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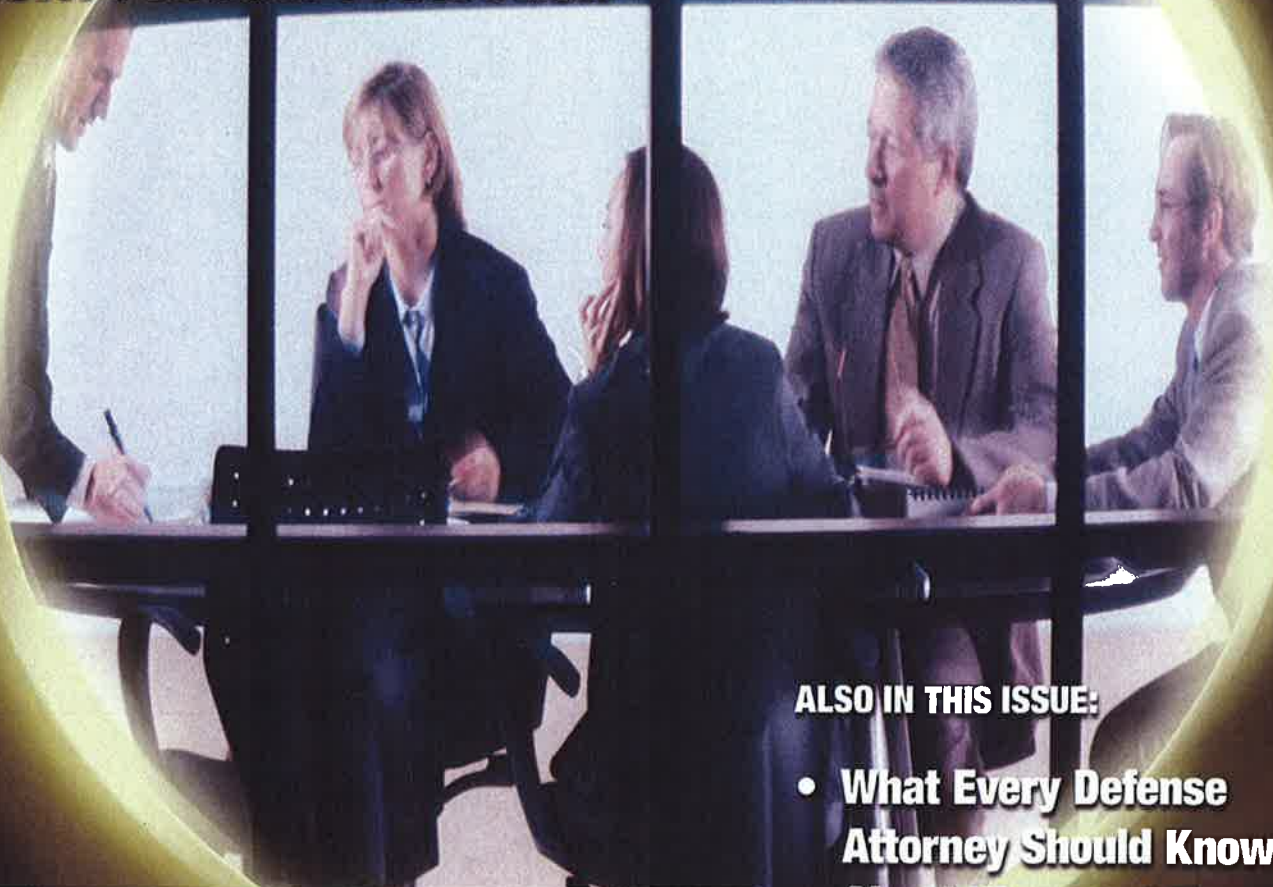
DEFENSE QUARTERLY™

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Internal Corporate Investigations: Attorney-Client Privilege and Work-Product Protection



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Searching for the Online Truth on Plaintiffs

Defense lawyers and corporate counsel have known for some time that the Internet offers a window into the private lives of plaintiffs. Often, a simple Google search on a plaintiff can yield photographs that contradict the allegations in a plaintiff's lawsuit, prior inconsistent statements, or other factual information that support the defense's theory of the case. Realizing the danger, plaintiffs' attorneys now customarily warn their clients of the hazards of keeping profiles on sites such as MySpace and Facebook, although there is little evidence that their clients heed this advice. An associate at Shapiro, Cooper, Lewis & Appleton, P.C., a plaintiffs' firm specializing in railroad litigation, recently warned of Internet pitfalls on her firm's blog:

If you have been in an accident or have suffered some other type of injury then be very careful about how you portray yourself to the public. Certainly your case is not the only aspect of your life and you are entitled to continue enjoying other aspects. The problem is when you put yourself out there in a certain light and everyone can see it, including defense attorneys and insurance adjusters.

