Social Media Communication in Litigation: Privilege, Protections and Pitfalls

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Where Results Matter

Social Media

- Big Data
  - 3 Billion Active Users
    - Facebook, Twitter, Instagram, Youtube…...

SMI Data

- WHO?
  - Personal Injury /1st and 3rd Party Claims
  - Premise Liability
  - Umbrella Policy
  - Workers Comp
- Direct Impact on credibility
  - Image of POI skiing
  - Video of POI dancing
  - Comments of Running
  - Just crazy
- Minor impact on credibility
  - Active lifestyle
  - Enjoyment of Life
    - Active post of photos, videos, comments

Can’t touch this……..

Value of Social Media Data

- Hits
  - Direct impact on credibility
  - Active lifestyle
  - Photo
- No-Hit
  - Allows you to strategize on other options
    - Active Surveillance??

CASE SELECTION

- High Exposure
- Surgeries
- Prior loss history
- Personal Demographics
  - Active lifestyle prior to accident?

RELATIONS

SOCIAL MEDIA SEARCH AS A PRECURSER TO COMPELLING ACCESS TO ADDITIONAL INFORMATION

- If the plaintiff does not have any "public" social media posts, it will be difficult to win a motion to compel the disclosure of information concerning the plaintiff's social media account.
- Where the plaintiff has "public" social media posts dated after the accident, then it can be argued that these posts contradict the plaintiff's claim for "loss of enjoyment of life," which is almost always included in the plaintiff's bill of particulars.

COURTS MAY ORDER *IN CAMERA* REVIEW

Courts are reticent to grant the defendants unfettered access to plaintiff's/claimant's social media accounts, in the interest of protecting plaintiff's privacy.

The Court might order an *in camera* review. Then, the Court will analyze and eliminate any posts that are not relevant.
See Richards v. Hertz Corp., 100 A.D.3d 728, 729–31, 953 N.Y.S.2d 654, 656–57 (2d Dept. 2012).

The Court granted the defendant's Motion to Compel discovery of the plaintiff's, Facebook account because the defendant submitted a Facebook photograph of plaintiff skiing, which called into doubt plaintiff's deposition testimony. However, the Court refused to authorize disclosure of all of plaintiff's Facebook posts.

COURT GRANTED MOTION TO COMPEL WHERE POSTS SHOWED RECREATIONAL ACTIVITIES

- In Melissa "G" v. N. Babylon Union Free Sch. Dist., 48 Misc. 3d 389, 391–92, 6 N.Y.S.3d 445, 447–48 (Suffolk Co. Sup. Ct. 2015), the Court granted disclosure of all the plaintiff's Facebook posts based on the fact that plaintiff was claiming "loss of enjoyment of life" in her bill of particulars.

- In support of its Motion, defendant submitted "public" Facebook posts of the plaintiff engaged in a variety of recreational activities, including activities with her boyfriend at work in a veterinary hospital, rock climbing, and out drinking with friends.

Line of Questioning @ EBT

- Questioning should be multiplied when attacking credibility
  - UNDER-VALUED
    - Direct Questions to known SMI data
  - VALUED
    - Multiplied Questions to known SMI data
- Series of corrections to transcript or none at all

No SMI Data at EBT

- Direct questions as to plaintiff activity that day?
  - Gym
- Where was the plaintiff prior to accident?
- Where was the plaintiff en route to?
- Was the plaintiff intending to meet anyone?
- Do you go by any nicknames?

Discovery of SMI Data

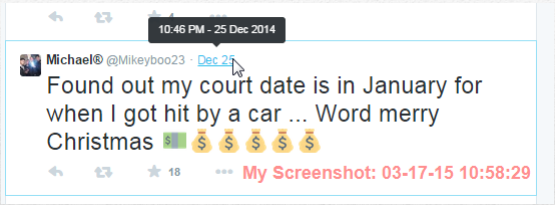
- All SMI data is discoverable
  - CPLR 3101
    - "….All portions of such material, including out-takes, rather than only those portions a party intends to use."
    - Foot on the ground investigators
      - POI realizes he/she is being filmed and starts the act.
- Plaintiff may demand material before deposition
  - You have the data, and intend to use it
  - All data hinders your case-call
  - Falk v. Inzinna
    - 299 A.D.2nd d 120 Appellate Division, Second Department 2002.
- Waiting at trial on cross to corner plaintiff
  - Court of appeals held that surveillance films which a defendant prepared in anticipation to use at trial were discoverable.
    - DiMichel v. South Buffalo Ry. Co.
- "Fishing Expedition"
  - Post/comment indicating activity and then seeking access to specific date/time of other social media sites.

