

Making Internet Searches Part of Due Diligence

AS INFORMATION IS ADDED to the Internet every minute of every day, the chance that lawyers can find key evidence there steadily increases. The evidence may prove or refute a point in contention, or allow an attorney to get the upper hand in a settlement conference or decide whether to take a client's case. While questions of admissibility will remain, due diligence should now be understood to include Internet searches.

For example, after being attacked by skinheads, a person learned that his name, address, and picture, along with a call to action to attack him, had been posted on a skinhead organization's Web site. When the person's lawyer accessed the site, the information about his client had been removed. Not willing to give up, the lawyer turned to his teenage nephew, who advised him that the old Web page might be stored at the Internet Archive Way Back Machine (www.archive.org) site, which is maintained by a nonprofit organization that stores old Web pages to preserve virtual history.

The lawyer found the incriminating pages at the site. If he had not, however, it would not have proven that the incriminating page had never appeared on the skinhead site. The Internet Archive does not archive every page of every Web site—there is a six-month delay before pages are archived on the Internet Archive site, and Web site owners can request that their sites not be archived. If a Web site owner has requested that the site not be archived, this fact appears in the search results at Archive.org. In that case, a lawyer could surmise that the site owner had something to hide and could attempt to subpoena the old pages from the site owner.

Once the lawyer found the pages at Archive.org, the next step was to get them admitted into evidence. Getting Internet evidence admitted is no different than getting other evidence admitted. To be admitted, the evidence must be relevant, authentic, and admissible. In the skinhead beating case, it would seem obvious that the evidence is relevant. Showing that the evidence was authentic could be accomplished by pointing to a case such as *Telewizja Polska USA, Inc. v. EchoStar Satellite*.¹ In that case, the court rejected the plaintiff's claim that Web pages from the Internet Archive were not properly authenticated and further rejected the plaintiff's attack on the Internet Archive as an unreliable source. The court stated that Rule 901 of the Federal Rules of Evidence "requires only a prima facie showing of genuineness and leaves it to the jury..."

When an attorney attempts to authenticate evidence from the Internet, it is important to prove when the research was done. This can be accomplished by having the researcher sign a declaration explaining how, and on what date, the researcher found the Web page evidence. To further authenticate the evidence from a Web site, the page should be printed with the URL listed. It is advisable to print

any page on the Web site that indicates who owns the site. This is usually found on a page titled "About us" or "About." Searching a domain registry, such as whois.com or betterwhois.com, to verify ownership is not necessarily going to yield the true owner or operator of a site, because domain registries do not verify names.

As to admissibility, many courts have indicated that hearsay objections to Internet evidence can be overcome. In the *Telewizja* case, the court rejected the plaintiff's contention that the archived Web pages stored at the Internet Archive constituted hearsay, holding that they were not statements but merely images and text showing what a Web

In a recent Indiana decision, the court was incredulous

that the plaintiff had failed to Google the missing defendant

as part of due diligence. The court upheld the defendant's claim

of insufficient service of process and affirmed dismissal.

site once looked like. The court also found that the Web site pages were an admission by a party-opponent and were admissible under the best evidence rule. The attorney attempting to counter authenticity would need to prove that someone planted the evidence at issue.

No Longer Voodoo

Only seven years ago, a district court cautioned against relying on data from the Internet as "voodoo information."² Today, not only are judges admitting information from the Internet into evidence but also conducting their own Internet research to help make decisions. In a recent Indiana decision, the court was incredulous that the plaintiff had failed to Google the missing defendant as part of due diligence. The court noted that the investigative technique of merely calling directory assistance to find a missing defendant has gone "the way of the horse and buggy and the eight track stereo" as a consequence of the Internet. The court upheld the defendant's claim of insufficient service of process and affirmed the dismissal of the case. The court stated, "We do note that there is no evidence in this case of a public records or Internet search for Groce...to find him. In fact, we [the judge] discovered, upon entering 'Joe Groce Indiana' into the Google search engine, an address for Groce that differed from either address used in this case, as well as an apparent obituary for Groce's mother that

Carole Levitt and Mark Rosch are principals of Internet For Lawyers and coauthors of *The Cybersleuth's Guide to the Internet*.

listed numerous surviving relatives who might have known his whereabouts.”³ The plaintiff could argue that there was no proof that the data the judge found had been available on the Internet at the time the plaintiff searched for the defendant, but a better course of action clearly would have been to conduct an Internet search.