Of course we all know that MySpace and Facebook are like any other Internet site created by the individual; they may not be accurate and they may not be current. Take the time to consider how you would interpret the information on your site if you were a defense lawyer looking for ways to weaken your

case. Don't make their jobs any easier for them. Make them work hard to try and diminish your claim. Trust me, they have plenty of tricks up their sleeves and we don't need to be giving them anymore.

Even without such warnings, plaintiffs, as other users of such online services, occasionally shield their profiles or operate under unknown handles or nicknames. Some eschew their real names altogether. Your outside counsel must become equipped with skills to locate online information about plaintiffs who hide under pseudonyms or otherwise conceal their true identities online. Although individuals often believe in the anonymity of the Internet and think they may speak freely online, there is ample online information available to those who know how to find it. Such information can be critical to the evaluation of a case's worth and the location of impeachment material. Yet many outside counsel stop at the first step in an online investigation, failing to discover facts and statements by a plaintiff that could dramatically affect the case.

A recent find in a mass toxic tort case illustrates the great value of a truly diligent Internet search. In that case, the plaintiff, a 27-year-old man, filed a lawsuit alleging physical and mental injuries resulting from a toxic chemical spill. As many in his generation, the plaintiff was Internet savvy and maintained a MySpace profile. Defense counsel, suspecting the existence of such a profile, entered the plaintiff's first name and last name into the MySpace Friend Finder and located a publicly accessible profile under that name. The plaintiff's identity was confirmed both by photographs and the listed city of origin on the MySpace profile. The few available photographs depicted the plaintiff in various silly situations, and included one picture in which he wore a banana costume and another depicting him unconscious on a table in the snow alongside a bottle of vodka. Although the information yielded was helpful, some outside counsel would have stopped at

that point in an online investigation and attempted to use the search results at a deposition or mediation.

However, because of the likelihood of additional information, defense counsel in this case continued the online investigation of this plaintiff. Next, defense counsel focused on the plaintiff's online handle and MySpace nickname, which was based on his affinity for raucous drinking. Entering this moniker into Google's search engine, defense counsel immediately located another online profile for the plaintiff under his pseudonym—one that would not have turned up in a search of the plaintiff's first and last names. This new profile subsequently led to a message board dedicated to the celebration of binge drinking—called "Modern Drunkard Magazine—A Forum for Boozeheads"—on which the plaintiff had posted approximately 4,500 messages. Many of the posts included photographs of him in various states of intoxication. A comprehensive review of the message board postings created a timeline of the plaintiff's postexposure misadventures, including postaccident road trips across the nation, wild parties, and hiking trips in the mountains. Further, the plaintiff's online archive of additional photographs—posted at an unrelated third website—was also discovered due to the manner in which the plaintiff posted them on these message boards. This third, online photo archive—also publicly accessible for all to see—was again discovered under his handle, as opposed to his real name. The plaintiff had uploaded hundreds of photographs of himself—many of which were date stamped—that showed him performing all types of activities, from binge drinking to partying on a Slip and Slide. Needless to say, many of the activities depicted in the photographs were completely inconsistent with what the plaintiff claimed he could do in the lawsuit.

Although most practitioners now perform a basic Google search on plaintiffs, outside counsel can miss a great deal of information if he or she fails to search for more than a person's name. The message



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board postings and photographs noted above dramatically undermined the plaintiff's claims of physical injuries and post-accident limitations. Neither the photo archives nor the message board posts were located by simply entering the plaintiff's name into a search engine. Thus, your outside counsel should diligently scour the Internet for background information on plaintiffs using not only their names, but also additional search criteria.

Google or Other Search Engines

Any Internet background search on a plaintiff begins with the limited personal information acquired in the pretrial claims or postcomplaint discovery process. A typical discovery response will yield basic biographical information, such as:

Thomas Throckmorton
12345 Main Street
Anywhere, South Carolina 29601
(864) 555-5309

DOB: 11/19/1975

Employer: ABC Corporation, Inc.

Typically, an Internet searcher will enter the name, both with and without quotations marks, into the search engine of choice, to locate sites that mention the individual. Basic searches might include:

Thomas Throckmorton
Tom Throckmorton
"Thomas Throckmorton"

More sophisticated searches include:

"Thomas Throckmorton" Anywhere
"Thomas Throckmorton" "South Carolina"
"Tom Throckmorton" SC

Throckmorton "ABC Corporation"

Advanced searches might include:

Tthrockmorton75

Discovery responses should also alert your outside counsel to "Throckmorton's" telephone number, home and business address. These items can be input into a search engine to yield additional informa-

tion of interest, including information tied to a plaintiff that would not be found by just entering his or her name. Outside counsel should explore all possible online leads.