Pattern Jury Instruction 1:91 – Interested Witness

The plaintiff and the defendant both testified before you. As parties to the action, both are interested witnesses.

An interested witness is not necessarily less believable than a disinterested witness. The fact that (he, she) is interested in the outcome of the case does not mean that (he, she) has not told the truth. It is for you to decide from the demeanor of the witness on the stand and such other tests as your experience dictates whether or not the testimony has been influenced, intentionally or unintentionally, by (his, her) interest.

You may, if you consider it proper under all of the circumstances, not believe the testimony of such a witness, even though it is not otherwise challenged or contradicted. However, you are not required to reject the testimony of such a witness, and may accept all or such part of (his, her) testimony as you find reliable and reject such part as you find unworthy of acceptance.



@ each stage of Litigation

- Pre-Suit
- Commencement of law suit to Deposition
- Post Depositions
- Trial

Let's Skydive….

C6-C7 disc herniation compressing the spinal cord**. Plaintiff will undergo a cervical spine fusion or disc arthroplasty as recommended by her treating physician**. Plaintiff has undergone nerve block and trigger point injections;

L5-S1 disc herniation compressing the spinal cord. **Plaintiff will undergo a lumbar spinal fusion or disc herniation as recommended by her treating physician.** Plaintiff has undergone nerve block and trigger point injections;

Cervical radiculopathy;

Lumbar radiculopathy;

Impaired and limited range of motion of the cervical spine;

Impaired and limited range of motion of the lumbar spine;

Fawcett v. Altieri

Citation: 38 Misc.3d 1022 (Supreme Court, Richmond County 2013)

- Two Part Test
  - 1- whether the content contained on/in a social media account is "material and necessary;
  - 2-then a balancing test as to whether the production of this content would result in a violation of the account holder's privacy rights.[4]

Fawcett v. Altieri

Citation: 38 Misc.3d 1022 (Supreme Court, Richmond County 2013)

- Information posted in open on social media accounts are freely discoverable and do not require court orders to disclose them.
- In order to obtain a closed or private social media account by a court order for the subscriber to execute an authorization for their release, the adversary must show with ***1028** some credible facts that the adversary subscriber has posted information or photographs that are relevant to the facts of the case at hand.
- The courts should not accommodate blanket searches for any kind of information or photos to impeach a person's character, which may be embarrassing, but are irrelevant to the facts of the case at hand.

Tapp v. New York State Urban Development Corp.

102 A.D.3d 620 (APP. DIV. 1D 2013)

- Defendants' argument that plaintiff's Facebook postings "may reveal daily activities that contradict or conflict with" plaintiff's claim of disability amounts to nothing more than a request for permission to conduct a "fishing expedition"

Thank You

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Recent Decisions in SOCIAL MEDIA

Court Decisions to 2017

"The prevalence of social media has forever changed the way in which we litigate."

Charles Mailloux, Esq.

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FEDERAL COURT

EMOTIONAL DISTRESS –

Giacchetto v. Patchogue-Medford Union Free School Dist., 293 F.R.D. 112 (2013)

"Based on the foregoing information, the Court concludes that Plaintiff's routine status updates and/or communications on social networking websites are not, as a general matter, relevant to her claim for emotional distress damages, nor are such communications likely to lead to the discovery of admissible evidence regarding the same. The Court does find, however, find that certain limited social networking postings should be produced. First, Plaintiff must produce any specific references to the emotional distress she claims she suffered or treatment she received in connection with the incidents underlying her Amended Complaint (e.g., references to a diagnosable condition or visits to medical professionals). Moreover, in seeking emotional distress damages, Plaintiff has opened the door to discovery into other potential sources/causes of that distress. Thus, any postings on social networking websites that refer to an alternative potential stressor must also be produced. See Holter, 281 F.R.D. at 344; Simply Storage, 270 F.R.D. at 435. These materials are to be served upon Defendant's counsel as directed in Section B.4. below. However, unfettered access to Plaintiff's social networking history will not be permitted simply because Plaintiff has a claim for emotional distress damages."

