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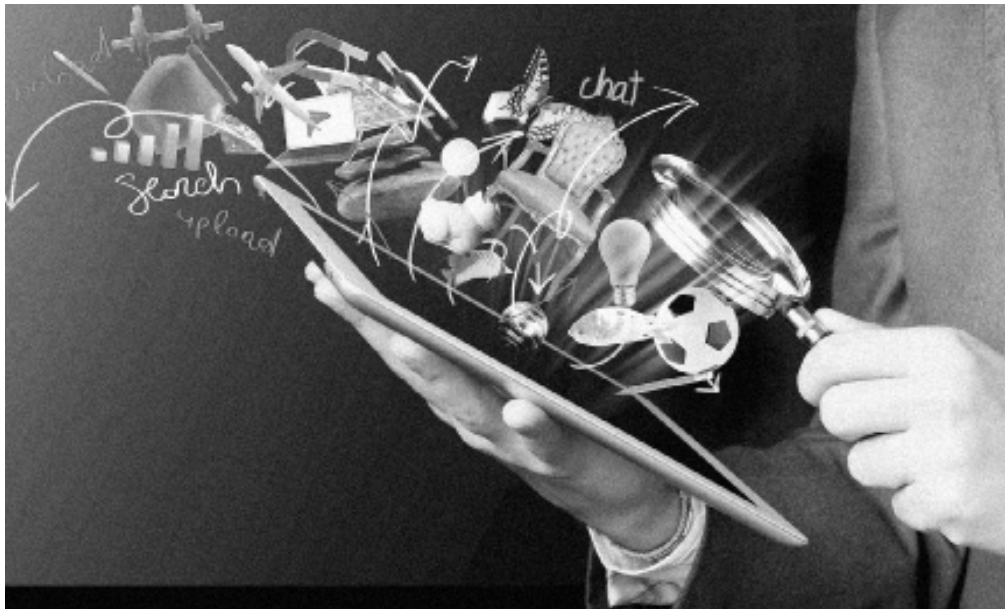
STATE E-DISCOVERY

Social Media Discovery And ESI in Motion Practice

By **Mark A. Berman**

New York courts are refining what is required to be asserted in order for a party to be entitled to the production of social media evidence concerning one's opposition. Courts often require that the requesting party first depose the witness and ask detailed questions concerning the witness' use of social media services, such as Facebook; the type and nature of postings made; and the postings themselves as they relate to the events and claims at issue. Courts are requiring that, prior to an initial deposition of an opposing party, counsel must seek



to uncover and then review a party's postings that are available to the public, and counsel must then inquire about such postings at the deposition. Courts are increasingly inclined to permit a follow-up deposition after a timely-filed, tailored demand for documents and authorizations seeking non-public social network postings that would appear to contradict a party's claims. As for non-public postings, counsel should be aware that ethical rules proscribe an attorney from using "false pretenses" to cause an opposing party

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to accept counsel as a Facebook "friend," and thereby gain access to such non-public postings.[1] Counsel should be prepared for an in camera review of the social media evidence

Use of electronically stored information (ESI) in dispositive motions has its own unique nuances, and the decisions below address certain of them. Lastly, this article discusses concerns associated with the production of iPhone ESI.[2]

Counsel should be aware that ethical rules proscribe an attorney from using "false pretenses" to cause an opposing party to accept counsel as a Facebook "friend," and thereby gain access to non-public postings.

Facebook ESI

The Second Department in *Richards v. Hertz*,[3] recently held that defendants demonstrated that plaintiff'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 [plaintiff's] Facebook profile, … 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.

Plaintiff's Facebook profile "may" contain 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 plaintiff's Facebook profile of irrelevant "material of a private nature," the motion court was directed to conduct an in camera inspection of plaintiff's postings since the date of the accident to determine what is relevant to plaintiff's alleged injuries.

In *Caban v. Plaza Constr.*,[4] a personal injury action, plaintiff opposed defendant's request for his Facebook screen name and passwords and objected to a request for social media evidence on the ground that defendant's request for access to his "entire" Facebook record is a "fishing expedition." The court denied without prejudice defendant's motion seeking a "downloaded zip or compressed file of the plaintiff's Facebook page or any other social media accounts," subject to serving a new demand that seeks "more specific identification" of plaintiff's Facebook information that "is relevant, in that it contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims." The court directed that plaintiff appear for an additional deposition with respect to the "types of information" which he posted so that defendant may establish a factual predicate with respect to the relevancy of the information.

