

Social Media Discovery

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Effective Use and Ethical Considerations of Social Media Discovery

By: Robert B. Gibson, Esq.

I. What is Social Media?

1. Romano v. Steelcase, Inc., 30 Misc. 3d 426, 907 N.Y.S.2d 650 (Supreme Suffolk 2010) “Both Facebook and MySpace are social networking sites where people can share information about their personal lives, including posting photographs and sharing information about what they are doing or thinking. Indeed, Facebook policy states that ‘it helps you share information with your friends and people around you,’ and that “Facebook is about sharing information with others...“MySpace [is] an "online community" where "you can share photos, journals and interests with your growing network of mutual friends...”

II. Screening of Clients and Adversaries

1. ABA Model Rules of Prof. Conduct, Rule 1.1, Comment 8 - lawyers have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation.
2. New York State Bar Association’s Social Media Ethics Guidelines (May 2017) – Guideline No.1.A - A lawyer has a duty to understand the benefits, risks and ethical implications associated with social media, including its use for communication, advertising and research and investigation.
3. Duty to Client
 - i. Jessica Weltge and Myra McKenzie-Harris, Esq. “The Mindfield of Social Media and Legal Ethics: How to Provide Competent Representation and Avoid the Pitfalls of Modern Technology” American Bar Association Section of Labor and Employment Law Ethics & Professional Responsibility Committee Midwinter Meeting March 24, 2017. Lawyers have a duty to be competent that requires them to “maintain the knowledge and awareness about technological changes that could impact the legal profession.”
 - ii. New York Rules of Professional Conduct – Rule 1.1(a) - A lawyer should provide competent representation to a client. Competent

representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

- iii. New York State Bar Association's Social Media Ethics Guidelines (May 2017) – Guideline No.5.A - A lawyer may advise a client as to what content may be maintained or made nonpublic on her social media account, including advising on changing her privacy and/or security settings. A lawyer may also advise a client as to what content may be “taken down” or removed, whether posted by the client or someone else. However, the lawyer must be cognizant of preservation obligations applicable to the client and/or matter, such as a statute, rule, regulation, or common law duty relating to the preservation of information, including legal hold obligations. Unless an appropriate record of the social media content is preserved, a party or nonparty may not delete information from a social media account that is subject to a duty to preserve.

- Defendants should demand preservation of social media.

4. Techniques to Screen Parties

- i. Start with Google.
- ii. Social Media Sites
 - a. Facebook Search by name.
 - b. Twitter/Instagram Search by hashtags “#”

5. Ethical Considerations of Findings

- i. Plaintiff's Considerations
 - a. New York Rules of Professional Conduct – Rule 3.1(a) - A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.
 - b. New York Rules of Professional Conduct – Rule 3.3(a)(3) – A lawyer shall not knowingly offer or use evidence that the lawyer knows to be false.
 - a. Duty of the lawyer as an officer of the Court to prevent the trier of fact from being misled by false evidence. See Comment #5.

- c. New York Rules of Professional Conduct – Rule 3.4(a)(1) A lawyer shall not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce.
 - d. New York State Bar Association’s Social Media Ethics Guidelines (May 2017) Guideline No. 5.B - Adding New Social Media Content. A lawyer may advise a client with regard to posting new content on social media, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not “direct or facilitate the client’s publishing of false or misleading information that may be relevant to a claim.”
- ii. Defendant’s Considerations
- a. New York Rules of Professional Conduct – Rule 4.2(a) - In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law
 - b. New York State Bar Association’s Social Media Ethics Guidelines (May 2017) - Guideline No. 4.C - A lawyer shall not contact a represented person or request access to review the restricted portion of the person’s social media profile unless express consent has been furnished by the person’s counsel.
 - c. Mark Barry, M.D. v. Medtronic, Inc., Case No. 1:14-CV-104 (E.D. Tex. Oct. 2016). The District Court provided a list of potential jurors to counsel and issued guidelines on the use of social media to research jurors. The Court prohibited the parties from communicating with any potential juror, from sending an access request to a potential juror, and from performing a search that would notify the juror of same, such as viewing the juror’s LinkedIn profile. If the prohibitions were violated, the Court stated that it could sanction, refer the attorney to the State Bar, or institute criminal proceedings against an attorney.
- iii. Duty to Preserve Evidence and Spoliation
- a. Kirkland v. New York City Housing. Authority, 236 A.D.2d 170, 173 (1st Dep’t 1997) “Spoliation is the destruction of evidence...Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them.”