ADMISSABILITY OF ELECTRONICALLY STORED INFORMATION –

Lorraine v. Markel American Insurance Company, 241 F.R.D. 534 (District Court, Maryland 2007)

"Whether ESI is admissible into evidence is determined by a collection of evidence rules5 that present themselves like a series of hurdles to be cleared by the proponent of the evidence. Failure to clear any of these evidentiary hurdles means that the evidence will not be admissible. Whenever ESI is offered as evidence, either at trial or in summary judgment, the following evidence rules must be considered: (1) is the ESI relevant as determined by Rule 401 (does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be); (2) if relevant under 401, is it authentic as required by Rule 901(a) (can the proponent show that the ESI is what it purports to be); (3) if the ESI is offered for its substantive truth, is it hearsay as defined by Rule 801, and if so, is it covered by an applicable exception (Rules 803, 804 and 807); (4) is the form of the ESI that is being offered as evidence an original or duplicate under the original writing rule, of if not, is there admissible secondary evidence to prove the content of the ESI (Rules 1001–1008); and (5) is the probative value of the ESI substantially outweighed by the danger of unfair prejudice or one of the other factors identified by Rule 403, such that it should be excluded despite its relevance. Preliminarily, the process by which the admissibility of ESI is determined is governed by Rule 104, which addresses the relationship between the judge and the jury with regard to preliminary fact finding associated with the admissibility of evidence. Because Rule 104 governs the very process of determining admissibility of ESI, it must be considered first."

PARTIES CAN REQUEST AN ORDER PRESERVING THE SOCIAL MEDIA STATUS QUO –
Thurmond v. Bowman, 2016 WL 1295957

"By altering her Facebook account, Thurmond violated the Court's May 21 order. Her conduct had the effect of hiding her postings from public view, and hence from defendants' counsel's view. Of course, it does not appear that the postings were deleted, and they remain available for defendants' use, and defendants have not shown that they were prejudiced by Thurmond's conduct in violating the order. Nevertheless, it is troubling that the posts were removed from public view after this Court issued a consent order designed to preserve the status quo of her social media accounts. Also troubling is Thurmond's execution of an affidavit that contained a statement she knew to be inaccurate. Although the false statement was ultimately immaterial to the issues in the pending motions, Thurmond's willingness to sign the affidavit knowing or having reason to know that it included a false statement threatens the integrity of the judicial process. Thurmond's conduct in both respects is certainly a fair subject for cross-examination at trial and could result in the impeachment of her credibility."

NEW YORK COURTS

COURT OF APPEALS

DENIAL OF FACEBOOK'S MOTION TO QUASH WARRANTS NOT APPEALABLE –
In re 381 Search Warrants Directed to Facebook, Inc., 29 N.Y.3d 231, 55 N.Y.S.3d 696 (2017)

"While Facebook's concerns, as a third party, about overbroad SCA warrants may not be baseless, we are mindful that there are counterbalancing concerns that militate against authorizing appellate review of warrants issued in connection with criminal prosecutions outside of the review that may be sought by a criminal defendant following conviction."

"In light of our holding, we have no occasion to consider, and therefore do not pass on, the merits of the parties' arguments regarding Facebook's standing to assert Fourth Amendment claims on behalf of its users, whether an individual has a reasonable expectation of privacy in his or her electronic communications, the constitutionality of the warrants at issue, or the propriety of the District Attorney's refusal to release the supporting affidavit. Nor do we pass on the question of whether 18 U.S.C. § 2703(d) authorizes a motion to quash an SCA warrant in the first instance. Due to the absence of jurisdiction for Facebook's appeal to either this Court or the Appellate Division, these issues remain open."

FIRST DEPARTMENT

VAGUE ASSERTIONS NOT DISCOVERABLE –
Pecile v. Titan Captial Group, LLC, 113 A.D.3d 526 (2014)

"They have failed to offer any proper basis for the disclosure, relying only on vague and generalized assertions that the information might contradict or conflict with plaintiffs' claims of emotional distress. Thus, the postings are not discoverable."

