

## **Social Networks: Friends or Foes? Confronting Online Legal and Ethical Issues in the Age of Social Networking**

### **Background**

As social-networking websites such as Myspace, Facebook, and Twitter continue to become more popular, criminal and civil attorneys across the nation are beginning to use these websites to find evidence and personal information integral to their cases. However, the legal community has not fully explored and has certainly not yet gained consensus on the complex legal and ethical issues involved in using these sites for investigations. These issues include how federal electronic communications laws intersect with state laws governing investigative practices, whether attorneys may use pseudonyms to reach out to witnesses online, and many more. Further complicating matters for the criminal bar, federal law and social networking sites' standard business practices often allow prosecutors much greater access to information than defense attorneys, creating unintended and perhaps unconstitutional inequities for criminal defendants.

American Bar Association recently reported in *Litigator News* that discovery of evidence on social-networking websites is becoming much more common in civil and criminal trials,<sup>1</sup> and for good reason—75% of online adults age 18-24 have at least one profile on a social-networking website.<sup>2</sup> These enormous databases of self-reported information contain a wealth of data such as personal facts, comments, photographs, and videos that can be highly relevant in legal proceedings. The information posted by users could be used as evidence of criminal activity, parole violations, or to impeach witnesses. In one case, a murder suspect was identified in a group photograph posted to MySpace. In another, a drunk driver whose passenger died in a car crash received five years in prison instead of probation because a judge felt that pictures she posted to MySpace of her in an outfit with shot glasses and an alcohol advertisement showed “she learned no lesson and showed no remorse.”<sup>3</sup> Although media reports suggest prosecutors are using this evidence more frequently than they were in the past, there has been little public discussion of the ethical and legal standards that should be required to obtain this information and whether its use reflects current cultural expectations of privacy.

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<sup>1</sup> Karen L. Stevenson, *What's On Your Witness's MySpace Page?*, LITIG. NEWS, Mar. 2008, available at [http://www.abanet.org/litigation/litigationnews/2008/march/0308\\_article\\_myspace.html](http://www.abanet.org/litigation/litigationnews/2008/march/0308_article_myspace.html).

<sup>2</sup> Amanda Lenhart, *Adults and Social Network Websites* (Pew Internet & American Life Project, Jan. 14, 2009), available at <http://www.pewinternet.org/Reports/2009/Adults-and-Social-Network-Websites.aspx>.

<sup>3</sup> Vesna Jaksic, *Finding Treasures for Cases on Facebook*, *The National Lawyer Journal*, Oct 15, 2007, available at <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1192179809126>.



## Synopsis of the Conference

Our conference, *Social Networks: Friends or Foes? Confronting Online Legal and Ethical Issues in the Age of Social Networking*, will stand out as a significant form of public legal discourse in three ways. First it will provide much needed education and insight to practitioners on how social networks have and can be used to better advise, protect, and serve their clients. Second, the conference will address the differences that may exist between defense, prosecution, and civil attorneys' access to digital information and whether these disparities are just. Finally, this conference will provide the opportunity to create a taxonomy of problems and opportunities raised by the expanding use of social-networking services, with an eye toward promoting more equitable standards.

## Sponsors and Speakers

The conference co-sponsors include the Samuelson Law, Technology & Public Policy Clinic; the Berkeley Center for Law and Technology; and the Berkeley Center for Criminal Justice.

Confirmed speakers include:

- Erin Murphy - Conference Chair and Assistant Professor of Law, UC Berkeley
- James Aquilina - Executive Managing Director and Deputy General Counsel, Stroz Friedberg
- John Carlin - Chief of Staff and Senior Counsel to the Director, F.B.I.
- Jim Dempsey - Vice President for Public Policy, Center for Democracy & Technology
- Bill Gallagher – Partner, Arenstein & Gallagher
- Lauren Gelman - Former Executive Director, Stanford Law School's Center for Internet and Society
- Jennifer Granick - Civil Liberties Director, Electronic Frontier Foundation
- Mark Howitson – Deputy General Counsel, Facebook
- Wes Hsu - Assistant U.S. Attorney, Chief Cyber and Intellectual Property Crimes Section, U.S. Attorney's L.A. Office
- Orin Kerr - Professor of Law, George Washington University
- Kurt Kumli - California Superior Court Judge, Santa Clara County
- David Lat - Managing Editor, AbovetheLaw.com
- Deirdre Mulligan – Assistant Professor, UC Berkeley School of Information; Director, Berkeley Center for Law and Technology
- Robert Morgester - Deputy Attorney General, Special Crimes Unit, Office of the California Attorney General



- Paul Ohm - Associate Professor of Law, University of Colorado Law School
- Jason Schultz - Director, Samuelson Law, Technology & Public Policy Clinic; Assistant Clinical Professor of Law, UC Berkeley
- Ben Sheffner - Production Counsel, NBC Universal Television Group; Editor, Copyrights & Campaigns blog
- John Steele - Attorney at Law; Adjunct Professor, Indiana University (Maurer School of Law)
- Chuck Weisselberg – Professor of Law, UC Berkeley Law

### **Mission of the Samuelson Clinic**

The Samuelson Law, Technology & Public Policy Clinic at the UC Berkeley School of Law strives to help define how civil liberties and other public values will be protected in an increasingly high-tech world. Established in January 2001, the Samuelson Clinic was the first in the nation to provide students with the opportunity to represent the public interest in sound technology policy through client advocacy and participation in legislative, regulatory, litigation and technical standard setting activities. The Clinic has a strong history of successful, well-attended, relevant public policy conferences. Most recently, we held a day-long event exploring security breach notification laws that featured the lawmaker who passed the first security breach legislation.

The idea for this conference grew out of a clinical project in which students represented a public defenders' office and researched and created ethical and legal guidelines for using social-networking websites in criminal investigations. Over the course of the semester-long project, it became obvious that social-networking websites were being increasingly used by attorneys and investigators, but there were no clear standards on how to use them. This conference will start the public dialogue to define these standards in line with societal expectations of privacy and fairness.

### **Organizers**

David Lee, Clinic Member  
Shane Witnov, Clinic Member  
Jennifer Lynch, Supervising Attorney & Lecturer in Residence  
Jason Schultz, Acting Director

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