

Want to Know Your Employees Better? Log On to a **Social Network**



But, Be Warned, You May Not Like What You See

By Tari D. Williams and Abigail Lounsbury Morrow

It's a new day and age from when you were in law school, whether you graduated 40 years ago or a few months ago. The reason? Technology. It seems new innovations and new information are constantly available. The Internet has opened a portal for exchanging ideas in a way never before seen.

The effects of a digital revolution have already made their way into the daily practice of law—electronic filings, e-mail, new discovery rules—but a new trend has many legal employers exploring their potential and current employees' lives outside the office. In 2006, an ExecuNet survey of 100 executive recruiters revealed 77 percent of the recruiters used sites such as Google and Yahoo! to check a job seeker's background.¹ Of those using Internet resources to research a job candidate, 35 percent of the recruiters eliminated a candidate from consideration based on the online information.²

In addition to third-party information from Google and Yahoo!, job candidates are also likely to have their own Web page on social networking sites. Social networking sites (a.k.a. MySpace.com, Friendster.com, Facebook.com and Xanga.com, to name a few) have given employers full disclosure straight from the candidates' mouths.

As with every new technological territory comes new questions. Can employers use these sites to gain insight on their potential hires? To monitor the behavior of current employees? What are the issues to be considered? The answers are that some law firms, judges and corporations do factor in what a candidate posts about himself or herself into the job search. As the information is, after all, on the World Wide Web, there's not a strong argument for privacy, but areas and issues of concern do exist.

This article will briefly highlight the trends in Alabama that social networks are playing in employment decisions and offer tips and advice as to matters to be considered for employers and employees.

Social Networks: A Primer

Social networks are an open forum in which individuals post messages, thoughts and pictures about themselves and their lives in order to make friends with other people of similar interests. It's a visual track of the long-known phenomena of six degrees of separation. Once you have a page established, you can track visitors and add friends. You can post pictures of accomplishments as you define them—be it your law school graduation or the killer keg stand you recently completed at an after-game party. Social network pages can also reveal an individual's biases and sometimes just too much information.³

Here in lies the rub (apologies to Shakespeare)—should any of this information be considered as part of a job applicant's application package? Some Alabama firms and other legal employers are debating whether to take a gander at social networking pages as part of the employment process.

Social networks do give more information than would likely come out during a quick introductory interview. The qualms some employers have about relying on the information are that life outside of the office is just that—life outside of work. However, particularly in the legal field where reputation and appearance are held in high esteem, what the individual felt the need to post to the whole wide world could be viewed as an

indication of his or her maturity. As Joey Ritchey, a member of Sirote Permutt's hiring committee, noted, all attorneys at the firm are reminded that their reputation as a part of the firm travels within them—be it online or out on the town.

"We remind our associates that they carry the firm name with them wherever they go. Just as they are carrying the identity of being a lawyer, they are also being associated with our firm," Ritchey said.

Sirote Permutt seems to be among the majority of Alabama firms who are considering using social networks as an additional check of an interviewee, but have not done so to date. Ritchey said the firm is struggling with the question of how much weight the pages should have.

"Something posted that's silly or stupid should not be the only judge of a candidate's worth, but the decision to post it does reflect on the candidate's immaturity," he said.

Ritchey's sentiment is becoming more widely accepted by potential employers who are often stunned to read of their potential hire's big night on the town, complete with a drink-by-drink replay and full account of sexual exploits—all on the World Wide Web.⁴

The Employer's Exposure to Liability

Aside from the more obvious potential blunders a candidate can post on his or her site, there are other concerns for employers who decide to incorporate these pages into the candidate's hiring process. Since the sites were designed as social launching points, information that otherwise would likely not arise in a job interview can be known. Sites often inquire about participants' sexuality. Some participants post pictures of themselves. Some participants post their birthdates. Some participants post information about their religion. Employers, therefore, should consider the benefit of seeing a candidate in his or her natural environment, i.e. his or her Web page, against the potential of a discrimination claim based on knowledge by the employer of these protected statuses.⁵ Of course, an argument exists that the candidate put this information into play by posting it on the Web site. As a shifting burden exists in employment discrimination cases, an employer's knowledge of these factors, or even an employer's decision to check, may be enough to create a problem.

