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Finding Evidence on Facebook

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November 1, 2011

Finding Evidence on Facebook

I blogged [earlier](#) about looming questions on the evidence horizon as to the admissibility of electronic communications on social networking sites like Facebook. In my last guest post (thanks again Colin!), I wanted to briefly touch on a precursor to that question – the ability of litigants to get at social media information, and particularly information stored on Facebook. One of the most important rules of Evidence is that if you don't have it, it is not admissible. See *A Few Good Men* (1992) (Tom Cruise explains: "It doesn't matter what I believe. It only matters what I can prove!")

Litigants are increasingly recognizing Facebook as a valuable source of evidence. But how do you get at that evidence? There are three obvious approaches:

First, you can simply fire up your computer and access any publicly available portions of a Facebook profile. This method of obtaining data is the easiest, but also the least likely to turn up anything valuable. In some cases, though, private data may be available through a turncoat "friend." For example, one of your "friends" (and lots of people have hundreds of "friends") may find your bragging about a bank robbery or alligator killing unseemly and forward it on to law enforcement (as happened [here](#)). [Here](#) is a case where a fugitive's "friends" included a law enforcement official. Not good.

Second, litigants can obtain access to "private" areas of a Facebook account through a discovery order directed at the person whose account it is. There appear to

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be few, if any obstacles, to obtaining information in civil litigation in this manner. See *Patterson v. Turner Construction Co.*, N.Y.A.D. 1 Dept. (Oct. 27 2011) (“The postings on plaintiff’s online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service’s privacy settings to restrict access . . . , just as relevant matter from a personal diary is discoverable.”); cf. Derek Witte, *Your Opponent Does Not Need a Friend Request to See Your Page*, 41 *McGeorge L. Rev.* 891, 900 (2010). Yikes!

Finally, and most interestingly, litigants may try to obtain access directly from Facebook. One of the benefits of this approach is that Facebook may have access to a great deal more historical data than the individual Facebook account holder. Also, if you are the government investigating a criminal case, you can generally expect more cooperation (and less incessant objecting) from Facebook than the target of your investigation.

Here is where things become complicated. If you are a civil litigant, your access to Facebook’s files might be blocked by the Stored Communication Act. See *Crispin v. Christian Audigier, Inc.*, 717 F.Supp.2d 965, 969 (C.D.Cal. 2010) (holding that Stored Communication Act required quashing of subpoena directed at MySpace and Facebook); Witte, at 899.

If you are the government, however, you are in luck. The same Stored Communications Act sets forth a streamlined process for the government to get access to Facebook postings relevant to a criminal investigation. [See Junichi Semitsu, From Facebook to Mug Shot, 31 Pace Law Rev. 291, 360 \(2011\); Orin S. Kerr, A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It, 72 Geo. Wash. L.Rev.. 1208 \(2004\).](#)

Much of this law is complicated by intersecting statutes and ambiguous statutory definitions. But one thing is clear. As litigants and courts begin to figure it out, electronic communications broadcast in unguarded moments of false privacy and conveniently preserved for future litigants will become a common aspect of modern litigation -- whether or not (as I blogged earlier) modern evidence law is ready

- Jeff Bellin

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