- b. Would spoliation sanctions be appropriate if relevant social media posts that are removed or taken down, could not be recovered?

III. Is it Effective?

1. The Benefits of Conducting Social Media Research
 1. Information Obtained From Facebook and Other Social Media Sites Can Significantly Inform and Influence the Discovery Process
 - i. It may obviate the need for other discovery tools.
 2. Information obtained that is relevant to liability
 - i. How the accident occurred
 3. Information obtained that is relevant to damages
 - i. Extent of plaintiff's injuries
 - ii. Extent of plaintiff's physical limitations
 - iii. Ability of plaintiff to work
 - iv. Extent of plaintiff's daily activities
 - v. Credibility

IV. Disclosure Generally

1. Discovery Standard
 - a. CPLR 3101(a) – There shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof. See Kapon v. Koch, 21 N.Y.3d 975 (2013).
 - b. CPLR 3101(a) is not unlimited and requires the party seeking disclosure to satisfy the requirement that the request is reasonably calculated to yield information that is material and necessary. See Forman v. Henkin, 30 N.Y.3d 656 (2018).
 - c. E.E.O.C. v. Simply Storage Mgmt, LLC, 270 F.R.D. 430, 437 (S.D. Ind. 2010). Relevant social media material includes “any profile, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and social networking site applications for the claimant... that reveal, refer, or relate to any emotion, feeling, or

mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state.”

- d. Richter, Jeffrey Brian, "Discovery of Social Network Data in Litigation" (2014). Law School Student Scholarship. Paper 554. http://scholarship.shu.edu/student_scholarship/554 “Basically, if the information being sought is relevant to the claims or defenses of the parties to the case, then it should be discoverable.”

V. History of Social Media Discovery in New York

1. Factual Showing Prior to Disclosure

- a. Tapp v. New York State Urban Dev. Corp., 102 A.D.3d at 620 (1st Dep’t 2013). “...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.”
- b. Nieves v. 30 Ellwood Realty LLC, 39 Misc.3d 63 (1st Dep’t 2013). The infant-plaintiff alleged physical and psychological damages. The Court held that defendant made showing that plaintiff’s Facebook profile contained photographs that were probative as to the extent of the infant-plaintiff’s injuries and that they were discoverable after an *in camera* review. If the trial court determined that the *in camera* review would be unduly burdensome, the trial court could direct plaintiff to review her own Facebook account.
- c. Spearin v. Linmar, 129 A.D.3d 528 (1st Dep’t 2015). Plaintiff alleged damages as a result of a piece of falling wood. Plaintiff’s Facebook profile picture depicted him sitting in front of a piano, which the Court held tended to contradict the plaintiff’s testimony that he was unable to play the piano.
- d. McCann v. Harleysville Ins. Co. of N.Y., 78 A.D.3d 1524 (4th Dep’t 2010). In an action involving a motor vehicle accident, the defendants sought the plaintiff’s Facebook account information. Defendant claimed that the information was relevant in determining whether the plaintiff met the serious injury threshold, but the Court reasoned that it was a mere “fishing expedition” based on the mere hope that it would reveal relevant evidence.
- e. Richards v. Hertz Corp., 100 A.D.3d 728, 730 (2d Dep’t 2012). Defendants demonstrated that plaintiff’s Facebook profile contained a photograph that was probative as to the extent of the plaintiff’s injuries. Therefore, the defendants made a showing that “at least some” of the discovery sought would be relevant or “lead to the discovery of information bearing on her claim.”

