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STATE E-DISCOVERY

Social Media and Recent Decisions On Form, Review and Use of Emails

By
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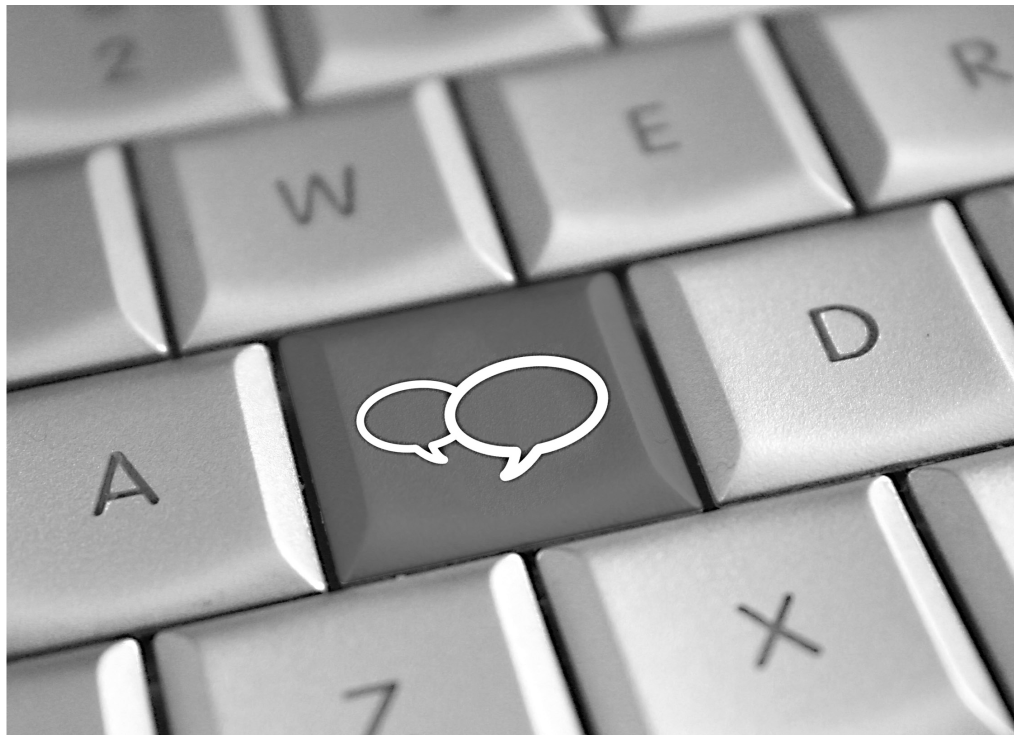
The Commercial and Federal Litigation Section of the New York State Bar Association recently released its "Social Media Ethics Guidelines."[1] The Guidelines may be the first of its kind published by a bar group in the United States addressing how to deal with the ethical pitfalls that lay hidden in the rapidly-changing field of social media. Relying upon New York ethics opinions, supplemented by ethics opinions issued by other bar associations throughout the United States, with links to each cited ethics opinion, the Guidelines offer practical advice for situations that come up every day for lawyers, such as "friending" represented and unrepresented parties, communicating with clients over social media, attorney advertising, advising a client on social media postings, and researching jurors' social media. The Guidelines follow-up on the



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section's CLE presented at the New York State Bar Association's 2014 Annual Meeting entitled "Social Media in Your Practice" which, using mobile devices, surveyed "live" the attendees on their ethical use of social media.[2]

Recent New York decisions are providing additional guidance as to what an attorney in a personal injury case needs to establish in order to obtain the production of social media electronically stored information (ESI), as well as what needs to be demonstrated to a court in order to obtain subscriber information associated with an IP address of an anonymous user. Two recent trial decisions—*Brandofino Communications v. Augme Tech.*[3] and *Soule v. Friends of the Cold Spring Harbor Fish Hatchery*[4]—discuss the form and manner of ESI production. These decisions address the requirement of providing ESI metadata and that produced ESI needs to be linked to Bates-numbers and particularized objections to document requests need to be set forth. Further, *Parker Waichman v. Mauro*,[5] addresses Gmail emails and the determination of if and when such emails were viewed, and how the emails are stored. The decision in *Law Offices of Kenneth J. Weinstein, P.C. v. Signorile*,[6] takes such issue to the next step and finds that the receipt of ESI in certain circumstances simply may not be "presumed."