IN CAMERA REVIEW IS AT THE DISCRETION OF THE TRIAL COURT –
Forman v. Henkin, 134 A.D.3d 529 (2015)

"The decision whether to order an in camera review rests in the sound discretion of the trial court, or in this Court's discretion if we choose to exercise it."

A PROFILE PICTURE CAN BE USED TO ESTABLISH A PREDICATE FOR DISCOVERY –
Spearin v. Linmar, 129 A.D.3d 528 (2015)

"Defendant established a factual predicate for discovery of relevant information from private portions of plaintiff's Facebook account by submitting plaintiff's public profile picture from his Facebook account, uploaded in July 2014, depicting plaintiff sitting in front of a piano, which tends to contradict plaintiff's testimony that, as a result of getting hit on the head by a piece of falling wood in July 2012, he can longer play the piano."

MUST CONTRADICT OR CONFLICT WITH ALLEGED RESTRICTIONS, DISABILITIES, LOSSES OR CLAIMS –
Tapp v. New York State Urban Development Corp., 102 A.D.3d 620 (2013)

"The motion court correctly determined that plaintiff's mere possession and utilization of a Facebook account is an insufficient basis to compel plaintiff to provide access to the account or to have the court conduct an in camera inspection of the account's usage. To warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account—that is, information that "contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims."

SETTING ACCOUNT TO PRIVATE DOES NOT SHIELD AGAINST DISCOVERY –
Patterson v. Turner Construction Company, 88 A.D.3d 617 (2011)

"The postings on plaintiff's online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service's privacy settings to restrict access (Romano v. Steelcase Inc., 30

Misc.3d 426, 433–434, 907 N.Y.S.2d 650 [2010]), just as relevant matter from a personal diary is discoverable (see Faragiano v. Town of Concord, 294 A.D.2d 893, 894, 741 N.Y.S.2d 369 [2002]).”

Appellate Term – First Department

COURT MAY REQUIRE PLAINTIFF TO DO AN INITIAL REVIEW OF OWN FACEBOOK PAGE –
Nieves v. 30 Ellwood Realty LLC, 39 Misc.3d 63 (2013)

“To the extent that a thorough in camera inspection may prove unduly burdensome, the trial court retains broad discretion to set reasonable terms and conditions thereon (see generally Downing v. Moskovits, 58 A.D.3d 671, 873 N.Y.S.2d 320 [2009]; Gillen v. Utica First Ins. Co., 41 A.D.3d 647, 839 N.Y.S.2d 155 [2007]), including the right to direct plaintiff to conduct an initial review of her own Facebook account, and limit the in camera inspection to items whose discoverability is contested by plaintiff.”

Supreme Court, New York County – Judge Cooper

SERVICE BY FACEBOOK MESSAGE PERMISSIBLE –
Baidoo v. Blood-Dzraku, 48 Misc.3d 309 (2015)

“Under the circumstance presented here, service by Facebook, albeit novel and non-traditional, is the form of service that most comports with the constitutional standards of due process. Not only is it reasonably calculated to provide defendant with notice that he is being sued for divorce, but every indication is that it will achieve what should be the goal of every method of service: actually delivering the summons to him.”

Criminal Court – City of New York – Judge Sciarrino

A PARTY *MAY* NOT HAVE PROPRIETARY INTEREST IN USER INFORMATION AND TWEETS –
People v. Harris, 36 Misc.3d 613 (2012)

“New York courts have yet to specifically address whether a criminal defendant has standing to quash a subpoena issued to a third-party online social networking service seeking to obtain the defendant's user information and postings.4 Nonetheless, an analogy may be drawn to the bank record cases where courts have consistently held that an individual has no right to challenge a subpoena issued against the third-party bank. New York law precludes an individual's motion to quash a subpoena seeking the production of the individual's bank records directly from *617 the third-party bank as the defendant lacks standing.5 (People v. Doe, 96 A.D.2d 1018, 467 N.Y.S.2d 45 [1st Dept. 1983]; People v. DiRaffaele, 55 N.Y.2d 234, 448 N.Y.S.2d 448, 433 N.E.2d 513 [1982]). In United States v. Miller, 425 U.S. 435, 96