Plaintiff in *Cuomo v. 53rd & 2nd Associates*[5] returned to work following surgery to both knees, and testified at his deposition that he cannot play sports or do any physical activities and cannot dance. Where plaintiff made reference to his Facebook account at his deposition, the court held that "[t]o the extent the Facebook account contains information that is relevant and contradicts or conflicts with his alleged restrictions, disabilities and losses, this information is discoverable."

Defendants requested production of plaintiff's "Internet and/or web based social networking sites maintained or used by [plaintiff] including all photographs, video recordings, statements, emails, blogs, or other written communication concerning the allegations in the complaint," as well as authorizations for plaintiff's electronic communications maintained by such social networking sites. The court in *Heins v. Vanbourgondien*,[6] ruled:

> Plaintiff shall comply with the demand served on behalf of defendant…with one exception. The plaintiff need not provide a list of all social networking accounts maintained or used, or the User ID and password for each of these accounts. After the plaintiff has been deposed, the defendants may renew their request for properly executed consent and authorizations as may be required by the operators of the social networking sites to which the plaintiff has subscribed since the day of the accident, per-

mitting the defendants to gain access to such sites, including any records that may be have been previously deleted or archived by such operators.

In *Abizeid v. Turner Const.*,[7] an action seeking damages for emotional distress and chronic pain as a result of a slip and fall, plaintiff claimed "I am constantly in pain, very, very depressed.... I don't want to do anything." Defendants asserted that before they served plaintiff with their notice to admit and demand for authorizations, they accessed the public portion of plaintiff's Facebook page and obtained several pictures of plaintiff on vacation, engaged in strenuous activities, such as off-road ATV riding, participating in a wedding as a bridesmaid and drinking a large cocktail in a restaurant. The court noted that "[a]lthough it is clear...that many of the postings and pictures may...relate to the events which gave rise to the plaintiff's claims and the conditions from which she now suffers, her mere use of Facebook should not give rise to an online 'fishing expedition.'" The court directed that to the extent defendants were able to identify plaintiff's presence on Facebook and the images and comments "appear to contradict claims made by the plaintiff, those areas of the plaintiff's Facebook account should be accessible to the defendants." The court ruled to "avoid overreaching" that it would review the contents of the Facebook page in camera and disclose "images and text that are relevant to the conditions the plaintiff has put in controversy."

In *Winchell v. Lopiccolo*,[8] a trial court recently noted the fact that while, "every bit of information Plaintiff enters onto her Facebook page demonstrates some level of cognitive functioning," decisions have not disclosed instances where "unfettered access was allowed, unless the requesting party first showed that information on the other party's public page contradicted their claims of injury or damages." The court noted the example that "if Plaintiff posted a message on Facebook saying that she has difficulty formulating the words to express her thoughts, the substance of the message is what should be considered to determine whether the message is relevant."

ESI in Dispositive Motions

In *Charles v. Charles*,[9] the motion court held that plaintiffs' verified complaint annexing emails served as proper authentication for them, and that circumstantial evidence could:

> verify the emails just as such evidence authenticates a voice heard over the telephone when the message reveals the speaker had knowledge of the facts that only the speaker would likely know. [citation omitted] More importantly, though, courts have applied the same rule when judging whether instant messages are properly authenticated (*People v. Pierre*, 41 AD3d 289, 291-292 [2007], lv denied 9 NY3d 880 [2007], habeas corpus denied sub nom *Pierre v. Ercole*, 2012 WL 3029903, *9-10, 2012 U.S. Dist LEXIS 103874, *23-25 [S.D N.Y.2012] ["instant message was properly authenticated, through circumstantial evidence, as emanating from defendant"]). Here, the emails contain sufficient circumstantial evidence to authenticate defendant Charles as recipient and sender.... Enough circumstantial evidence therefore exists in the record, when taking these facts into account, to authenticate relevant emails as written and received by defendant Charles. Consequently, email authentication and admissibility exists to support the motion even if the plaintiffs' verified complaint proved insufficient.