Social Media Communications

In *Pecile v. Titan Capital Group*,[7] the First Department made it clear that a specific and particularized basis needs to be laid if a party wants the production of social media discovery. There, the court stated:

> [r]egarding defendants' demand for access to plaintiffs' social media sites, 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.

> Recent New York decisions are providing additional guidance as to what an attorney in a personal injury case needs to establish in order to obtain the production of social media ESI.

In *Taylor v. Argueta*,[8] the appropriate basis had been established, and the motion court found that defendants had demonstrated that plaintiff's Facebook "may" contain information that is "probative on the issue of the extent of her injuries and/or disability." Defendants had provided descriptions of some activities contained on the public portion of plaintiff's Facebook account from the date of the accident to the present. As such, the motion court directed an in camera inspection of plaintiff's postings "due to the likelihood that some information contained therein is of a private nature with no relevance to the subject action." The court, however, denied the production of the plaintiff's fiancée's Facebook account.

The predicate for the motion court to order the production of Facebook postings was established in *Lennon v. Fox*[9] where plaintiff placed her physical condition at issue and defendants demonstrated that photographs identified at plaintiff's deposition "as posted on her Facebook account were probative of the issue and the extent of plaintiff's claimed injuries." Defendants' counsel learned, after plaintiff's deposition, that plaintiff had disconnected her Facebook account. The court ordered an in camera inspection of "*all* photographs, status reports, emails, and videos posted on plaintiff's Facebook account, including, but not limited to those deleted, from Oct. 29, 2011 to the present, including any new account or account re-activated under a different alias." Defendants, however, were denied access to plaintiff's LinkedIn account because a proper showing had not been made.

In *St. Paul's Sch. of Nursing v. Papaspiridakos*,[10] in ruling whether defendant was in contempt of

a "so-ordered" stipulation, where defendant "initiated communications" in contravention of the stipulation, the trial court found defendant in civil contempt by sending Facebook "requests to become friends" to certain prohibited individuals under the stipulation. The trial court held that defendant had a "constitutional right to post comments" on his public Facebook page, and found that since defendant's "Facebook posts were made to the public on defendant's public Facebook page, and were not posted on anyone's specific Facebook page," such Facebook posts "were not directed" at a specific prohibited person and thus did not constitute harassment under the stipulation.

IP Addresses of Anonymous Users

In *Edelson v. Doe*,[11] after considering "a variety of factors to weigh the need for disclosure against First Amendment interests, including: (1) a concrete showing of a prima facie claim of actionable harm; (2) specificity of the discovery request; (3) the absence of alternative means to obtain the subpoenaed information; (4) a central need for the subpoenaed information to advance the claim; and (5) the party's expectation of privacy," the motion court ordered the production of the IP address log records and other identifying subscriber information associated with a certain IP address concerning an anonymous user and further provided such user with a "reasonable opportunity to be heard" so that opposition papers may be filed.

> In 'Weinstein', the court noted that the presumption of receipt of bills is "inappropriate" where there is an issue of fact as to defendant's receipt of bills, which were emailed monthly, but were delivered to the "spam box" of defendant's computer.

Form and Manner of Production

In *Brandofino*, plaintiff asserted that defendants should be compelled to produce documents in an accessible format and that the absence of a Concordance load file "has made the task of any review of their production, which consisted of predominantly emails and their attachments, more difficult and burdensome by removing the reviewer's ability to ascertain readily how many pages a document contains, or the association between the pages of the production." Plaintiff also asserted that "defendants' conversion of its ESI into PDF files resulted in the absence of critical metadata from their production." Plaintiff contended that "metadata is essential to organizing and accessing the thousands of documents that have already been produced, and those that defendants have yet to produce, because it allows for the easy sorting of documents by date, author, or recipient." Defendants had made "no objection to providing text-searchable TIFF files with a Concordance load file and associated metadata in its document responses." The motion court found:

> Plaintiff's initial document requests contained specific instructions that responsive documents should be "produced with the metadata normally contained with such documents, and the necessary Concordance load files." As such, defendants cannot claim that plaintiff is now for the first time requesting the documents to be produced in this format for the sake of convenience. Indeed, defendants' initial production was made in accordance with these instructions, without any objection. To complain otherwise, is disingenuous. To change unilaterally the parties' rules of discovery in the middle of the process, without judicial intervention, is not prudent. Furthermore, and critically important, plaintiff's argument is compelling due to the sheer volume of documents at issue. The production should be made in an accessible format that allows for easy sorting of the documents. Defendants merely proffer a

token challenge to this assessment, which in and of itself is questionable given that they continue to receive documents on the Concordance platform from plaintiff, but seek now to deny plaintiff access to this same benefit.

