

# NEW OPPORTUNITY

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At a conference last year, a seasoned counsel briefly paused from regaling the audience with stories of productive video surveillance. A young attorney seized upon the respite to pose a question. "Have you had much success with obtaining information on the plaintiff through Google or in MySpace instead of or in addition to surveillance?"

The veteran acknowledged the notion and then launched into the next war story of surveillance success, either discounting the newer notions by his nonresponse or evading his lack of awareness of these new fangled ways. Either was unfortunate.

These new technologies present new opportunities. They provide potential proof in a low cost manner whose authenticity is magnified by the fact it was created by the Plaintiff.

My experience in trials has confirmed the notion.

Time magazine's 2006 Person of the Year was "You". The article honoring the designee encapsulated the movement as follows:

It's a story about community and collaboration on a scale never seen before. It's about the cosmic compendium of knowledge Wikipedia and the million-channel people's network YouTube and the online metropolis MySpace. It's about the many wresting power from the few and helping one another for nothing and how that will not only change the world, but also change the way the world changes.

Its impact cannot be overstated. A Senate race was determined by a YouTube video. If anything is written of or about someone on the internet, Google cannot only find it, but it can find photos of the person and aerial photos of their neighborhood.

Those of us with teenage children, college age children and young adults recognize the ubiquitous societies and lament the time consumed therein.

What does this have to do with defending cases?

The social networks of MySpace and Facebook are self-generated compendiums of information about its participants. They include information from education and employment to activities and interests. Photographs and videos are posted. Messages are exchanged. Their lives are open books that are often open sourced.

The impact of this information explosion has rumbled throughout the areas of law. Postings have been determinative in cases involving parolees. *United States v. Ebersole*, 263 Fed. Appx. 251 (3d Cir. Pa. 2008). Consequences of postings have been the bases of actions by teachers [*Spanierman v. Hughes*, 2008 U.S. Dist. LEXIS 69569 (D. Conn. Sept. 16, 2008)] and students [*J.S. v. Blue Mt. Sch. Dist.*, 2008 U.S. Dist. LEXIS 72685 (M.D. Pa. Sept. 11, 2008)].

Self-posted internet information can have a substantial potential impact in the defense of personal injury claims. Unwarranted claims can be undermined by the words and postings of the plaintiffs themselves. Their postings can undermine their claims of disability and limitations.

In a recent trial in Federal Court in Cincinnati, the plaintiff claimed he suffered a dislocated shoulder as a result of an accident involving the truck of my Firm's client. He ultimately underwent surgery on his shoulder.

The plaintiff claimed that his shoulder injury precluded participation in activities he pursued prior to the accident. These included hunting and fishing. He further claimed that he was rendered reclusive by the resulting pain, rarely having social interaction with friends as he had done before the accident.

Shortly before trial we were able to locate the plaintiff's MySpace page. This was a valuable resource in undermining these claims.

Despite claims to the contrary, the plaintiff's MySpace page included a post-accident listing of favorite activities that included hunting and fishing as well as MMA.

MMA, we learned from his roommates MySpace page, was Mixed Martial Arts combat involving punching, kicking, and wrestling. When confronted with this interest in MMA, the plaintiff claimed he meant that he would watch matches, but not participate. This story was undermined by his own words on his MySpace page that his interests included MMA if it was not too cold to train. Confronted with his own words, he conceded his writing.

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Claims of reclusiveness were undermined by the series of photos posted on his page as well as the pages of his "friends". "Friends" leave messages on each other's pages, leading you to their pages and to their photographs. Pages of the plaintiff's friends ultimately led to photos of the plaintiff.

The jury was shown photographs ranging from the plaintiff dining with friends to partying with others. The captions often provided a time reference, including identifying one series of photos as being from a post-accident New Year's Eve party.

The cross examination was culminated by the plaintiff's description of a video posted on his web page. It depicted the letter "J" being sprayed on his back with Raid and lit on fire, resulting in him running from the camera with his arms moving freely. The Plaintiff's own description of the "J" was more powerful and credible than any showing would have been.

The result in this admitted liability case was the award of less than \$3,000, substantially less than even the medical bills in the case. The jury reimbursed him for his emergency room visit and limited treatment for soft-tissue injuries unrelated to the shoulder. No award was made for any of the \$60,000 of alleged lost wages or any pain and suffering.

Similarly, in a case in state court in New Jersey, a plaintiff claimed a neck injury due to an accident with our client's truck. He underwent surgery on the neck and claimed ongoing limitations as a result. In this case, liability was in dispute.

In addition to his day job, at night the plaintiff was a drummer in a rock and roll band. In this case, we were unable to locate a MySpace page for the plaintiff.

We were, however, able to locate the band's webpage and MySpace page. The webpage provided a bounty of photographs of the plaintiff at various performances. The photo section was conveniently labeled as to the name of the bar in which the band was playing. More importantly, they were dated so that the plaintiff's activities could be shown in relation to the timing of his surgery and his subsequently claimed period of limitations.

The band's MySpace page provided video of the band. The plaintiff was shown freely moving his head with the beat as he drummed to the music.

The lesson is of the vitality and importance of this evidence. First, it is credible. It is a product of the plaintiff.

Second, it is objective. Jurors after the recent trial of O.J. Simpson in Las Vegas indicated that they discounted

the witnesses' testimony. Instead, they gave substantial weight to the photographs and tape recordings entered into evidence.

Third, this evidence strikes a blow to plaintiff's credibility that has ripple effects throughout the case. The New Jersey case involved disputed liability.

This case had been arbitrated before being transferred to our Firm, and before our location of the website material. That arbitration resulted in a verdict of \$150,000 for the plaintiff less 50% for his comparative negligence.

After the trial in which the website photos were admitted, the jury returned a verdict for the defendants in 22 minutes. The evidence undermining the plaintiff's credibility as to his damage claims bolstered our client's credibility on the liability claim.

Fourth, obtaining this evidence is inexpensive. In contrast to the cost and unreliability of surveillance, the website evidence can be preserved by printing or downloading. We utilized the in-house resources of our IT person—when she didn't have a middle school soccer game.

We live in a new time with new resources to be understood and utilized for the defense of claims. These online communities provide such opportunities. 