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## In litigation, private Facebook posts are suddenly less private

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ATLANTA, Jan 27 - (Reuters Legal) It's the latest litigation tactic in the online age: Lawyers are trying to mine the private zones of Facebook and other social-media sites for photos, comments, status updates and other tidbits that might contradict what their opponents are saying in court. And increasingly, judges in civil cases are granting access to online caches that had formerly been considered off-limits.

Defense lawyers in personal-injury cases, in particular, are finding social networks to be a rich source of potentially exculpatory evidence. In one recent case, a New York woman who claimed to be bedridden after falling off a defective chair showed up in family Facebook photos smiling happily in front of her house.

While judges have long allowed information gleaned from public portions of networking sites to be used as evidence in civil trials, materials that are password-protected or reserved for selected "friends" have been given a greater level of protection. But in recent months, two state courts have granted defendants broad access to "private" photos and comments. A federal court issued a similar ruling in 2009.

This shifting legal balance between privacy and evidence-gathering reflects the broader debate that has been raging over what level of privacy, if any, citizens can expect as they put more and more personal information online. And privacy, at least on this front, seems to be losing. "This is beginning to catch on across the country," said Jim Dempsey, vice president of public policy at the Center for Democracy and Technology, a liberal think tank. "You do have a right of privacy in your private Facebook postings. But in the context of litigation, that right can be overcome."

### COURT-ORDERED CONSENT

Postings on social networks are generally governed by the federal Stored Communications Act, which regulates how private information can be disseminated in non-criminal matters. The law has been interpreted to mean that the sites don't have to hand over users' personal data in response to a civil subpoena. Defense lawyers, though, have devised a strategy to work around this roadblock: They ask judges to order plaintiffs to sign consent forms granting defendants access to their private material. The defendants then attach these consent forms when they subpoena the sites. In these subpoenas, the plaintiffs are essentially authorizing the sites to hand over printouts of the private portions of their pages to the defendants.

A personal-injury case in Erie, Pennsylvania, shows how online musings intended as private can now make their way into litigation. In 2007, a racecar driver named Bill McMillen sued the owners of a local track, Hummingbird Speedway, claiming that he was seriously injured and lost "the enjoyment of life" as a result of an accident on the track. The lawyer for the speedway, Gary Bax, said he checked out McMillen on Facebook and found comments and photos suggesting that after the accident, McMillen went on a fishing trip to Florida and attended the Daytona 500.

Bax filed a motion to compel McMillen to turn over his Facebook and MySpace user names and passwords, so Bax could dig deeper. In September, Jefferson County Court of Common Pleas Judge John Henry Foradora granted the motion, noting that Facebook and MySpace are specifically designed for sharing personal information. "While it is conceivable that a person could use them as forums to divulge and seek advice on personal and private matters," Judge Foradora wrote, "it would be unrealistic to expect that such disclosures would be considered confidential." A trial has not yet been scheduled.

### SMILEY FACES

A similar ruling was handed down in the case involving the woman who claimed she fell off a defective chair. Kathleen Romano alleges she suffered "serious permanent personal injuries" due to the negligence of Grand Rapids, Michigan-based furniture company Steelcase. But according to Steelcase lawyer James Gallagher, Romano's MySpace postings regularly included smiley faces, suggesting that she was happy. Gallagher, a partner at Gallagher & Faller in Garden City, N.Y., said he also tracked down the Facebook page of Romano's daughter, which, he said, included postings and photos indicating that the family had traveled to Florida, contradicting Romano's claims that she is homebound. "We figured something smells here," Gallagher said, "and we wanted to see what else was in there."

New York Supreme Court Judge Jeffrey Arlen Spinner granted Gallagher's motion to compel Romano to provide

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access to the private portions of her Facebook and MySpace pages. "Plaintiffs who place their physical condition in controversy," Judge Spinner wrote, "may not shield from disclosure material which is necessary to the defense of the action."

Defense lawyers in both the Romano and McMillen cases said they will file subpoenas with Facebook and MySpace that incorporate the consent forms. Romano's attorney, Robert S. Kelner, said that if the case doesn't settle, he will appeal Judge Spinner's decision as overly broad. "If you have a private page, you may invite very few people and you may disclose very few things," Kelner said. "That is not something that should ever be open to a blanket authorization."

In this case, Facebook is trying to stay out of it: The company filed a motion arguing that defense lawyers should seek access to plaintiff's online material directly -- and not via a subpoena to the site. Facebook acknowledges, though, that litigants can be compelled to turn over private communications. "If a person believes that their Facebook materials are relevant to a case, they may have a duty to preserve and produce those materials," company spokesman Andrew Noyes said in an email to Reuters Legal. MySpace did not file a response to the motion in the Romano case and did not respond to a request for comment.

In his September ruling, Judge Spinner cited a 2009 decision in U.S. District Court in Colorado involving two repairmen who sued Wal-Mart after an electrical accident in one of the company's stores. In the federal case, Magistrate Judge Michael J. Watanabe ruled that the plaintiffs' private comments on Facebook, MySpace and Meetup.com were subject to subpoenas sought by Wal-Mart. The content of the sites are not protected by doctor-patient privilege or subject to a protective order, Judge Watanabe ruled, because the subpoenas were "reasonably calculated" to discover evidence that might be relevant to the lawsuit.

To be sure, not all defense requests for access to private postings are being granted. In November, a New York State Appeals Court denied a defense request to compel the plaintiff in an insurance dispute to turn over photographs from the private portion of her Facebook profile. The court found that the request amounted to a "fishing expedition," though it ruled that a more narrowly targeted request could be filed.

Still, the cases seem to be trending in favor of the defense, and defense lawyers are expected to keep pressing. Steelcase attorney Gallagher said he has received about a dozen requests from other defense attorneys for his briefs. "This is a wave that is going to explode all over plaintiffs' law," he said.

(Reporting by Brian Grow of Reuters Legal)

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