2. Tailored Demands

- a. Kregg v. Maldonado, 98 A.D.3d 1289, 1290 (4th Dep't 2012). Defendant sought disclosure of all of plaintiff's social media account records. The Court held that the demand was not narrowly tailored and that the proper procedure was to demand disclosure that "relates to the claimed injuries arising from the accident."
 - b. Patterson v. Turner Constr. Co., 88 A.D.3d 617 (1st Dep't 2011). Defendant sought an authorization to obtain all of plaintiff's Facebook records after the incident complained of in the complaint. Court found that it is possible that not all of plaintiff's Facebook posts and records would be relevant. In reversing, the court held that a more specific demand was required to determine relevant information, such as whether the posts contradict the plaintiff's alleged injuries.
 - c. Ronald Hedges "Limitations on Discovery of Social Media" American Bar Association <https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2017/limitations-on-discovery-of-social-media.html>
3. Privacy Settings
- a. Patterson v. Turner Constr. Co., 88 A.D.3d 617 (1st Dep't 2011). The court previously allowed discovery of a personal diary. Therefore, disclosure of a plaintiff's "private" Facebook posts, if relevant, were discoverable.
4. Jones, Alexandra D., "Forman v. Henkin: The Conflict Between Social Media Discovery and User Privacy" (2016). The Circuit. 87. <http://scholarship.law.berkeley.edu/clrcircuit/87>
 5. Rick E. Kubler & Holly A. Miller, Recent Developments in Discovery of Social Media Content, ABA 3 (March 2015), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015_inscle_materials/written_materials/24_1_recent_developments_in_discovery_of_social_media_content.authcheckdam.pdf [<https://perma.cc/T8TD-RP83>]

VI. Recent Updates in Social Media Discovery

1. The Court of Appeals Set a New Standard in Forman v. Henkin, 30 N.Y.3d 656 (2018)
 - i. Open questions prior to Forman
 1. If a party has their Facebook account settings on private, how does an adversary make the factual showing required for production of Facebook records?
 2. Would courts be deterred from determining if a sufficient factual showing had been met given the *in camera* review requirement?

3. Would courts be overburdened with performing *in camera* reviews if the party met the threshold factual showing?

ii. Factual Background

- a. A personal injury action in which the plaintiff was injured after a fall from the defendant's horse. At her deposition, she testified that she posted on Facebook prior to the accident, but deactivated her account at some point after. She alleged that she no longer engages in various activities, had impaired memory that impacted her ability to read and write, and has been unable to compose e-mails and text messages. She also testified that she could not recall whether she posted any photographs on Facebook since her injury.
- b. Defendant sought the plaintiff's Facebook photographs after her injury, and her pre- and post-injury writings.

iii. Prior Legal History

- a. The Trial Court found that any photographs posted on Facebook which depict the plaintiff engaging in various activities after her injury, "particularly any activities she claims she no longer is able to engage in due to her fall..." are probative and discoverable. Plaintiff's writings for a limited period of time prior to the accident and post-injury were discoverable to assess the plaintiff's ability to "read, reason, find words, write, and communicate effectively." See Forman v. Henkin, 2014 NY Slip Op 30679(U) (Supreme New York).
- b. The plaintiff appealed to the Appellate Division First Department. The Court found that "a party must be able to demonstrate that the information sought is likely to result in the disclosure of relevant information bearing on the claims." The Court held that the defendant failed to establish entitlement to the plaintiff's photographs and messages. See Forman v. Henkin, 134 A.D.3d 529 (1st Dep't 2015).
- c. In dissent, Justice David Saxe questioned why there was a heightened rule for social media discovery that required (1) the defendant to produce something from the plaintiff's public social media information that contradicts plaintiff's claims and (2) an *in camera* review to ensure that the defendant is only provided relevant materials.
 - a. Left open was how a defendant could meet the requirement of producing contradictory information where Facebook privacy settings can effectively limit a party from viewing anything more than the profile picture.

