



Facebook Changes Open Up New World Of Discovery

By **Greg Ryan**

Law360, New York (October 28, 2011, 7:06 PM ET) -- Facebook's new sharing features will unleash a flood of personal information onto the social network, giving litigators a double-edged sword that could win or lose their clients' cases in court, attorneys say.

The technology giant unveiled the much-hyped features at its f8 conference in September. Timeline, the most prominent new feature, acts as a repository for all of a user's information on the site. Under Facebook's previous profiles, accessing activities from several years ago was time-consuming and laborious. With Timeline, users can flip through wall posts and other actions organized neatly by year.

Though the feature is not expected to be available to the public for several weeks, attorneys are already speculating about the pros and cons of its use in e-discovery.

“People shouldn't fear the changes, but they also shouldn't think there will be a pot of gold at the end of the rainbow, either,” Jonathan M. Redgrave of Redgrave LLP said.

Timeline's ability to streamline historical data will simplify searches for information relevant to a case — an attribute that is likely to save time and effort. However, the more information Facebook users post online, the more time and money attorneys will have to spend digging it up.

Moreover, the possibility of an evidentiary smoking gun against an opponent increases with more information, but so does the possibility of a smoking gun against a client, David R. Cohen of [Reed Smith LLP](#) said.

Timeline presents a unique circumstance in that it allows Facebook users, for the first time, to post information on the site retroactively. For instance, a user who wishes to post notes or photographs about a vacation in 2002 can do so today, and the entry will appear under the year 2002 on Timeline.

Though metadata should reveal when the item was actually posted, the new feature may force lawyers to spend time and money conducting analyses on Facebook posts, attorneys said. Counsel need to ensure a case-relevant item posted under the year 2002, for example, was not recently posted to the site by a mischievous litigant hoping to better his or her case.

“If there's an opportunity for abuse, people will try to create abuses,” Cohen said. And

attorneys could use Timeline to trip up witnesses by fishing for discrepancies between what a witness posted on Timeline and what he or she says in court, he added.

Most particularly, attorneys should be careful to advise clients not to go back and alter anything on Timeline if they are on a hold order, Shannon Capone Kirk of [Ropes & Gray LLP](#) said.

Attorneys will be able to use Timeline for purposes other than discovery, such as to build a case strategy or even to determine whether they should take on a case. Lawyers could use the feature to research potential clients to see if their claims check out, or to scope out potential jurors, attorneys said.

Plaintiffs attorneys in wrongful death cases would be able to use Timeline to illustrate the major events in their client's life as part of their closing argument, substituting the free feature in the place of expensive electronic storyboards, Kirk said.

Entry of evidence from Timeline faces a body of e-discovery law for social media that, while still unsettled, is beginning to congeal — at least when it comes to requesting items directly from opponents, according to attorneys.

To date, most courts have ruled attorneys can request and receive writings, photographs and other Facebook items from their opponents during discovery, no matter a user's privacy settings, as long as it is necessary for the case.

A Pennsylvania court held in May, for example, that a man bringing a personal injury lawsuit against [Weis Markets Inc.](#) had to allow the company access to information on Facebook and MySpace about his recreational activities, even though the information was not publicly available on the sites. The pursuit of truth was more important than the plaintiff's privacy interests, the court determined.

Courts in other states, such as New York and Indiana, have ruled similarly.

“I definitely think that's the trend: If it's fit for 500 Facebook friends, it's fit for discovery,” Joel Patrick Schroeder of [Faegre & Benson LLP](#) said.

But judges are still untangling the issue, especially as it concerns the extent of the access litigants are granted to an opponent's Facebook account, attorneys said. On Thursday, for example, a New York appeals court ruled a lower court may have erred when it allowed a construction company access to all of the information in a personal injury plaintiff's Facebook account posted following an incident. The company should only have access to information that is relevant to the case, the appeals court held.

But when Facebook itself was subpoenaed for a user's data — as opposed to instances in which litigants were seeking the data from one another — at least one court ruled that the information was off limits.

A California federal judge determined in May 2010 that Christian Audigier Inc. could not subpoena Facebook and MySpace for the private messages of an artist who sued the designer

for copyright infringement, ruling such messages were protected under the Stored Communications Act.

It is not clear where courts would consider wall posts — one of the centerpieces of Timeline — under the SCA, according to Kirk.

For example, she said, “My mom has 20 [to] 30 Facebook friends, and I'm pretty sure she thinks what she's writing there is considered private among those friends. Can we expect my mom to understand all of the changes Facebook makes, and the proactive nature of the Internet these days? Maybe these are factors courts could be looking at.”

Some privacy advocacy groups have criticized the easy access Timeline affords to information in the present that users posted to Facebook in the past. In a recent letter to the [Federal Trade Commission](#), the Electronic Privacy Information Center and others claimed Timeline constituted an unfair and deceptive trade practice because it publicizes information under the current privacy policy that was posted under a previous privacy policy.

Timeline is not the only new feature for which attorneys have to account, either. Facebook is revamping its Open Graph feature to better enable what founder Mark Zuckerberg called “frictionless sharing.” Now, certain activities that users perform outside of Facebook, such as listening to a song on online music service Spotify or reading an article on the [Washington Post](#)'s website, can be automatically displayed on friends' Facebook homepages.

Together, the new features underline just how quickly the social media landscape changes. Even e-discovery companies — such as X1 Discovery Inc., which released a new discovery search platform Oct. 18 for Facebook, Twitter and LinkedIn — need to sprint to catch up, attorneys said.

But however difficult it may be to keep pace with such changes, it's easy to see that the information provided by social media is integral to building a case, according to attorneys.

“In terms of direct requests from one litigant to another, there's a wealth of information on Facebook that could be valuable to cases. It should be routine at this point,” Kirk said.

--Editing by Elizabeth Bowen.