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What's On Your Witness's MySpace Page?

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As more and more people post personal information on social networking sites such as Facebook.com, Myspace.com, and even Match.com, attorneys are increasingly seeking discovery of such evidence, which is becoming commonplace in civil and criminal trials. Users' pages often contain a wealth of personal facts, photographs, and videos, and links to other sites. Not surprisingly, colleges and employers now check applicants' web pages on a regular basis.

Social networking sites typically have public and private components. On MySpace.com, for example, users can choose public or private settings. Anyone who logs onto the site and knows either the account holder's real name or screen name can view that person's public profile. To access the profile, the viewer must be on the account owner's "Friends" list, and then send a "friends request" to the account holder, who can accept or reject it. Facebook.com (the site describes itself as "a social utility that connects you with the people around you") is similar, but its search engine uses real names, not screen names.

Two recent cases dealt directly with social website evidence. In *Mackelprang v. Fidelity Nat'l Title Agency of Nevada, Inc.*, the defendant in a sexual harassment case sought to compel production of emails from two MySpace.com accounts, arguing that the plaintiff sent private messages on MySpace "to facilitate the same types of electronic and physical relationships she characterized as sexual harassment in her Complaint." While the district court ultimately ruled the requests were improper, in more compelling cases litigants have obtained admissible evidence from these websites.

For example, in *Ohio v. Gaskins*, the defendant, charged with statutory rape, sought to introduce evidence that the victim held herself out on MySpace.com as an eighteen-year old. The trial court admitted photographs of the victim that had been posted on her site, and allowed a witness to testify as to the authenticity of the photos.

Research on MySpace, Facebook, and blogs can also be beneficial when preparing to take or defend depositions, or when hiring experts. Janice V. Mitrius, Chicago, cochair of the Section of Litigation's Technology for the Litigator Committee, says she regularly checks these sites when conducting due diligence on potential experts or opposing counsel: "I'm primarily looking for information that may affect credibility, and it's always interesting to see if they've put something on one of these sites."

In a related development, an Indiana court recently questioned whether an attorney who was attempting to serve a complaint had made meaningful efforts to locate the defendant when the attorney had failed to run a Google search on him. *Munster v. Groce*.

Thus, while you can now conduct extensive due diligence on opposing parties, you should assume that your adversaries are conducting similar searches on you and your witnesses. And, while litigators may think this research will give them an edge on their opponents, they may now just be keeping up.