In another recent case, the Louisiana Appeals Court upheld a decision in which the trial court nullified a government tax sale because the original tax-delinquent owner would have been “reasonably identifiable” and locatable if the government had run a simple “Internet search” to “locate the named mortgagee.” It was the trial court judge who conducted an Internet search and determined that the owner was in fact “reasonably identifiable.” Part of the basis of the appeal was whether or not it was appropriate for the judge to conduct such a search at all. The appeals court dismissed this argument, observing: “[W]e find any error the trial court may have committed by conducting the internet search is harmless, because the trial court’s ultimate conclusion that the tax sale violated Dr. Weatherly’s due process rights is legally correct.”⁴

To find potentially relevant evidence, lawyers also need to look beyond the obvious, such as a person or company’s Web site. Other avenues for research include social network sites (myspace.com or facebook.com), blogs (http://blogsearch.google.com), podcasts (ipodder.com), and videos (youtube.com). People often drop their guard when they are posting to these sites. Not only their written words but also their behavior, attitude, or tone of voice can be put before a jury. For example, Hugh Foskett might have had a better chance at winning Seattle’s 43rd district state house seat in 2006 if pictures from his facebook.com page showing behavior unbecoming to a candidate had not been publicized. (Social networking sites are no longer just for kids. All ages are beginning to add profiles and pictures.)

Lawyers should also look to other places on the Internet that are not traditionally thought of as useful to serious researchers. These include dating sites (match.com), reunion sites (classmates.com), and discussion groups that leave searchable records at Google Groups. These are all places where people post personal information. A divorce lawyer, for example, may be able to find information at these sites that can make a significant difference at a settlement conference. Admissibility is not at issue when the parties are not at trial. Searches of group discussion lists should be routine. A lawyer may learn, for example, what a client who allegedly caused an accident told a discussion group but not the attorney. A search for the client’s name

— DALE A. ELENIAK —
EXPERT WITNESS/LITIGATION ANALYSIS
REAL ESTATE/COMMERCIAL & RESIDENTIAL

• Standards of Care, Standards and Practices • Broker Supervision
 • Agency and Disclosure

Attorney, RE broker, C.A.R. panel attorney, DRE Approved Instructor, over 3,000 real estate inquiries per year since 1991, author of “The Six Page Deposit Receipt” and over 400 R/E related articles published as “Dales Legal Corner.”

TEL **805-579-7834** ■ **DALE A. ELENIAK, PLC** ■ FAX **805-579-7845**
 633 BRECKENRIDGE PLACE, SIMI VALLEY CA 93065
 theword1@pacbell.net

THE PREMIER STEAKHOUSE
IN LOS ANGELES




86 YEARS OF FAMILY OWNERSHIP

USDA PRIME EASTERN CORN-FED BEEF

- ◆ AGED IN OUR OWN COOLER
- ◆ CUT BY OUR MASTER BUTCHER
- ◆ GRILLED OVER MESQUITE CHARCOAL

AN AWARD WINNING WINE LIST PRESENTED BY OUR AWARD WINNING SOMMELIER

Complimentary shuttle service to Staples Center, Music Center and Disney Hall

OPEN 24 HOURS EACH DAY, 365 DAYS A YEAR

Breakfast 24 hours	1310 West Sixth St.
Lunch 24 hours	Los Angeles CA 90017
Dinner 24 hours	213.483.6000
Visit our second location on the West Side. Open 24 hours	2700 Wilshire Blvd. Santa Monica CA 90403 310.453.4000



www.pacificdiningcar.com



EXPERT WITNESS — Claims Consultant

EXPERIENCE

INTEGRITY

HONESTY

OVER 40 YEARS EXPERIENCE as a claims adjuster, licensed in three states and qualified in state and federal courts. **Expert in good faith/bad faith, standards and practices** and standard in the industry. Specialties in property/casualty construction defect, fire/water, uninsured/underinsured motorist, warehouse and cargo claims. Failure to defend and/or indemnify. Litigation support, case review and evaluation claim consultation, coverage review and valuations. Appraisal, Arbitration and Claims Rep. at MSC & MMC.