George Lenard, a partner with Harris, Dowell, Fisher & Harris LC of St. Louis, Missouri, posted on his employment blog:

It could be evidence of unlawful discrimination if an employer checks for such Internet information on only certain types of applicants or employees, for example, African-Americans and Hispanics. It may also be evidence of unlawful discrimination if although the employer searches for such information on all applicants or employees, discriminatory bias affects the employer's evaluation of the information obtained. For example, an employer may view more negatively photos of an African American male, beer in hand, hanging out at a bar with a hip-hop DJ than photos of a white boy, also with beer in hand, hanging out at a rock 'n' roll bar with a bunch of other white boys wearing frat T-shirts. Tell me, was it really the public evidence of drinking that disqualified the individual? How many current employees would be disqualified from employment if never getting publicly intoxicated—or even drinking in public—was a job

requirement? These are the kinds of questions the EEOC would ask if discrimination was [sic] raised.⁶

Some Alabama legal employers have stated they would wait to review social networking sites until after the initial interview. Other employers have stated they intend to inform a candidate that his or her page will be viewed in the hiring process.

Another concern about social networking pages is that a potential candidate will feel violated if an employer has access to material the candidate believed was private or limited to a known network. This is a factor with such organizations such as Facebook.com. Facebook.com allows students to network within their collegiate community, thereby limiting access to individuals who have the same e-mail address (i.e., only others whose e-mail ends in law.ua.edu would be available to see my page set up under my law school e-mail address), who have been invited into the network by the individual participant or who have a bona fide connection to the institution (i.e., alumni, faculty or staff).

The social networks do require participants to abide by guidelines and regulations stating the information posted is correct and the information requested to generate an account is correct. If a firm were to create an account for the express purpose of reviewing candidate's pages, the firm would be in violation of the user agreement. However, if a University of Alabama School of Law graduate, who was a hiring partner at a firm, created an account within his network of the University of Alabama School of Law, his or her entrance into the network would be legitimate.

If entrance into the social network is found not to be legitimate, in some states, the potential job candidate may be able to support a claim of tortious interference with business expectancy. According to Lenard, a labor law attorney with over 20 years of experience, such a claim would be "iffy."⁷ Interference by a third party is generally required for this type of claim. However, Lenard did state that "perhaps, such a claim against the individual who obtained the information improperly, not the company, would satisfy this requirement, but maybe not. [Plus], other elements of this type of claim might also be difficult to prove, such as whether the candidate had a reasonable expectancy of employment."⁸

Alabama law does not provide for a claim of tortious interference with business expectancy. But, for years Alabama has recognized a cause of action for intentional interference with business or contractual relations. To recover under this cause of action, a plaintiff must prove the following elements: (1) The existence of a contract or business relation; (2) the defendant's knowledge of the contract or business relation; (3) intentional interference by the defendant with the plaintiff's contract or business relation; and (4) damage to the plaintiff as a result of the defendant's interference.⁹ Additionally, plaintiffs must produce substantial evidence of fraud, force, or coercion on the defendant's part.¹⁰ Recovery on this type of claim under Alabama law is highly unlikely.

Employers using social network sites should also be aware of possible federal law violations. Use of such sites may violate the Federal Computer Fraud and Abuse Act and the Fair Credit Reporting Act. There might be a federal cause of action under the Federal Computer Fraud and Abuse Act to the extent the recruiter/employer exceeded authorized access in obtaining data from the social network's computer system.¹¹ As for the Fair Credit Reporting Act (FCRA), despite its name, this law has broader application than credit inquiries. The FCRA requires employers to use reliable and verifiable methods and data

sources when screening job applicants.¹² It could be argued these sites are reliable and verifiable data sources because the information on the site is provided by and managed by the applicant.¹³ However, for the FCRA to be applicable, the information gleaned from a social network site must have been obtained by a third party. And, the FCRA would not prohibit use of the information, but would require disclosure of the fact that such information was the basis for the decision.¹⁴