S.Ct. 1619, 48 L.Ed.2d 71 [1976], the United States Supreme Court held that the bank records of a customer's accounts are "the business records of the banks," and that the customer "can assert neither ownership nor possession" of those records. In New York, the Appellate Division held that, "[b]ank records, although they reflect transactions between the bank and its customers, belong to the bank. The customer has no proprietary or possessory interests in them. Hence, he cannot preclude their production." (People v. Doe at 1018, 467 N.Y.S.2d 45).

Here, the defendant has no proprietary interests in the @destructuremal account's user information and Tweets between September 15, 2011 and December 31, 2011. As briefly mentioned before, in order to use Twitter's services, the process of registering an account requires a user's agreement to Twitter's Terms. Under Twitter's Terms it states in part:

By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed)."

SECOND DEPARTMENT

AUTHENTICATING YOUTUBE –

People v. Franzese, 2017 WL 4399180

"The defendant's contention that a YouTube video that was admitted into evidence was not properly authenticated is only partially preserved for appellate review (see CPL 470.05[2]). In any event, the contention is without merit. "[A]uthenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it," and "[t]he foundation necessary to establish these elements may differ according to the nature of the evidence sought to be admitted" (People v. McGee, 49 N.Y.2d 48, 59, 424 N.Y.S.2d 157, 399 N.E.2d 1177; see People v. Price, 29 N.Y.3d 472, 476, 58 N.Y.S.3d 259, 80 N.E.3d 1005). Here, the YouTube video was properly authenticated by a YouTube certification, which indicated when the video was posted online, by a police officer who viewed the video at or about the time that it was posted online, and by the defendant's own admissions about the video made in a phone call while he was housed at Rikers Island Detention Center (see Zegarelli v. Hughes, 3 N.Y.3d 64, 69, 781 N.Y.S.2d 488, 814 N.E.2d 795; People v. Hill, 110 A.D.3d 410, 971 N.Y.S.2d 532; People v. Clevenstine, 68 A.D.3d 1448, 891 N.Y.S.2d 511). The video was further authenticated by its appearance, contents, substance, internal patterns, and other distinctive characteristics (see Fed Rules Evid rule 901[b][4]). The quantum of authenticating evidence is greater here than what the Court of Appeals found to be inadequate in People v. Price (29 N.Y.3d at 472, 58 N.Y.S.3d 259, 80 N.E.3d 1005)."

A PHOTO PROBATIVE AS TO THE EXTENT OF INJURIES –

Richards v. Hertz Corporation, 100 A.D.3d 728 (2012)

"The Dunn defendants demonstrated that McCarthy's Facebook profile contained a photograph that was probative of the issue of the extent of her alleged injuries, and it is reasonable to believe that other portions of her Facebook profile may contain further evidence relevant to that issue. Thus, with respect to McCarthy's Facebook profile, the Dunn defendants made a showing that at least some of the discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on her claim (see Patterson v. Turner Constr. Co., 88 A.D.3d 617, 618, 931 N.Y.S.2d 311; cf. Abrams v. Pecile, 83 A.D.3d 527, 528, 922 N.Y.S.2d 16; McCann v. Harleysville Ins. Co. of N.Y., 78 A.D.3d 1524, 1525, 910 N.Y.S.2d 614). While the Supreme Court directed the injured plaintiffs to provide the Dunn defendants with copies of photographs depicting them participating in sporting activities, McCarthy's Facebook profile may also contain other items such as status reports, e-mails, and videos that are relevant to the extent of her alleged injuries. However, due to the likely presence in McCarthy's Facebook profile of material of a private nature that is not relevant to this action, the Supreme Court should conduct an in camera inspection of all status reports, e-mails, photographs, and videos posted on McCarthy's Facebook profile since the date of the subject accident to determine which of those materials, if any, are relevant to her alleged injuries (see Patterson v. Turner Constr. Co., 88 A.D.3d at 618, 931 N.Y.S.2d 311). Accordingly, we remit the matter to the **657 Supreme Court, Kings County, to conduct such an in camera inspection, and thereafter for a new determination of that branch of the injured plaintiffs' cross motion which was for a protective order pursuant to CPLR 3103 striking so much of the demand for authorizations dated March 30, 2010, as related to McCarthy."