In *Soule*, where defendants produced Bates-stamped documents in readable PDF format, but without reference to plaintiff's numbered demands, the motion court found defendants' production to be "insufficient" and ordered defendants to "provide the documents containing metadata with a spreadsheet and particularized objections that can be linked via the Bates stamp numbers."

Forensic Review

In *Parker*, third-party defendants claimed that, based on a review of defendants' emails produced pursuant to a subpoena served on Google, which emails defendants did not produce, defendants provided inaccurate or knowingly false information regarding relevant matters at their depositions and at trial. The court granted third-party defendants' motion seeking to conduct a forensic examination[12] of certain "temporary files" or fragments on defendants' local hard drives and/or storage media so that their expert could "determine the user's activity" in the Google Web-based email account, including "what information was viewed in the account and when it was viewed." The expert opined that he would be able to compare

the Google production with the information available in the temporary files or fragments identified through a forensic examination of Defendants' computers and/or storage media may provide forensic evidence 1) that the emails produced by Google were at one time viewed on Defendants' computer system, 2) regarding the date and time that these emails were viewed, and 3) regarding where the emails were stored on

defendants' business and personal computer systems, including smartphones and tablets. The court also granted defendants' motion to examine plaintiff law firm's computer system concerning changes in case status in their proprietary case management software system.

No Presumption of Email Receipt

In *Weinstein*, the court noted that, in an account stated cause of action, the presumption of receipt of bills is "inappropriate" where there is an issue of fact as to defendant's receipt of bills, which were emailed monthly, but were delivered to the "spam box" of defendant's computer. See *Consolidated Constr. Grp. v. RMCC*, Index No. 1638/2013 (Sup. Ct. Suffolk Co. Nov. 6, 2013) ("Unlike the presumption of receipt that attaches to the service of legal notices by mail, no such presumption attaches to email or facsimile transmissions," thus raising a "question of fact as to whether and when such notice was given.").

1. The Guidelines can be found at the New York State Bar Association's website at https://www.nysba.org/Sections/Commercial_Federal_Litigation/Com_Fed_PDFs/Social_Media_Ethics_Guidelines.html.
2. See Mark A. Berman and Ignatius A. Grande, "Social Media Creates Complex Ethical Issues," NYLJ, Vol. 251, No. 41.
3. 42 Misc. 3d 1218(A) (Sup. Ct. N.Y. Co., Jan. 24, 2014).
4. Index No. 13505/2012 (Sup. Ct. Nassau Co., Jan. 13, 2014).
5. Index No. 001215/2012 (Sup. Ct. Nassau Co. Dec. 19, 2013).
6. Index No. 7623/2013 (Sup. Ct., Nassau Co. Feb. 18, 2014).
7. 113 A.D.3d 526, 979 N.Y.S.2d 303 (1st Dep't 2014).
8. Index No. 38111/2011 (Sup. Ct. Suffolk Co., Jan. 31, 2014).
9. Index No. 600876/2012 (Sup. Ct. Nassau Co., Feb. 27, 2014).
10. 42 Misc. 3d 1216(A) (Sup. Ct. Queens Co., Jan. 23, 2014).
11. Index No. 14824/2013 (Sup. Ct. Suffolk Co. Jan. 16, 2014).
12. See *Young Woo & Assoc. v. Kim*, _ A.D.3d _, 981 N.Y.S.2d 921 (1st Dep't 2014) ("The motion court properly found Rodriguez in contempt based on her defiance of the court's unequivocal directions as to plaintiffs' right to conduct a forensic investigation of certain electronic devices in the possession, control or custody of defendant and nonparty Sahn Eagle LLC.").

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