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State E-Discovery

N.Y. Social Media Now Subject to the Same Standards as Other Discovery

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The New York State Court of Appeals in a unanimous decision *Forman v. Henkin*, 2018 NY Slip Op 01015 (N.Y. Ct. App., Feb. 13, 2018) now consistent with federal practice, eliminated the requirement of a requesting party to meet a heightened "factual predicate" for the production of social media designated as "private" under a user's privacy settings to be ordered in favor of the general rules concerning discovery. The court made it simple, and stated that "there is nothing so novel about [social media] materials that precludes application of New York's longstanding disclosure rules[.]" However, to be successful on a motion to compel, demands seeking social media will need to have scope and temporal limitations and be carefully drafted to specifically seek information material and necessary to the prosecution or defense of an action.

Indeed, this writer two years ago called into question the dichotomy of such differing standards for social media discovery in a New York Law Journal article he authored titled "Social Media Discovery in Personal Injury Cases: Is Equilibrium Possible?" NYLJ, Feb. 1, 2016 (Vol. 255, No. 20):

> Should the procedures regarding the discovery of "private" social media posts in a personal injury action differ from traditional paper discovery? Should the rule not be, as suggested in the dissent in *Forman v. Henkin*, 2015 Slip Op. 09350 (1st Dep't Dec. 17, 2015), that as long as the information is relevant and responsive to an appropriate discovery demand, it is discoverable regardless of whether it is a "private" post or whether it would reveal embarrassing information.

However, courts have imposed limitations on such discovery in personal injury actions which may stem in part from the perception that a person's personal social media posts are often unbridled and uncensored, and the view that they need, where appropriate, to be protected from disclosure. Courts have held that the production of sensitive information about a person's diminished mental or physical condition should be governed by a heightened procedure for them to be produced, notwithstanding that compensation is being sought for injury to such conditions and that a confidentiality order could protect against disclosure of such information. The question is why should there be a standard other

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than "relevance" especially as social media posts are shared among others.

The court in *Henkin* noted that a user may "set privacy levels to control with whom they share their information," designating a portion of a social media account as "private" which "typically means that items are shared only with 'friends' or a subset of 'friends' identified by the account holder." However, the court concluded that "[w]hile Facebook—and sites like it—offer relatively new means of sharing information with others, there is nothing so novel about Facebook materials that precludes application of New York's long-standing disclosure rules to resolve this dispute."

The court stated:

> A threshold rule requiring that party to "identify relevant information in [the] Facebook account" effectively permits disclosure only in limited circumstances, allowing the account holder to unilaterally obstruct disclosure merely by manipulating "privacy" settings or curating the materials on the public portion of the account. Under such an approach, disclosure turns on the extent to which some of the information sought is already accessible—and not, as it should, on whether it is "material and necessary to the prosecution or defense of an action."

Significantly, the court "rejected" the "notion that the account holder's so-called 'privacy' settings govern the scope of disclosure of social media materials" and stated that "even private materials may be subject to discovery if they are relevant." As such, the court noted that courts addressing disputes over the "scope of social media discovery should employ our well-established rules—there is no need for a specialized or heightened factual predicate to avoid improper 'fishing expeditions.'" Rather, on a case-by-case basis, courts

> should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account. Second, balancing the potential utility of the information sought against any specific "privacy" or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of non-relevant materials.

The court "rejected" the "notion that the account holder's so-called 'privacy' settings govern the scope of disclosure of social media materials" and stated that "even private materials may be subject to discovery if they are relevant."

Discovery of "private" social media posts are now thus subject to the same rules as, for instance, the discovery of an individual's handwritten or typed personal diary, calendar or notes. Protective orders and redaction continue to remain available to protect the author from the production of embarrassing or irrelevant information. However, the difference between digital information (whether text or an image) and hard (paper) copy is that—where relevant and if such data exists—one can potentially receive in response to a document demand information concerning posts, such as:

- when and from where the text of a post was actually posted;
- when and from where the actual digital image or video was taken and/or posted;
- the frequency of an individual's posts;
- who viewed the post;
- comments made by others concerning the post; and
- with whom the post was shared.

Other than through a likely unsuccessful deposition of the author of the written diary or note, none of the above information, often critical to an issue in a case, could be discovered concerning a traditional written document.

What does this mean for a litigator? It means that when seeking or opposing social media discovery, an attorney needs to know what information is potentially available from a particular social media platform, and that demands for such information must be surgical in nature and detailed in order to be able to procure, either voluntarily or through focused motion practice, the information actually needed to prosecute or defend a case.

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