Supreme Court, Suffolk County – Judge Rebolini

THE PRODUCING PARTY IS THE JUDGE OF RELEVANCE IN THE FIRST INSTANCE –
Melissa "G" v. North Babylon Union Free School Dist., 48 Misc.3d 389 (2015)

"In discovery matters, counsel for the producing party is the judge of relevance in the first instance (see Rozell v. Ross–Holst, 2006 WL 163143, 2006 U.S. Dist. LEXIS 2277, 97 Fair Empl. Prac. Cas. (BNA) 1104 [S.D.N.Y.2006]). While it has been suggested that an in camera review is appropriate to determine whether certain material on plaintiff's Facebook account is discoverable, an in camera inspection in disclosure matters is the exception rather than the rule, and there is no basis to believe that plaintiff's counsel can not honestly and accurately perform the review function in this case (see Rozell v. Ross–Holst, supra). Accordingly, plaintiff is directed to print out and to retain all photographs and videos, whether posted by others or by plaintiff herself, as well as status postings and comments posted on plaintiff's Facebook accounts, including all deleted materials ("postings"). Notwithstanding defendants' request for disclosure in this action of "the complete, unedited account data" for plaintiff's Facebook accounts, this Court is mindful that "[t]he fact that an individual may express some degree of joy, happiness, or sociability on certain occasions sheds little light on the issue of whether he or she is actually suffering emotional distress" (Giacchetto v. Patchogue–Medford U.F.S.D., 293 F.R.D. 112, 115 [E.D.N.Y.2013]). Accordingly, not all of plaintiff's personal communications to others are subject to scrutiny in connection with her claims. Since there is a reasonable expectation of privacy attached to the

one-on-one messaging option that is available through Facebook accounts, private messages sent by or received by plaintiff need not be reviewed, absent any evidence that such routine communications with family and friends contain information that is material and necessary to the defense."

Supreme Court, Suffolk County – Judge Spinner

LIBERAL DISCLOSURE POLICY IN NEW YORK –
Romano v. Steelcase Inc., 30 Misc.3d 426 (2010)

"The information sought by Defendant regarding Plaintiff's Facebook and MySpace accounts is both material and necessary to the defense of this action and/or could lead to admissible evidence. In this regard, it appears that Plaintiff's public profile page on Facebook shows her smiling happily in a photograph outside the confines of her home despite her claim that she has sustained permanent injuries and is largely confined to her house and bed. In light of the fact that the public portions of Plaintiff's social networking sites contain material that is contrary to her claims and deposition testimony, there is a reasonable likelihood that the private portions of her sites may contain further evidence such as information with regard to her activities and enjoyment of life, all of which are material and relevant to the defense of this action. Preventing Defendant from accessing to Plaintiff's private postings on Facebook and MySpace would be in direct contravention to the liberal disclosure policy in New York State."

Supreme Court, Queens County – Judge Flug

IN CAMERA INSPECTION –
Gonzalez v. City of New York, 47 Misc.3d 1220(A) (2015)

"The Court have recognized, however, that a persons Facebook profile or other social media accounts, may contain material of a private nature that is not relevant, the Supreme Court should conduct an in camera inspection of all status reports, e-mails, photographs, and videos posted on the plaintiff's social media accounts since the date of the accident to determine which of those materials, if any, are relevant to the alleged claim and injuries (see Patterson v. Turner Constr. Co., supra)."

