

THE WEB AS A WEAPON

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UNCORKING LITIGATION MANAGEMENT EXPERTISE

LITIGATION 2.0: the web as a weapon

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I. INTRODUCTION

Most are familiar with using the internet as a research tool, but generally limit research to “googling” a subject. While google is an excellent resource, more refined searches of specific websites can provide a treasure trove of information. The proliferation of user generated content on the Internet gives attorneys a welcomed weapon to research parties and witnesses.¹ Billions of people have access to this information. Shockingly, users frequently post embarrassing information about themselves. Often this information directly contradicts statements made during the course of litigation.²

War stories abound:³ Plaintiff complaining of carpel tunnel syndrome so severe he can no longer work. Through the magic of internet research, video footage of the plaintiff playing the drums in a rock band is uncovered along with future tour dates where he is seen “overcoming” his disability. Auto tort plaintiff complains of post traumatic stress preventing him from getting behind the wheel again. On his MySpace page, he posts pictures and brags about his recent extreme stunt driving school adventure.

Uncovering this damning information before the Internet may have been impossible or require expensive surveillance.

Attorneys are becoming more aware of the danger the Internet can pose for their clients. Increasingly, attorneys will conduct research prior to filing a lawsuit and advise clients to clean up the information. This does not always mean the information is gone. The Internet Archive organization has a website called the Way Back machine, which allows you to browse through 85 billion web pages archived from 1996 to a few months ago. This includes many webpages that have been “deleted” or otherwise no longer available on the active Internet. <http://www.archive.org/web/web.php>

¹ User generated refers to the websites that primarily use information created, uploaded, or posted by the customer/user of the website.

² It is advisable to also run searches on your key witnesses and clients.


³ The war stories have been modified to maintain confidentiality.


II. TYPES OF WEB INFORMATION AVAILABLE


There are numerous websites catering to diverse interests, some as obscure as knitting clothes for pets. Neighborhoods have websites for members of the community to discuss events and concerns. When formulating internet research, time should be dedicated to finding groups that may be specific to your adversary (school alumni groups, neighborhood groups, etc.). Additionally, the high volume sites should be searched. A sampling of some useful sites is listed below.


A. Social Networking Sites

Social networking sites allow individuals and groups to “link” or “friend” each other via a website. There is an incredible amount of information exchanged on these sites from photos, upcoming events, names of friends and colleagues, etc. People trade messages, share photos, and post their current activities on their “wall”. The most popular are Facebook and MySpace, both sites should be the starting point of an internet based investigation.


 Facebook - Web address: www.facebook.com


 MySpace- Web address: www.myspace.com


 Friendster- Web address: www.friendster.com

 Netlog- Web address: www.netlog.com
NetLog is sometimes described as the European MySpace

 Hi5- Web address: www.Hi5.com
Hi5 is an international version of sites like Facebook and MySpace popular in Latin and South American countries.

 LinkedIn- Web address: www.linkedin.com
LinkedIn is a professional networking site. Generally contains information about education, professional associations, colleagues, and work history. The content tends to be tamer than what may be found on Facebook or MySpace. The website however can be an excellent resource about an adversary’s background and known colleagues.

 43 Things- Web address: www.43things.com
A social networking site where users create accounts and then share lists of goals and hopes.

 Twitter - Web address: www.twitter.com
Twitter is a free social messaging utility for staying connected in real-time. Through Twitter users post short, usually one line, status updates—called “tweets”—on their activities throughout the day. Evidently, some people believe their life is so interesting that people want to read “dropped off dog at vet...need to return movies”. Many of today’s mobile phones are equipped with the ability to send tweets, which has led to more frequent updates. Though

generally mundane, tweets can be used to create a timeline leading up to events critical in litigation.

B. Media Sharing Sites

These websites allow users to post and share photos and videos. Often, the photos and videos are “tagged” with comments by the user and friends. In one case, a plaintiff complained of trauma that caused leg pain affecting her ability to stand for long periods of time. Through Flickr, she shared pictures of her latest ski trip. Her leg pain did not appear to impede her skiing. Friends from the trip posted comments on the pictures, providing counsel with a list of fact witnesses who had no recollection of any complaints of leg pain during the ski trip.

 PhotoBucket- Web Address: www.photobucket.com

 Picasa- Web Address: www.picasa.google.com

 PictureTrail- Web Address: www.picturetrail.com

 Flickr- Web Address: www.flickr.com

 Slide- Web Address: www.slide.com

 Veoh- Web Address: www.veoh.com

 WebShots- Web Address: www.webshots.com

 YouTube- Web Address: www.youtube.com

C. Blogging Sites

Blogs are websites where the writer—called a blogger—provides commentary or news on a particular subject; some blogs are personal dairies. Some blogs will contain video commentary, called a vlog. Many websites exist to enable people to create and maintain blogs.

