. 918, 919 (S.D.N.Y. 1984). More specifically, the court noted that "the Sixth Circuit and other courts have held that documents are deemed to be within the 'control' of a party if it 'has the legal right to obtain the documents on demand.'" *See In re Bankers Trust Co*., 61 F.3d 465, 469 (6th Cir. 1995).

The court in *Flagg* applied the rules of discovery within the bounds of the ECPA, holding that "if the City can ***block*** the disclosure of … messages by ***withholding*** its consent, it surely follows that it can ***permit*** the disclosure of these communications by ***granting*** its consent." Consequently, the court held that "this acknowledged power readily qualifies as a 'legal right to obtain' the messages … and hence constitutes 'control' within the meaning of Rule 34 (a)(1)."

California courts have come to a similar conclusion. The court in *O'Grady v. Sup. Ct*., 139 Cal. App. 4th 1423 (2006), held that "copies may still be sought from the intermediary if the discovery can be brought within one of the statutory exceptions – most obviously, a disclosure with the consent of a party to the communication." The court explained that "where a party to the communication is also a party to the litigation, it would seem within the power of a court to require his consent to disclosure on pain of discovery sanctions."

There is no doubt that Facebook provides a wealth of information that would be highly relevant for use in litigation. Status updates often show what a person was doing and when they were doing it. Photographs reveal "injured" plaintiffs doing yoga, running marathons, and going on adventure vacations. A combination of traditional discovery procedures and a thorough understanding of the ECPA will serve as powerful tool in allowing attorneys to access this highly relevant information.

Marie Trimble is an associate at Gordon & Rees LLP in San Francisco, California. Ms. Trimble focuses her practice in Employment Law.

Back...