

## Court Offers to “Friend” Witnesses for *In Camera* Review of Facebook Photos and Postings

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With more than 500 million active Facebook users sharing photos and posting information about significant (or insignificant) events on Facebook walls, one of those users may include the Magistrate Judge in *Barnes v. CUS Nashville, LLC dba Coyote Ugly Saloon*, 2010 WL 2265668 (M.D. Tenn. June 3, 2010). In a novel approach to resolving an electronic discovery dispute, the Court offered to create a Facebook account in order to “friend” two witnesses for an *in camera* review of their Facebook profiles which purportedly contained photographs of them and the plaintiff dancing on top of the defendant’s bar.

defendant’s motion to compel production of the witnesses’ Facebook photographs and other related information.

However, the Court stated that although the defendant had “mishandl[ed]” issuing the subpoenas, the plaintiff could have cooperated and:

helped resolved the matter by clearing up the issue of the various witnesses, who are friends of the plaintiff, to produce the various photos on Facebook. Their resistance does raise the specter with the de-

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According to the allegations in the complaint, the plaintiff was “encouraged” by the defendant’s employees to climb onto the bar to dance. The plaintiff apparently did attempt to climb onto the bar “to be photographed with her friends.” At some point, the plaintiff slipped and fell off the bar and hit her head, sustaining personal injuries. The plaintiff had already provided certain information from her Facebook account about the evening and accident, including a message that read: “can you please take the pictures of me on the stretcher off ... its [sic] not okay with me.”

The defendant issued subpoenas to two of the plaintiff’s friends who were apparently also photographed dancing on the bar seeking the photographs and other information from their Facebook accounts. According to the Court, it did not have jurisdiction to enforce the subpoenas in either Colorado or Kentucky and denied the de-

defendant that there is something there they want to hide. Clearly the issue of who took the pictures of the plaintiff and her friends dancing on the bar is highly relevant, and plaintiff is in the best position to quickly resolve this.

In an effort to expedite discovery about the Facebook photographs, their captions and comments, and to get the case to trial, the Magistrate Judge offered to set up a Facebook account and “friend” the plaintiff’s two friends and witnesses to the accident for the “sole purpose of reviewing photographs and related comments in camera”

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for relevance which would then be disseminated to the parties. The Court’s opinion does not indicate whether the Magistrate Judge’s offer was accepted by the parties and witnesses.

### Preserving Electronic Evidence on Facebook

With the potential relevance of information contained on social media sites such as Facebook and MySpace ever increasing, preservation of this fragile evidence is often necessary and a key concern. Since October 2010, Facebook users can easily preserve all this electronic evidence with a few clicks through their Facebook account settings and entry of the account password. Facebook then provides a link via email to download all of the information directly to the account holder’s computer. In order to preserve the Facebook download for litigation purposes, the party/

<sup>1</sup> Characterizing the defendant’s motion to compel the plaintiff to produce Facebook photographs and permit access to her Facebook account as essentially a “fishing expedition,” the court in *McCann v. Harleystown Insurance Co. of New York*, 78 A.D. 3d 1524, 910 N.Y.S. 2d 614 (Nov. 12, 2010) held that the defendant failed to establish a “factual predicate with respect to the relevance of the [Facebook] evidence” and denied the motion.

<sup>2</sup> In a copyright infringement claim in *Crispin v. Christian Audigier, Inc.*, 717 F.Supp. 2d 965 (C.D. Cal. 2010), the defendants served subpoenas on various social network sites including Facebook and MySpace seeking all communications between the plaintiff and the defendants. Although holding that “private” messages sent using Facebook and MySpace fall under the protections of the Stored Communications Act, 18 U.S.C. 2701, the court remanded the case for additional evidence to determine whether the plaintiff’s wall postings and communications were public and not subject to the user’s privacy settings.

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witness should save the email message with the download link and download the .zip file created by Facebook. A copy of the .zip file should be preserved for use during the litigation. Proper preservation steps would include the creation of an MD5 hash for the .zip file so that the particular photographs, postings, messages and account information contained within the .zip file can be authenticated for use in depositions or trial.

To what extent litigants may obtain access to a witness or party’s Facebook account or other social media sites will no doubt continue to be debated and argued with varying results. Some courts regard the request for access to social media sites as a “fishing expedition”<sup>1</sup> while other courts regard public wall posts<sup>2</sup> or information relating to a party’s mental state<sup>3</sup> as containing potentially relevant electronic discovery that must be preserved and produced in litigation. One thing is clear – with more than 250 million people accessing sites like Facebook every day this source of potentially relevant electronic evidence is unlikely to be ignored by the courts and litigants.

<sup>3</sup> In a sexual discrimination case, the court in *EEOC v. Simply Storage Management, LLC*, 270 F.R.D. 430 (S.D. Ind. 2010) held that where allegations included emotional distress or mental injury, the defendant was entitled to all social network site “profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries...” that “reveal, refer, or relate to any emotion, feeling or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to production a significant emotion, feeling, or mental state.”

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