 Vox- Web Address: www.vox.com

 Blogger- Web Address: www.blogger.com

 LiveJournal- Web Address: www.livejournal.com

 Xanga- Web Address: www.xanga.com

D. Research Sites



Web Address: www.google.com

Google is an all around great resource for investigating many aspects of a claim. Google is constantly developing new applications for disseminating information. One application is an addition to its google maps feature. <http://maps.google.com/> Google has sent drivers across the country with vehicles equipped with cameras shooting street views. With this feature you can enter an address then zoom to the street level and view the building. From there you can virtually “walk” the street seeing the buildings as if you were there physically. *Note this is not a real time view.



Amazon- Web Address: www.amazon.com

Everybody knows that Amazon.com is an online retailer of books, movies, music, games and electronics, etc.

Important for litigation research, Amazon.com allows users to post reviews about products. If you have a matter involving a product, check to see if it is available on Amazon.com, then read the reviews. You may find that your adversary posted a review that contradicts the allegations from the litigation.

III. OBTAINING INFORMATION BY SUBPOENA

A. Information to Provide

Many people have common names, which makes it difficult for websites to comply with your subpoena; or give them a reason not to comply. Researching the website before issuing a subpoena will allow for more descriptive information in the subpoena. Providing as much information as possible will help you obtain more with your subpoena. Here is an example of details that will help your efforts:

- Full name of user(s).
- Full URL to website profile (this is the web address displayed in your browser while viewing the plaintiff’s web page).
- Known email addresses.
- Phone numbers.
- Address.

B. What to Ask For

The following are suggested areas of inquiry for a subpoena to a website operator. It is important to tailor your request to the type of website.

- All internet usage activity of record
- All private messages

- All page comments
- All “wall” posts (Facebook)
- List of all friends
- List of all friend requests
- All blogs entries and posts
- Account access activity log with IP address and date/time of access (The IP address can be used to track down the computer used to access the website. This can be useful to prove the website was accessed by your adversary’s home or work computer.)

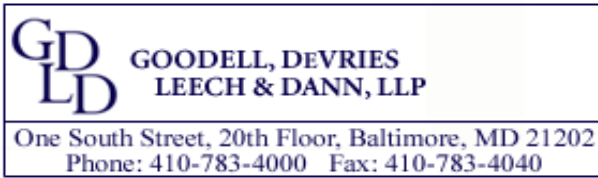
C. Other Issues

The subpoena should instruct that the providers prevent the deletion of any information contained in the accounts. There is generally no remedy under the exiting rules of many jurisdictions that can be used enforce this request; however many providers may comply with the request.

A Motion to Quash the Subpoena or for a Protective Order may argue that the information on the website is private and confidential. For this reason it is very important to access the website’s user agreement before sending the subpoena. Quite often, the user agreement states that any information posted will be publically available on the web. This type of language can be useful to rebut privacy and confidentiality arguments. *Note some websites allow users to set “privacy settings” that restrict access to specific people who have been granted permission.

IV. CONCLUSION

You have the information, but is it admissible? Sometimes the information is so damaging, you are able to resolve the claim on very favorable terms with worrying about evidentiary issues. Other times you find yourself preparing for trial wondering how to exploit the fruits of your cyber search. Internet evidence, just like any other evidence, must be relevant and admissible. Magistrate Judge Paul W. Grimm with the United States District Court for the District of Maryland wrote a 101 page opinion that details the process of using electronic evidence under the Federal Rules of Evidence: *Lorraine v. Markel Am. Ins. Co.*, 241 FRD 534 (D. Md. 2007). This opinion is a great resource for dealing with evidentiary issues, even if you are in state court.



Mr. Hines joined the firm as a partner in 2003. He was formerly the managing principal of a regional law firm's District of Columbia and Virginia offices. Mr. Hines is licensed in Maryland, the District of Columbia and Virginia, and has represented clients in trials and appeals in all three jurisdictions. His areas of practice include professional malpractice, toxic tort and environmental, pharmaceutical, products liability, and commercial, securities and employee litigation. Mr. Hines is listed in Best Lawyers in America under legal malpractice law and in The Best of the U.S.



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EDUCATION

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PROFESSIONAL ORGANIZATIONS

Maryland State Bar Association

Defense Research Institute

American Bar Association, Section of Litigation, Mass Torts Litigation Committee

BAR MEMBERSHIPS

Maryland State Bar, 1985

District of Columbia Bar, 1986

Virginia State Bar, 1999

PROFESSIONAL EXPERIENCE

Goodell, DeVries, Leech & Dann, LLP, Partner, 2003

Eccleston and Wolf, P.C., Managing Principal, District of Columbia office, 1997

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