iv. Court of Appeals Sets Standard

- a. General Protections from Disclosure
 - a. Three categories of protected materials
 - i. Attorney work product
 - ii. Privileged matter
 - iii. Trial preparation materials
 - b. Palpably Improper
 - iv. Gilman & Ciocia, Inc. v. Walsh, 45 A.D.3d 531 (2d Dep't 2007). Demands are palpably improper if they seek information that is irrelevant or confidential, or are overbroad and burdensome.
 - c. Overly broad
 - v. Spearin v. Linmar, 129 A.D.3d 528 (1st Dep't 2015). Defendant's demand for all of plaintiff's post-accident Facebook postings was overbroad, but an *in camera* review of plaintiff's post-accident Facebook postings was necessary to identify information that would be relevant to his alleged injuries.
 - vi. McCann v. Harleystown Ins. Co. of N.Y., 78 A.D.3d 1524 (4th Dep't 2010). An authorization to obtain the plaintiff's Facebook account is overly broad.
 - vii. Harrison v. Bayley Seton Hosp., 219 A.D.2d (2d Dep't 1995) If demands for discovery are "overly broad and vexatious and tend to confuse, rather than sharpen, the central issue," a motion to compel discovery should be denied.
 - viii. Ganin v. Janow, 86 A.D.2d 857 (2d Dep't 1982). Use of the phrases "all," "any," or "any and all" is improper and does not satisfy CPLR 3120's requirement that documents be "specifically designated" and "specified with reasonable particularity in the notice."

1. Exceptions

- a. When use of the above phrases "may relate to specific subject matter" (See In re Citibank, N.A., 100 A.D.2d 784 (1st Dep't

1984) holding that all Federal tax returns over a 5-year period not overly broad; Palmieri v. Kilcourse, 457 N.Y.S.2d 104 (2d Dep't 1982) holding that all medical records pertaining to treatment of patient by a particular doctor discoverable).

- d. Evaluated on a “case-by-case” basis. See Andon v. 302-304 Mott St. Assocs., 94 N.Y.2d 740 (2000). The plaintiff-mother brought suit on behalf of the infant-plaintiff alleges damages due to lead paint. Defendants sought to compel the plaintiff-mother to undergo an IQ examination. The Appellate Division found that the defendant failed to offer evidence as to why the plaintiff-mother’s IQ was relevant in this case aside from conclusory opinions made by a pediatrician.
- b. Forman does away with the requirement that a party identify relevant information prior to disclosure.
 - a. A party can manipulate privacy settings to frustrate obtaining information.
 - b. The “threshold inquiry is not whether the materials sought are private but whether they are reasonably calculated to contain relevant information.” Id. at 666.
- c. Considerations for Courts based on Forman
 - i. The nature of the event giving rise to the suit. Id. at 665.
 - ii. The injuries claimed. Id.
 - iii. Any other information specific to the case. Id.
 - iv. Courts must balance i. – iii. above against the account holder’s “privacy concerns” and tailor the order to identify the types of materials that are relevant and should be disclosed. Id.
- v. Open questions not resolved by Forman
 - a. What warrants disclosure of a party’s entire Facebook account, including posts?
 - a. The Court did not reach the question of whether the plaintiff’s writings, given her claims that she had impaired memory that impacted her ability to read and write, were discoverable. Rather the Court deferred to allow the defendant to pursue a follow-up request for disclosure depending on what the information ordered to be disclosed revealed. See Forman, 30 N.Y.3d 656, 667, n.7.

- b. If a party makes a misrepresentation about the existence of a Facebook account, would the number of posts be relevant to credibility?

- b. CPLR 3101(i)
 - a. CPLR 3101(i): “...there shall be full disclosure of any films, photographs, video tapes or audiotapes, including transcripts or memoranda thereof...There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use.”

 - b. Would a demand under CPLR 3101(i) cover photographs and/or videotapes on Facebook? Instagram? Twitter?

 - c. The defendants were denied disclosure of evidence that could potentially be relevant to the defense. The parties failed to cite to CPLR 3101(i) and the Court noted that it would not address its applicability in this case. Forman, 30 N.Y.3d 656, 667 n.6.

 - d. Should CPLR 3101(i) include disclosure of films, photographs, video tapes or audiotapes, including transcripts of memoranda thereof, **including but not limited to those on social media**, involving a person referred to in paragraph one of subdivision (a) of this section?
 - i. Is that even required?


V. **Lessons from *Forman***

1. Tailor social media discovery demands as to both subject matter and time period.
 2. Avoid overly broad terms such as “all” and “any.”
 3. Make a preservation demand for social media.
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Effective Use and Ethical Considerations of Social Media Discovery

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What Is Social Media?