Even with clear and correct entrance into a social network, no guarantees exist that what you see is correct. An August 2006 survey by RapidResearch found almost one-third of social network participants admit to posting false information about themselves.¹⁵ On top of that statistic, a growing trend exists of people creating false and disparaging Web pages for others. Most often seen among young users, a group will post a false page under another's identity without the victim's knowledge. Reports have been made of college graduates finding such pages about themselves after an interview that seemed to have gone well, but the employer made a hasty retreat.¹⁶ Ritchey agrees that if his firm found something unsavory on a candidate's page, it could be a deal breaker. He also noted that he may not share the reason for the final decision.

What's an Employer to Do?

Look at the big picture. Do not base hiring decision solely on information gathered from social networks and other Internet sources. Keep in mind that the information discovered may be out of context, incomplete and/or inaccurate. Ask yourself how relevant the information creating the negative impression is to actual job performance.

The use of social networking sites in pre-employment screening is just starting to garner national attention. Therefore, the use of such sites in the hiring process is not clearly defined. Right now, the concern is how to appropriately use the data to supplement a job candidate's application profile. A recent post on EZBackgroundChecks.com included some noteworthy advice regarding the type of questions a prospective employer should ask when using data from a social network site to evaluate a job candidate:¹⁷

1. Does the candidate's background/profile information support the professional qualifications submitted with the application/resume?
2. Is the candidate well rounded? Shows a wide range of interest?
3. Do the candidate's posts demonstrate great communications skills?
4. Does the candidate's site convey a professional image?
5. Does the candidate's personality fit the organization?
6. Have others posted recommendations and positive appraisal of the candidate?

Warning signs include the following:

1. Is the candidate linked to criminal behavior?
2. Has the candidate posted negative comments about previous employers or co-workers?
3. Has the candidate posted information about drug and/or alcohol use?
4. Has the candidate posted confidential information from a previous employer?

Lastly, but definitely not least, protect yourself. If you are going to do Internet searches and use them as a basis for employment decisions, document them and do it consistently, without regard to any legally protected classifications, e.g. race, sex, age. Some research suggest that it is appropriate to have a non-decision-maker conduct the Internet search and filter out the legally protected information before passing along the rest of the information to the decision-maker.¹⁸

Job Candidates Are Becoming More Aware

A 2006 survey by CollegeGrad.com showed that 47 percent of college grad seekers who use social networking sites such as MySpace or Facebook have either already changed or plan to change the content of their pages as a result of their job search.

Complete survey results:¹⁹

Have you changed your content at MySpace or Facebook because of your job search?

No—39.9 percent

Yes—25.9 percent

No, but I plan to—9.4 percent

I don't use either MySpace or Facebook—24.8 percent

A large number of colleges now include advice to students about the proper use of social networks on their career services Web page and/or include such advice in student presentations and career counseling sessions. The University of Alabama Career Services Office routinely advises students to be cautious about the type of information they post about themselves and others on social network sites. The university's School of Law Career Services Office has a publication by Naymz entitled, *Not Just Your Space—The College Student's Guide to Managing Online Reputation*²⁰ readily available for students as a resource document.

Just as many employers and recruiters utilize social networks to weed out undesirable job candidates, they are also utilizing them to discover the good ones. For example, CareerBuilder.com has recently partnered with Facebook to offer their career matching applications on Facebook's platform²¹ And, other career matching services and recruiters are taking note.

Richard Castellini, vice president of marketing for CareerBuilder.com, recommends the following to make your profile employer-friendly:²²

1. **Promote yourself.** Employers often look at profiles to get a better sense of the candidate's talents and fit within the company culture. Use your profile to showcase your creativity and contributions. Highlight achievements and awards, post things you've written or designed, include community or volunteer activities or other pertinent information.
2. **Have no regrets.** Don't post anything on your profile or your friends' profiles you wouldn't want a prospective employer to see. Derogatory comments, risqué photos, foul language and lewd jokes all will be viewed as a reflection of your character.
3. **Be discreet.** If your network offers the option, consider setting your profile to "private," so that it is viewable only by friends of your choosing. And since you can't control what other people say on your site, you may want to use the "block comments" feature.