Supreme Court, Kings County – Judge Sunshine

SERVICE MAY BE POSSIBLE THROUGH FACEBOOK WHERE SHOWING MADE THAT FACEBOOK PAGE BELONGS TO THE PARTY AND THEY MAKE USE OF IT –
Qaza v. Alshalabi, 54 Misc.3d 691 (2016)

"The facts and circumstances before this Court are distinguishable from the facts before the Court in the case of Safadjou v. Mohammadi relied upon by plaintiff's counsel (105 A.D.3d 1423, 964 N.Y.S.2d 801 [4

Dept.,2013]). In Safadjou v. Mohammadi the Court permitted service by e-mail pursuant to CPLR 308(5); however, in that case, the record established that the plaintiff and defendant had been communicating by e-mail and, therefore, the Court found that "plaintiff made the requisite showing that service by e-mail was 'reasonably calculated to apprise defendant of the pending lawsuit and thus satisfie[d] due process' " (Safadjou v. Mohammadi, 105 A.D.3d 1423, 1425, 964 N.Y.S.2d 801 [4 Dept.,2013], citing Harkness v. Doe, 261 A.D.2d 846, 847, 689 N.Y.S.2d 586 [4th Dept.,1999]). Unlike the facts and circumstances presented in Safadjou, in the application before this Court plaintiff has failed to sufficiently authenticate the Facebook profile as being that of defendant and has not shows that, assuming arguendo that it is defendant's Facebook profile, that defendant actually uses this Facebook page for communicating. As such, plaintiff has not demonstrated that, under the facts presented here, service by Facebook is reasonably calculated to apprise defendant of the matrimonial action."

Supreme Court, Orange County – Judge Marx

REQUESTS FOR UNRESTRICTED ACCESS ARE OVERBROAD –
Winchell v. Lopiccolo, 38 Misc.3d 458 (2012)

"The Court finds that Defendants' Request for unrestricted access to Plaintiff's Facebook page is overbroad."

Supreme Court, Richmond County – Judge Maltese

STANDARD TEST –
Fawcett v. Altieri, 38 Misc.3d 1022 (2013)

"A survey of cases dealing with the production of social media accounts, in both the criminal and civil contexts, reveal a two prong analysis before courts compel the production of the contents of social media accounts. This inquiry requires a determination by the court as to whether the content contained on/in a social media account is "material and necessary;" and then a balancing test as to whether the production of this content would result in a violation of the account holder's privacy rights."

THIRD DEPARTMENT

KEG STAND PHOTOS ADMITTED INTO EVIDENCE –
Johnson v. Ingalls, 95 A.d.3d 1398 (2012)

"We further reject plaintiff's contention that certain photographs obtained from her Facebook account were unduly prejudicial and improperly admitted into evidence. After an in camera review, Supreme Court excluded the majority of the photographs that defendants proffered as unduly prejudicial, cumulative or insufficiently probative, but permitted use of approximately 20 photos during plaintiff's

cross-examination. Plaintiff claimed that, as a result of her injury, she suffered severe anxiety, vertigo, constant migraines and pain for a period of about two years, that her anxiety prevented her from going out or socializing with friends, and that she required antidepressant medication. The photos admitted were taken over a 1 ½-year period beginning shortly after the accident. They depicted plaintiff attending parties, socializing and vacationing with friends, dancing, drinking beer in an inverted position referred to in testimony as a "keg stand," and otherwise appearing to be active, socially engaged and happy.1 They further revealed that plaintiff consumed alcohol during this period, contrary to medical advice and her reports to her physicians. The discretion of trial courts in rendering evidentiary rulings is broad (see Richmor Aviation, Inc. v. Sportsflight Air, Inc., 82 A.D.3d 1423, 1426, 918 N.Y.S.2d 806 [2011]; Saulpaugh v. Krafte, 5 A.D.3d 934, 934–935, 774 N.Y.S.2d 194 [2004], lv. denied 3 N.Y.3d 610, 786 N.Y.S.2d 813, 820 N.E.2d 292 [2004]). The photographs had probative value with regard to plaintiff's claimed injuries, their evidentiary value was properly balanced against their potential for prejudice, and we find no abuse of discretion."