 Romano v. Steelcase, Inc., 30 Misc. 3d 426, 907 N.Y.S.2d 650 (Supreme Suffolk 2010)

- Both Facebook and MySpace are social networking sites where people can share information about their personal lives, including posting photographs and sharing information about what they are doing or thinking...



Indeed, Facebook policy states that 'it helps you share information with your friends and people around you,' and that 'Facebook is about sharing information with others'...



MySpace [is] an 'online community' where 'you can share photos, journals and interests with your growing network of mutual friends...'

Screening of Clients and Adversaries

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ABA Model Rules of Prof. Conduct, Rule 1.1, Comment 8

- Lawyers have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation



New York State Bar Association's Social Media Ethics Guidelines (May 2017)

- A lawyer has a duty to understand the benefits, risks and ethical implications associated with social media, including its use for communication, advertising and research and investigation




Duty to the Client

- Lawyers have a duty to be competent that requires them to “maintain the knowledge and awareness about technological changes that could impact the legal participation”

–Jessica Weltge and Myra McKenzie-Harris, Esq.
“The Mindfield of Social Media and Legal Ethics: How to Provide Competent Representation and Avoid the Pitfalls of Modern Technology.” American Bar Association Section of Labor and Employment Law Ethics & Professional Responsibility Committee Midwinter Meeting March 24, 2017
- A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation

–New York Rules of Professional Conduct—Rule 1.1(a)
- A lawyer may advise a client as to what content may be maintained or made nonpublic on her social media account, including advising on changing her privacy and/or security settings. A lawyer may also advise a client as to what content may be “taken down” or removed, whether posted by the client or someone else.
- However, the lawyer must be cognizant of preservation of obligations applicable to the client and/or matter, such as statute, rule, regulation, or common law duty relating to the preservation of information, including legal hold obligations. Unless an appropriate record of the social media content is preserve, a party or nonparty may not delete information from a social media account that is subject to a duty to preserve

–New York State Bar Association’s Social Media Ethics Guidelines (May 2017)—Guideline No. 5.A




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Techniques to Screen Parties

Step 1




Start with Google




Step 2

Next, investigate social media websites

- Facebook (**search by name**)
- Twitter/Instagram (**search by hashtag “#”**)




HEIDELL, PITTONI, MURPHY & BACH, LLP

Ethical Considerations of Findings

Plaintiff's Considerations


- New York Rules of Professional Conduct—Rule 3.1(a)
 - A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous

 **Hypothetical: Plaintiff has social media posts which indicate that he/she is working after the alleged accident.**

Ethical Considerations of Findings

Plaintiff's Considerations (cont'd)


- New York Rules of Professional Conduct—Rule 3.3(a)(3)
 - A lawyer shall not knowingly offer or use evidence that the lawyer knows to be false
 - Duty of the lawyer as an officer of the Court to prevent the trier of fact from being misled by false evidence. See Comment #5

 **Hypothetical: Plaintiff has social media posts depicting him/her on vacation. Plaintiff testifies that he/she has been unable to travel since the accident.**

Ethical Considerations of Findings

Plaintiff's Considerations (cont'd)

- [New York Rules of Professional Conduct—Rule 3.4\(a\)\(1\)](#)
 - A lawyer shall not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce

 **Hypothetical: Defense counsel demands photographs that depict the plaintiff traveling after the accident.**

Ethical Considerations of Findings

Plaintiff's Considerations (cont'd)

- [New York State Bar Association's Social Media Ethics Guidelines \(May 2017\) Guideline No. 5.B Adding New Social Media Content](#)
 - A lawyer may advise a client with regard to posting new content on social media, as long as the proposed content is not known to be false by the lawyer
 - A lawyer also may not “direct or facilitate the client’s publishing of false or misleading information that may be relevant to a claim”

Ethical Considerations of Findings (cont'd)

Defendant's Considerations

- [New York Rules of Professional Conduct—Rule 4.2\(a\)](#)
 - In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law
- [New York State Bar Association's Social Media Ethics Guidelines \(May 2017\) Guideline No. 4.C](#)
 - A lawyer shall not contact a represented person or request access to review the restricted portion of the person's social media profile unless express consent has been furnished by the person's counsel