You should also regularly check your profile to see what comments have been posted by others. Talk to your friends and ask that they not post lewd photos or derogatory comments about you and others on your profile. One of the easiest steps to take is to use one of the search engines to look for online records of yourself to see what is out there about you. If you find any damaging information, request that it be removed. Keep in mind that everything on the internet is archived. So, just because it is removed, does not mean that it cannot resurface. Be prepared to answer questions and correct or clarify any false and/or misleading information.

Hiring Doesn't End the Issues

Once a hiring decision has been made, social networks continue to play a role in the workplace. Of course instructing new hires (and old) against posting inappropriate pictures and information is an easy fix, but many issues raised by social networks are not so obvious.

Many firms have now blocked access to popular sites such as Myspace.com after noticing employees were spending too much time during the workday visiting their Web pages.²³

- 71 percent of office workers access social networking sites at least 'a few times a week.' One in three (39 percent) access them several times a day.
- 27 percent of office workers spend three or more hours a week using these sites when at work.
- 42 percent of office workers have discussed work-related issues on these sites.²⁴

Although a recent study recommends against banning access to social networking pages,²⁵ businesses have concerns about what information employees may inadvertently be sharing about their companies.²⁶ This is a particular concern for law firms who have an added responsibility of confidentiality. Even co-workers have concerns about what each other are sharing and some employees are being held accountable.

A poll by Sophos found that 66 percent of workers think their colleagues share too much information on Facebook. Forrester Research recently found that 14 percent of companies have disciplined employees and 5 percent fired them for offenses related to social networking.²⁷

The shared information could be about an employee's work or about another employee.

Take the case of Dana Schaeffer of Burlington. When she started a new job a year ago, Schaeffer, now 42, required training from two co-workers who were in their 20s. At home one night about two weeks after she started the job, she was on her own MySpace page when, she recalls, she thought to herself: "Hmm, I wonder in anybody in my office has it. They seem like a pretty techno-savvy place." So she typed in the name of one co-worker, checked out his MySpace page, then typed in the name of another, and went to that page . . . and was stopped cold. There was a vituperative message about her, directed to a co-worker. She went to that person's page, and found an even more vicious reply to the original message.

It was devastating for Schaeffer. "They went back and forth on how much they couldn't stand working with me," she says. "I was absolutely, absolutely horrified. It was very hurtful."²⁸

In addition to morale issues, social networking pages can also reveal shortcomings in your best workers. Take, for example, the tale of a woman who adhered to all of the correct policies and guidelines for keeping her social networking page professional.²⁹ She did, however, reveal herself despite her best efforts, when she took a sick day to go hiking with friends.³⁰ Her employer found out because the photos posted on the employee's Web site were dated with the day of her deception.³¹

The Future Looks Bright

As with all things, the potential pitfalls of social networking are balanced by their potential benefits. Becoming an educated user of the systems at least keeps you in touch with the upcoming generation of attorneys and makes you aware of issues before they surprise you.

As students and employers continue to become more aware of these issues, solutions are also emerging. To capitalize on a new generation's comfort with exposure on the World Wide Web, companies, such as summerclerk.com and linkedin.com, are providing professional networking sites—instead of social ones. Potential job candidates are also increasingly using their social networking pages as places to post résumés and issue-based blogs.

Employers, too, are getting in on the benefits of the social networks by creating pages for their businesses. In doing so, employers have an opportunity to show the potential hires more of the business's culture, personality and indefinable traits, which are often the factors that make for a long-lasting relationship.

Who knows? The paper résumé and in-person interview may just be replaced by all this new-fangled technology. Or, maybe not. ▲▲▲

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