FOURTH DEPARTMENT

DISCOVERY REQUEST MUST BE NARROWLY TAILORED –
Kregg v. Maldonado, 98 A.D.3d 1289 (2012)

"Although CPLR 3101(a) provides for "full disclosure of all matter material and necessary in the prosecution or defense of an action," it is well settled that a party need not respond to discovery demands that are overbroad (see Optic Plus Enters., Ltd. v. Bausch & Lomb Inc., 35 A.D.3d 1263, 1263, 827 N.Y.S.2d 895). Where discovery demands are overbroad, " 'the appropriate remedy is to vacate the entire demand rather than to prune it' " (Board of Mgrs. of the Park Regent Condominium v. Park Regent Assoc., 78 A.D.3d 752, 753, 910 N.Y.S.2d 654). In McCann v. Harleysville Ins. Co. of N.Y., 78 A.D.3d 1524, 1525, 910 N.Y.S.2d 614, we addressed a similar discovery demand and concluded that the request for access to social media sites was made without "a factual predicate with respect to the relevancy of the evidence" (see Crazytown Furniture v. Brooklyn Union Gas Co., 150 A.D.2d 420, 421, 541 N.Y.S.2d 30). Here, as in McCann, there is no contention that the information in the social media accounts contradicts plaintiff's claims for the diminution of the injured party's enjoyment of life (cf. Romano v. Steelcase, Inc., 30 Misc.3d 426, 427, 907 N.Y.S.2d 650). As in McCann, the proper means by which to obtain disclosure of any relevant information contained in the social media accounts is a narrowly-tailored discovery request seeking only that social-media-based information that relates to the claimed injuries arising from the accident. Thus, we deny that part of the Suzuki defendants' motion to compel the disclosure of the entire contents of the injured party's social media accounts, without prejudice to the service of a more narrowly-tailored disclosure request."

DENIAL OF SOCIAL MEDIA DISCOVERY TODAY DOES NOT PRECLUDE REQUEST TOMORROW –
McCann v. Harleysville Insurance Company of New York, 78 A.D.3d 1524 (2010)

“In appeal No. 2, defendant appeals from an order denying its subsequent motion seeking to compel plaintiff to produce photographs and an authorization for plaintiff's Facebook account information and granting plaintiff's cross motion for a protective order. Although defendant specified the type of evidence sought, it failed to establish a factual predicate with respect to the relevancy of the evidence (see Crazytown Furniture v. Brooklyn Union Gas Co., 150 A.D.2d 420, 421, 541 N.Y.S.2d 30). Indeed, defendant essentially sought permission to conduct “a fishing expedition” into plaintiff's Facebook account based on the mere hope of finding relevant evidence (Auerbach v. Klein, 30 A.D.3d 451, 452, 816 N.Y.S.2d 376). Nevertheless, although we conclude that the court properly denied defendant's motion in appeal No. 2, we agree with defendant that the court erred in granting plaintiff's cross motion for a protective order. Under the circumstances presented here, the court abused its discretion in prohibiting defendant from seeking disclosure of plaintiff's Facebook account at a future date. We therefore modify the order in appeal No. 2 accordingly.”

NONSPECIFIC FACEBOOK POSTING NOT DEFAMATION –
Kindred v. Colby, 54 Misc.3d 1205(A) (2015) [Unreported]

“ALLEGED DEFAMATORY STATEMENT IN JUNE 5, 2013 FACEBOOK POSTING
Defendants argue that the June 5, 2013 Facebook posting which contains the language “an irate neighbor has gone through your facebook photos to identify those near and dear to you” does not refer to Plaintiff and therefore, is not actionable. Defendants assert that the posting refers only to an “irate neighbor” with no reference to Plaintiff by name or by any other identifying factors. The Plaintiff's opposition papers do not refute or contest that this statement is not actionable for a defamation claim. The entire Facebook statement is “[t]hat ‘special’ feeling when you realize an irate neighbor has gone through your facebook photos to identify those near & dear to you” (Attorney Affidavit of Heidi Ruchala, Esq ., 12/29/2014, Exhibit C).
A claim of defamation is based on a false statement “that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace” (Davis at 268; Frechtman v. Gutterman, 115 AD3d 102 [1st Dept.2014]). The reference in the challenged June 5, 2013 facebook posting states only “an irate neighbor.” There is no evidence submitted to show that this facebook posting, which is the language set forth in the Plaintiff's complaint as a defamatory statement, identifies the Plaintiff, Dennis Kindred, in any way.
This alleged defamatory statement cannot expose Dennis Kindred to any harm because it does not identify him. Based on this June 5, 2013 facebook posting language, the complaint does not set forth a cause of action by Plaintiff for defamation against the Defendants.”