Ethical Considerations of Findings (cont'd)


Defendant's Considerations (cont'd)

- [Mark Barry, MD v. Medtronic, Inc., Case No. 1:14-CV-104 \(E.D. Tex. Oct. 2016\)](#)
 - The District Court provided a list of potential jurors to counsel and issued guidelines on the use of social media to research jurors. The Court prohibited the parties from communicating with any potential juror, from sending an access request to a potential juror, and from performing a search that would notify the juror of same, such as viewing the juror's LinkedIn profile. If the prohibitions were violated, the Court stated that it could sanction, refer the attorney to the State Bar, or institute criminal proceedings against an attorney

Ethical Considerations of Findings (cont'd)

Duty to Preserve Evidence and Spoliation

- Kirkland v. New York City Hous. Authority, 236 A.D.2d 170, 173 (1st Dep't 1997)
 - "Spoliation is the destruction of evidence... Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them"

 **Hypothetical: Would spoliation apply if plaintiff deletes information from social media and cannot recover it?**

Is Social Media Discovery Effective?

The Benefits of Conducting Social Media Research



- Information obtained from Facebook and other social media sites can **significantly inform and influence the discovery process**
- It may obviate the need for other discovery tools



- Information obtained is **relevant to liability**
- How the accident occurred




- Information obtained is **relevant to damages**
- Extent of plaintiff's injuries
- Extent of plaintiff's physical limitations
- Ability of plaintiff to work
- Extent of plaintiff's daily activities
- Credibility

Disclosure Generality

CPLR 3101(a)

- There shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof. See generally Kapon vs. Koch, 21 N.Y.3d 975 (2013)

CPLR 3101(a) is not unlimited and requires the party seeking disclosure to satisfy the requirement that the request is reasonably calculated to yield information that is material and necessary 

E.E.O.C. v. Simply Storage Mgmt, LLC, 270 F.R.D. 430, 437 (S.D. Ind. 2010)

- Relevant social media material includes “any profile, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and social networking site applications for the claimant...that reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state”

Richter, Jeffrey Brian, "Discovery of Social Network Data Litigation" (2014)



Law School Student Scholarship. Paper 554

http://scholarship.shu.edu/student_scholarship/554



- "Basically, if the information being sought is relevant to the claims or defenses of the parties to the case, then it should be discoverable"

History of Social Media Discovery in New York

Factual Showing Prior to Disclosure

-  Tapp v. New York State Urban Dev. Corp., 102 A.D.3d at 620 (1st Dep't 2013)
 - "...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"
-  Nieves v. 30 Ellwood Realty LLC, 39 Misc.3d 63 (1st Dep't 2013)
 - The infant-plaintiff alleged physical and psychological damages
 - Court held that defendant made showing that plaintiff's Facebook profile contained photographs that were probative as to the extent of the infant-plaintiff's injuries and that they were discoverable after an in-camera review
 - If the trial court determined that the in-camera review would be unduly burdensome, the trial court could direct plaintiff to review her own Facebook account

Factual Showing Prior to Disclosure (cont'd)

-  Spearin v. Linmar, 129 A.D.3d 528 (1st Dep't 2015)
 - Plaintiff alleged damages as a result of a piece of falling wood
 - Plaintiff's Facebook profile picture depicted him sitting in front of a piano, which Court held tended to contradict the plaintiff's testimony that he was unable to play the piano
-  McCann v. Harleysvill Ins. Co. of N.Y., 78 A.D.3d 1524 (4th Dep't 2010)
 - In an action involving a motor vehicle accident, the defendants sought the plaintiff's Facebook account information
 - Defendant claimed that the information was relevant in determining whether the plaintiff met the serious injury threshold, but the Court reasoned that it was a mere "fishing expedition" based on the mere hope that it would reveal relevant evidence

Factual Showing Prior to Disclosure (cont'd)



• Richards v. Hertz Corp., 100 A.D.3d 728, 730 (2d Dep't 2012)