Contact Gene Evans at E. L. Evans Associates
Phone (310) 559-4005 / Fax (310) 390-9669 / E-mail elevans66@yahoo.com

3310 AIRPORT AVENUE, SUITE 2, SANTA MONICA, CALIFORNIA 90405

Tax Controversy Services

LITIGATION SUPPORT
TAX CONTROVERSY
ACCOUNTING SERVICES
TAX COMPLIANCE & PLANNING



G.L. Howard, C.P.A.
Established 1986

"We analyze, verify, quantify."

Contact: **Gary L. Howard, CPA**

**10417 Los Alamitos Blvd.
Los Alamitos, CA 90720
Ph. (562) 431-9844 x11
Fax (562) 431-8302
www.glhowardcpa.com
gary@glhowardcpa.com**

- Tax Preparation: Late Returns and Non-filers
- Audit Representation: Franchise Tax Board, Board of Equalization and Employment Development Dept.
- Criminal Tax Litigation Support
- Installment Agreements
- IRS and State Tax Collections (liens and levy issues)
- Offers in Compromise
- Tax Shelter Audits
- Voluntary Disclosures

When you need to impress someone with the truth...

POLYGRAPH

JACK TRIMARCO & ASSOCIATES POLYGRAPH/INVESTIGATIONS, INC.



*Jack Trimarco - President
Former Polygraph Unit Chief
Los Angeles F.B.I. (1990-1998)*

CA. P.I. #20970

Member Society of Former Special Agents
Federal Bureau of Investigation

9454 Wilshire Blvd.

Sixth Floor

Beverly Hills, CA 90212

(310) 247-2637 TEL

(310) 306-2720 FAX

email: jtrimarco@aol.com
www.jacktrimarco.com

Former Polygraph Inspection Team Leader
Office of Counter Intelligence
U.S. Department of Energy

and e-mail address on Google Groups could reveal, for example, that the client tried methadone as a means of coping with migraines and shared this information with other migraine sufferers but not the police at the accident scene.

It is important to remember that many people do not use their real names when posting to discussion groups. In those cases, searching by the poster's e-mail address may yield more useful results. Attorneys who already routinely ask their clients and others for such information as telephone numbers should also ask for e-mail addresses. Sometimes, however, people post their true names. On classmates.com, for example, people tend to use their real names because they are trying to find former friends. At classmates.com, people often post information about where they work (or worked), attended school, or served in the military. These bits and pieces of information might be exactly what a lawyer needs.

The powers of Internet searching do not end there. For example, using Google's advanced search page to search only for specific file formats, lawyers can sometimes unearth a Power Point presentation, an Excel spreadsheet, or a Word document that bears some relation to a client or opponent. If a search yields a Power Point presentation, lawyers should be sure to view it in the editing mode so that they may read the presenter's outline and notes.

Attorneys can even arrange to have potential evidence automatically collected and delivered to an e-mail account by means of an alert service (for example, www.google.com/alerts). Google Alerts originally monitored only news that correlated with the researcher's key words (e.g., a topic, a company name, or a person's name), but now monitoring has been expanded to Web sites, Google Groups, and most recently to blogs. If a given topic, person, or company is mentioned in the news, on a Web site, in a Google Group discussion, or on a blog, an alert service will automatically add the information to the collection of evidence. As useful as search engines are in collecting evidence, however, they cannot be expected to show how the evidence is relevant or how to authenticate it and get it admitted. That job still belongs to attorneys. ■

¹ Telewizja Polska USA, Inc. v. EchoStar Satellite, Case No. 02C3293 (N.D. Ill. Oct. 15, 2004), available at <http://cyberlaw.stanford.edu/packets/echostar.pdf>.

² St. Clair v. Johnny's Oyster & Shrimp, 76 F. Supp. 2d 773, 775 (S.D. Tex. 1999).

³ Munster v. Groce, 829 N.E. 2d 52 (Ind. App. 2005) available at <http://caselaw.lp.findlaw.com/data2/indianastatecases/app/06080501mpb.pdf>.

⁴ Weatherly v. Optimum Asset Mgmt., 928 So. 2d 118 (La. App. 2005), available at <http://www.la-fcca.org/Opinions/PUB2005/2005-12/2004CA2734Dec2005.Pub.10.pdf>.