Social Networking Sites

Especially if an individual is under the age of 40, it is wise to investigate social networking sites to ascertain any possible plaintiff presence. Your outside counsel should set up an account on MySpace and Facebook exclusively for investigating plaintiffs. Your outside counsel should search both networking sites to determine if a plaintiff—or a witness—has an account under their first name. If a plaintiff has a more common name, and you expect a myriad of results, MySpace will allow the searcher to limit the search to individuals within a certain number of miles (five to 100) of a particular zip code. Often, however, individuals take advantage of privacy settings or adopt handles so that a typical first name/last name

search will not locate an individual, even if the individual does maintain an account on the service. Social networking sites do allow searches by e-mail address; even entering a phone number, physical address, or IM screen name into the search field may yield additional information, depending on what information a profile holder has chosen to reveal. If your outside counsel is aware that a person graduated from high school in a particular year, both MySpace and Facebook allow a searcher to peruse graduates, and mere attendees, of particular high schools by year, which may locate a plaintiff—just as you would search for your own former classmates—even if a plaintiff has chosen not to list him- or herself under his or her own name.

Once your outside counsel has located a particular plaintiff's profile, another potential search method is to "Google" a plaintiff's online handle. MySpace, for example, offers its users the ability to create a customized URL, offering direct access to their profiles, such as:

[http://www.myspace.com/
tthrockmorton75](http://www.myspace.com/tthrockmorton75)

or

[http://www.myspace.com/
drunkasaskunk75](http://www.myspace.com/drunkasaskunk75)

Once your outside counsel has confirmed that a plaintiff has a particular handle or ID in use, from a MySpace profile or e-mail address, he or she can search for that handle. Sometimes, searching for a handle will lead to another site, such as Flickr.com, an online photo storage service, or other such sites where users operate under handles. Searching by a plaintiff's handle or ID may also lead your outside counsel to a blog maintained by the plaintiff, providing a windfall of information authored by the plaintiff that may contradict his or her litigation claims.

Search for Friends

If at first your outside counsel does not locate a plaintiff on the social networking sites but knows the name of a plaintiff's sibling or friend, he or she can search for the family member or friend. Most social networking sites allow you to view the friends of a particular user. For instance, Facebook will typically allow you to view a user's friends even if that user has established a "private"

profile. If your outside counsel locates a friend's profile, he or she may find the plaintiff by searching for the plaintiff's pseudonym in the friend's list of online friends. Further, if the friend or sibling's profile is publicly accessible, it may display photographs of or messages posted by the plaintiff. Remember, plaintiffs need not have

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own profiles for third parties to
post pictures of them on-line.

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their own profiles for third parties to post pictures of them online. Outside counsel can sometimes find the most relevant information on the online profile of an individual uninvolved in the lawsuit at issue.

Finding What Is Lost

Sometimes, outside counsel have an avenue for discovering websites as they once existed, years ago, using the Internet Archive and its "Wayback Machine." The Internet Archive is a particularly helpful utility if a plaintiff owns and operates a website, such as a company website or a blog, or even if counsel discovers a former employer's website that lists employee biographical information. By navigating to www.archive.org, your outside counsel can enter to the search field the URL address of a website and discover how it existed and appeared on the Internet up to 10 or 12 years ago. Typically, the most recent version of the page available in the archive is the version that existed on the Internet approximately six months before the archive search. Not all websites are obtainable via this utility, and some websites are affirmatively excluded from the archive. Typically, large, corporate news websites opt out of the archive. Nevertheless, a surprising number of websites can be located in the Internet archive. Although the Internet archive is most helpful when researching the background of retained testifying experts who hawk their services on the web, young plaintiffs or the self-employed often

change their websites over time, deleting or omitting factual information that can be of assistance to outside counsel.

A Word to the Wise

On discovering online information about a plaintiff, it is absolutely critical for your outside counsel to capture and preserve it. In a recent case, this writer discovered that a plaintiff alleging moderate personal injuries had posted photographs of himself windsurfing on his MySpace profile, which at that time, was publicly accessible. We captured the main profile page and the images he had posted, saving the profile pages in PDF format and the images in their original JPG format. However, a week before the deposition, we went back to his MySpace profile and attempted to discover any changes or updates that this plaintiff had made since the last time we had checked. In the interim, the plaintiff had changed his MySpace profile settings so that the profile was "private," which made all the previously viewable photographs inaccessible to individuals he did not register on the profile as his "friends." Had we not captured the pages and photos when we first discovered them, they would have been lost to us. Counsel must also document the method of capture for future authentication purposes.

When your outside counsel encounters plaintiffs born in the 1970s and 1980s, online factual investigation is critical. In all likelihood, a plaintiff born after 1970 has some type of Internet presence, whether on MySpace, Facebook, various other social networking sites or Internet message boards. In fact, there is an increasing chance that plaintiffs born before 1970 are now online, posting relevant information about themselves and their activities somewhere across the Internet.

Considering the culture of the Internet and the fondness that individuals have for their online lifestyle and friends, it is unlikely that plaintiffs will censor themselves online. Rather, it is more likely that they will simply begin taking steps to prevent outsiders from discovering their profiles, either by changing their names, selecting profile settings that make their profiles private, or using other measures that make online information more difficult to locate. ■