- Defendants demonstrated that plaintiff's Facebook profile contained a photograph that was probative as to the extent of the plaintiff's injuries
- Therefore, the defendants made a showing that "at least some" of the discovery sought would be relevant or "lead to the discovery of information bearing on her claim"

Tailored Demands



• Kregg v. Maldano, 98 A.D.3d 1289, 1290 (4th Dep't 2012)

- Defendant sought disclosure of all plaintiff's social media account records
- The Court held that the demand was not narrowly tailored and that the proper procedure was to demand disclose that "relates to the claimed injuries arising from the accident"



• Patterson v. Turner Constr. Co., 88 A.D.3d 617 (1st Dep't 2011)

- Defendant sought an authorization to obtain all of plaintiff's Facebook records after the incident complained of in the complaint
- Court found that it is possible that not all plaintiff's Facebook posts and records would be relevant
- In reversing, the court held that a more specific demand was required to determine relevant information, such as whether the posts contradict the plaintiff's alleged injuries

Privacy Settings



- Patterson v. Turner Constr. Co., 88 A.D.3d 617 (1st Dep't 2011)
 - The court previously allowed discovery of a personal diary
 - Therefore, plaintiff's "private" Facebook posts, if relevant, were discoverable

Recent Updates in Social Media Discovery



The Court of Appeals Sets New Standard in Forman v. Henkin, 30 N.Y.3d 656 (2018)

Open questions prior to *Forman*

- 1) If a party has their Facebook account settings on private, how does an adversary make the factual showing required for the production of Facebook records?
- 2) Would courts be deterred from determining if a sufficient factual showing had been met given the in-camera review requirement?
- 3) Would courts be overburdened with performing in-camera reviews if the party met the threshold factual showing?

Factual Background of Forman

- A personal injury action in which the plaintiff was injured after a fall from the defendant's horse
 - At her deposition, she testified that she posted on Facebook prior to the accident, but deactivated her account at some point after
 - She alleged that she no longer engages in various activities, had impaired memory that impacted her ability to read and write, and has been unable to compose e-mails and text messages
 - She also testified that she could not recall whether she posted any photographs on Facebook since her injury
- Defendant sought the plaintiff's Facebook photographs after her injury, and her pre- and post-injury writings

Prior Legal History

- The Supreme Court found that any photographs posted on Facebook, which depict the plaintiff engaging in various activities after her injury, “particularly any activities she claims she no longer is able to engage in due to her fall...” are probative and discoverable
- Plaintiff’s writings for a limited period of time prior to the accident and post-injury were discoverable to assess the plaintiff’s ability to “read, reason, find words, write, and communicate effectively”

See [Forman v. Henkin](#), 2014 NY Slip Op 30679(U) Supreme New York



Prior Legal History (cont'd)

- The plaintiff appealed to the Appellate Division First Department
- The Court found that “a party must be able to demonstrate that the information sought is likely to result in the disclosure of relevant information bearing on the claims”
- The Court held that the defendant failed to establish entitlement to the plaintiff’s photographs and messages

See [Forman v. Henkin](#), 134 A.D.3d 529 (1st Dep’t 2015)



Prior Legal History (cont'd)

- In dissent, Justice David Saxe questioned why there was a heightened rule for social media discovery that required
 - 1) The defendant to produce something from the plaintiff's public and social media information that contradicts plaintiff's claims, and
 - 2) An in-camera review to ensure that the defendant is only provided relevant materials

Left open was how (1) could be solved when Facebook privacy settings can effectively limit a party from viewing anything more than the profile picture



Court of Appeals Sets Standard: General Protections from Disclosure

- Categories of protected materials



Attorney's work product




Privileged matter



Trial preparation materials




Court of Appeals Sets Standard: General Protections from Disclosure (cont'd)

- Palpably improper

-  - [Gilman & Ciocia, Inc. v. Walsh](#), 45 A.D.3d 531 (2d Dep't 2007)
Demands are palpably improper if they seek information that is irrelevant or confidential, or are overbroad and burdensome

Court of Appeals Sets Standard: General Protections from Disclosure (cont'd)

