

Abstract

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

Prof. Derek S. Witte<sup>1</sup>

Thomas M. Cooley Law School

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.**
- 3. So, You Must Preserve & Produce The Contents Of Your Page.**
- 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.*

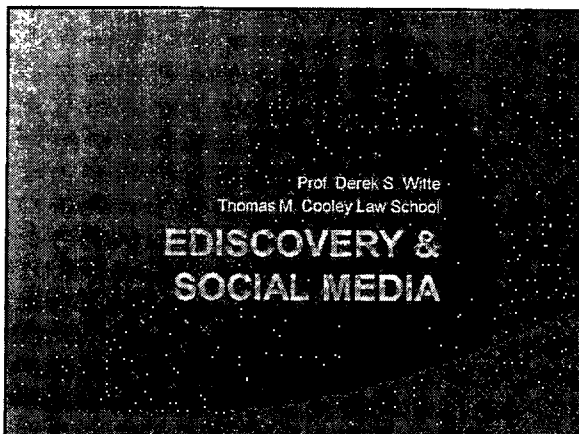
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<sup>1</sup> Prof. Derek S. Witte teaches Contracts and Commercial Law at Cooley Law School in Grand Rapids, Michigan. Professor Witte is responsible for presenting the Michigan ICLE on e-discovery. He recently spoke at the IQPC 8th E-Discovery Conference in New York on the topic of Facebook and ESI. He has spoken about e-discovery for the Federal Bar Association's West Michigan Chapter and recently moderated and hosted an e-discovery conference for the Grand Rapids Bar Association, which focused on the new Michigan e-discovery rules.

*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.*



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### 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.

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*Mackelprang v. Fid. Nat'l Title Agency of Nevada, Inc.*, 2007 WL 119149 (D. Nev. 2007)

- 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.

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*Mackelprang v. Fid. Nat'l Title Agency of Nevada, Inc.*, 2007 WL 119149 (D. Nev. 2007)

- 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.

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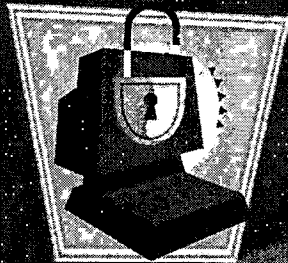
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So, until The Law Is Clear, Take All Reasonable Precautions To Preserve Your Social Networking Page When It Becomes Relevant To A Foreseeable Lawsuit



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### 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." In re Sherry, 2008 WL 118026 (N.D. Cal. April 20, 2008) (stating that Facebook informed the plaintiff that it was "creating a preservation order" to keep the pages on track).
- Stored Communications (18 USC 2702) Act MAY apply, but allows 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 off pages from your Facebook page, or
  - Take screen shots and save them.
  - Try to save the web page as some other file and store it somewhere on your computer.
- For corporations:
  - have a computer forensics expert capture each version of your company's Facebook or Twitter page using a forensically sound method.
  - Create and follow a policy for updating these pages so that all versions are captured.

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### 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 websites 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.

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### 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.
- Some cases suggest that Facebook and others have internal data preservation procedures. *In re Skerry*, 2009 WL 109726 (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 "litigation hold" on your own pages.

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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).
- ⊗ Subpoena ESI directly from Facebook, LinkedIn, etc.
  - ⊗ See *Cohen v. Google, Inc.*, 2009 WL 2383410 (N.Y. Sup. Ct. Aug. 17, 2009) (enforcing subpoena against Google and ordering it to disclose identity of anonymous blogger on Blogger.com).
  - ⊗ 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 (18 USC 2702) Act *MAY* apply but allows for exceptions and has not been applied to Social Networking Sites.

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