

# Social Networking: A Legal Primer

GARY S. KESSLER & ANTHONY BARBIERI



Social networking (aka “social media”) is taking over the world. Facebook alone has more than 500 million users, and if

it were a country, it would be the third most populated. However, there are many more social networking sites: Twitter, LinkedIn, MySpace, YouTube, blog.com, to name just a few. Not only is social networking taking over how we live, work, communicate, and “socialize”, it is changing how we do business, and that means there will be certain legal issues for your companies. Technology and society are years ahead of the legal world, and many lawyers lack the knowledge and guidance on the discoverability and use of social networking content in civil litigation and at the workplace.

Whether you agree with the decision or not, the Supreme Court seems to have its hands around some of the issues facing

social networking and users’ rights. In *City of Ontario v. Quon*, the Court found no Fourth Amendment violations occurred when a police officer’s supervisors read his personal text messages that were sent on his city-issued pager while he was at work. The Court ruled: “prudence counsels caution before the facts in this case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations of employees using employer-provided communication devices.” The Supreme Court stated “[r]apid changes in the dynamics of communication and information transmission are evident, not just in the technology itself but in what society accepts as proper behavior. At present, it is uncertain how workplace norms, and the law’s treatment of them, will evolve.”

We are just starting to see the use of social networking “documents” in litigation. While similar to more traditional forms of electronic communication, such as email, “tweets” and posting on Facebook tend to be less formal and more relaxed. We now see that businesses are promoting their products and seeking favorable “reviews” from “friends” while employees are communicating the qualities and benefits of the particular goods and services being offered. “Critics” are posting reviews and providing opinions and commentary. As a result of this expansion of social networking media, the outcome of more and more commercial litigation matters are turning on evidence found on social networking sites.

This past summer, in a slip-and-fall case in Nashville, Tennessee, the defendant (the “Coyote Ugly” bar, where the plaintiff fell while climbing onto the bar), subpoenaed Facebook, seeking photos that the plaintiff posted about the incident. The Court refused, denying a Motion to Compel under the Stored Communications Act (SCA), but then offered to actually create a Facebook page for the exclusive purposes of reviewing discovery data – in social networking parlance, the Judge became a “friend” of the case. The judge issued the following order: “In order to try to expedite further discovery regarding the photographs, their captions, and comments, the Magistrate Judge is willing to create a Facebook account. If Julie Knudsen and Michael Vann will accept the Magistrate Judge as a “friend” on Facebook for the sole purpose of reviewing photographs and related comments in camera, he will promptly review and disseminate any relevant information to the parties. The Magistrate Judge will then close this Facebook account.”

Most social networking users want the entire world to know everything (or nearly everything) about them. This doesn’t stop at the courthouse steps. By not blocking access to their “profile” pages, and information (including pictures) about their background, activities, and various other escapades and transgressions, all of this potentially harmful information is available to the adverse party and their counsel in litigation. As soon as litigation occurs, or seems eminent, it is important



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to search the Internet and social networking sites for valuable litigation information. Once information is found, it should be preserved just like any other information. Companies should be aware that their employees who are likely to be witnesses in any litigation will be subject to such reviews by opposing attorneys.

In some recent occurrences, the Philadelphia Bar Association opined that an attorney could not gain access to an adverse witness's Facebook and MySpace pages by asking a third party (whose name the witness would not recognize) to "friend" the witness. The bar association did determine, however, that the attorney could attempt to "friend" the witness himself, using his real name, as that would not constitute "conduct involving dishonesty, fraud, deceit or misrepresentation" and the New York State Bar Association opined that attorneys may obtain information from social networking sites to use for impeachment purposes as long as the profile is available to the entire social networking site and the lawyer, or no one under her direction, "friends" the person.

But just like with emails and other

traditional forms of discovery – especially if stored electronically – there is no real difference between discovery of social networking and discovery of other electronically stored information. Recently, courts in New York and Indiana have held that if a party or a witness can share its social networking content with hundreds of "friends", he or she can share it with the opposing side. For instance, a court ordered a personal-injury plaintiff to provide a consent and authorization so Facebook and MySpace could turn over access to her entire Facebook and MySpace pages.

To the extent that social networking content is like other forms of electronically stored information, the same legal standards regarding preservation, collection, review and production apply. Unlike email, information posted on social network sites is constantly changing and being updated. The law has not yet developed a standard on what must be maintained and the duration of such retention, but services are available to capture postings and preserve them. Each company must determine what, if any, retention guideline will be adopted for such information.

## IREM CALENDAR



**APRIL 9-13, 2011**

**IREM® Leadership and Legislative Summit**  
Washington, DC

**APRIL 21, 2011**

**IREM® Dallas Signature Event**

Celebrating "Earth Day"  
In the Wide World of IREM®  
Dallas World Aquarium  
11:30 am - 2:00 pm  
*Registration includes ticket to tour Aquarium – see page 5*

**MAY 1 - MAY 27, 2011**

**Genesis Women's Shelter Donation Drive**  
*see page 7 for details*

**MAY 10, 2011**

**Membership Luncheon**  
Maggiano's NorthPark  
Speaker: Dallas Mayoral Candidate Ron Natinsky

**MAY 17-20, 2011**

**Track A – Property Operations I**  
Spectrum Center

**MAY 30, 2011**

**Memorial Day**  
IREM® Dallas office closed

**JUNE 14, 2011**

**Membership Luncheon**  
DoubleTree Hotel  
LBJ & Midway Road

**JUNE 20-23, 2011**

**Track B – Property Operations II**  
Spectrum Center

**JUNE 24, 2011**

**ACoM Exam**  
Spectrum Center

**NO LUNCHEONS IN JULY & AUGUST**