- Overly broad

-  - [Spearin v. Linmar](#), 129 A.D.3d 528 (1st Dep't 2015)
Defendant's demand for all of plaintiff's post-accident Facebook postings is overbroad, but in camera review of plaintiff's post-accident Facebook postings necessary to identify information that would be relevant to his alleged injuries
-  - [McCann v. Harleystown Ins. Co. of N.Y.](#), 78 A.D.3d 1524 (4th Dep't 1995)
An authorization to obtain the plaintiff's Facebook account is overly broad
-  - [Harrison v. Bayley Seton Hosp.](#), 219 A.D.2d 1524 (2d Dep't 1995)
If demands for discovery are "overly broad and vexatious and tend to confuse, rather than sharpen, the central issue," a motion to compel discovery should be denied

Court of Appeals Sets Standard: General Protections from Disclosure (cont'd)

- Overly broad (cont'd)



- [Ganin v. Janow](#), 86 A.D.2d 857 (2d Dep't 1985)

Use of the "all", "any", or "any and all" is improper and does not satisfy CPLR 3120's requirement that documents be "specifically designated" and "specified with reasonable particularity in the notice"

Exceptions:

- When the use of above phrases "may relate to specific subject matter"

(See *In re Cititbank, N.A.*, 100 A.D.2d 784 (1st Dep't 1984) holding that all Federal tax returns over a 5-year period not overly broad; *Palmieri v. Kilcourse*, 457 N.Y.S.2d 104 (2d Dep't 1982) holding that all medical records pertaining to treatment of patient by a particular doctor discoverable)



Court of Appeals Sets Standard: General Protections from Disclosure (cont'd)

- Evaluated on a "case-by-case" basis



- [Andon v. 302-304 Mott St. Assocs](#), 94 N.Y.2d 740 (2000)

- The plaintiff-mother brought suit on behalf of the infant-plaintiff alleges damages due to lead paint. Defendants sought to compel the plaintiff-mother to undergo an IQ examination
- The Appellate Division found that the defendant failed to offer evidence as to why the plaintiff-mother's IQ was relevant in this case and that defendant's expert pediatrician offered conclusory opinions

Forman: Relevance of Information

- Forman does away with requirement that a party identify relevant information prior to disclosure
 - Party can manipulate privacy settings to frustrate obtaining information

“Threshold inquiry is not whether that materials sought are private but whether they are reasonably calculated to contain relevant information”

Id. at 666

Forman: Considerations for Courts

- Nature of the event giving rise to the suit. Id. at 665
- Injuries claimed. Id.
- Any other information specific to the case. Id.
- Courts must balance i-iii (above) against the account holder’s “privacy concerns” and tailor the order to identify the types of materials that are relevant and should be disclosed. Id.

Forman: Open Questions Remain

What warrants disclosure of a party's entire Facebook account, including posts?

- The Court did not reach the question as to whether the plaintiff's posts, given her claims that she had impaired memory that impacted her ability to read and write, were discoverable. Rather the Court deferred to allow the defendant to pursue a follow-up request for disclosure depending on what the information ordered to be disclosed revealed. See Footnote 7
- If a party made a misrepresentation about the existence of a Facebook account, **would the number of posts be relevant to credibility?**

Forman: Open Questions Remain

CPLR 3101(i)

- CPLR 3101(i): "...there shall be full disclosure of any films, photographs, video tapes or audiotapes, including transcripts or memoranda thereof...There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use."
 - **Would a demand under CPLR 3101(i) cover photographs and/or videotapes on Facebook? Instagram? Twitter?**
- Forman Footnote 5 - Defendants denied disclosure of evidence that could potentially be relevant to the defense. Parties failed to cite to CPLR 3101(i) and the Court noted that it would not be addressed nor would the Court express any views as to its application.
 - **Should CPLR 3101(i) include disclosure of films, photographs, video tapes or audiotapes, including transcripts of memoranda thereof, including but not limited to, those on social media, involving a person referred to in paragraph one of subdivision (a) of this section?**
 - **Is that even required?**

Forman: Lessons Learned



Tailor social media discovery demands as to both **subject matter** and **time period**



Avoid terms such as **“all”** and **“any”**



Demand preservation of social media material

Thank You