In *Bank of America v. Friedman Furs & Fashion*,[10] the court denied plaintiff's motion for summary judgment under a line of credit, where, among other grounds: (i) "there was no indication that the [loan history report upon which plaintiff was relying] was made in the regular course of business," since the report was not generated until after the action was commenced, and thus is "not a record of the transactions...as they occurred, but is instead a summary prepared for the purpose of this litigation"; and (ii) the loan history report was "not self explanatory, since the entries are confusing" and the accompanying affidavit was not from an individual with "'personal knowledge of the care and maintenance' of plaintiff's electronic business records," and therefore plaintiff was unable to satisfy its burden, under State Technology Law 306 and CPLR 4539(b), of laying a proper foundation for submitting the subject "reproductions."

In *Hakim v. Hakim*,[11] the First Department held that plaintiff's otherwise barred claims were "revived," by defendant's in-house counsel's

emails referring to defendant's intent to provide plaintiff with an accounting of what he owed to his uncle. The court held that "[v]iewing the emails in the light most favorable to [plaintiff] and drawing all reasonable inferences therefrom, they constitute an acknowledged obligation to furnish the accounting required for Isaac's purchase of his membership in the LLC."

iPhone ESI

In *AllianceBernstein v. Atha*,[12] the First Department held that the trial court's order directing defendant to turn over his iPhone was beyond the scope of plaintiff's request, which was for the "iPhone's call logs from the date he left plaintiff's employ."[13] The court found the order was "too broad for the needs of this case" holding:

> [O]rdering production of defendant's iPhone, which has built-in applications and Internet access, is tantamount to ordering the production of his computer. The iPhone would disclose irrelevant information that might include privileged communications or confidential information. Accordingly, the iPhone and a record of the device's contents shall be delivered to the court for an in camera review to determine what if any information contained on the iPhone is responsive to plaintiff's discovery request. In camera review will ensure that only relevant, non-privileged information will be disclosed.

1. See New York City Bar on Professional Ethics, Formal Opinion 2010-2.

2. The authors recently addressed social media discovery in "Getting and Using That ESI," NYLJ, Vol. 248 No. 84 and "Metadata Meets Facebook E-Discovery," NYLJ, Vol. 247 No. 83. In addition, the use of ESI in dispositive motions was addressed by the authors in "Overbroad Demand and Improper Denials," NYLJ, Vo. 245. No. 39, and "N.Y. Courts Embrace Use of E-Communication Discovery," NYLJ, Vol. 243 No. 39.

3. 100 A.D.3d 728, 953 N.Y.S.2d 654, 656-57 (2d Dept. 2012).

4. Index No. 15557/2007, at 3-4 (Sup. Ct. Queens Co. Sept. 24, 2012).

5. Index No. 111320/2010 at 2 (Sup. Ct. N.Y. Co. Aug. 27, 2012).

6. Index No. 003967/2011 (Sup. Ct. Suffolk Co. Sept. 25, 2012).

7. Index No. 23538/2010, at 3-5 (Sup. Ct. Nassau Co. Sept. 13, 2012).

8. 954 N.Y.S.2d 421, 424, 2012 N.Y. Slip Op. 22337 (Sup. Ct. Orange Co. Oct. 19, 2012).

9. 37 Misc. 3d 1229(A), 2012 WL 6097680, 2012 N.Y. Slip Op. 52226(U) (Sup. Ct. Kings Co. Dec. 5, 2012).

10. 2012 WL 6619203 at *9, 2012 N.Y. Slip Op. 52306(U) (Sup. Ct. Kings Co. Dec. 18, 2012).

11. 99 A.D.3d 498, 501, 953 N.Y.S.2d 1, 4 (1st Dept. 2012).

12. 100 A.D.3d 499, 954 N.Y.S.2d 44 (1st Dept. 2012).

13. After a failure to produce the information sought from defendant, the trial court ordered defendant to deliver the iPhone to plaintiff's counsel to enable it "to obtain the contact information it requested" at defendant's deposition [Doc. No. 29] (emphasis added), which order was predicated on plaintiff's letter application seeking the production from defendant's iPhone of: (1) the contact list; (2) the call log; and (3) all communications between defendant and plaintiff's clients.VVV

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