New York Law Journal
Technology Today
WWW.NYLJ.COM
An ALM Publication
VOLUME 251—NO. 04
TUESDAY, JANUARY 7, 2014

STATE E-DISCOVERY

Cooperation, E-Discovery Limits, Legal Ethics of Social Media Posts

By **Mark A. Berman**

Cooperation in e-discovery is not just an altruistic goal, but is required under New York's Commercial Division rules.[1] A Commercial Division decision expressly addressed the need to hold a "meet and confer" and to use a person knowledgeable about a client's computer systems in connection with such meeting in an attempt to work through an e-discovery dispute, and another decision highlighted counsel cooperatively working together to resolve a social media e-discovery dispute.

As reported,[2] courts will require the production of social media discovery. However, the movant seeking it needs to establish its actual existence and not speculate about it. A court will require the movant to demonstrate that the social media sought is material and necessary before it will consider ordering its production over alleged privacy concerns.

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A New York County Lawyers' Association ethics opinion provides that counsel may advise a client to "take down" or remove a "problematic" social media posting, but counsel and client both must be cognizant of whether there is a statutory, regulatory or common law basis requiring that such posting be preserved. One recent decision

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rejects service of process through Facebook, while another decision orders the discovery of electronically stored information on personal handheld devices. Lastly, a decision addresses the risk of "sending" a legal notice by email, and counsel and clients should consider having one's email platform, such as Microsoft Outlook, generate a "delivery receipt" and/or a "read receipt" concerning legally significant "sent" emails.

Cooperation Is Required And Works

In *Klein Family Partnership v. AJW Manager*,[3] plaintiff moved to compel defendant to identify the individuals at its "e-discovery firm" and to "allow" those individuals to communicate with plaintiff's e-discovery firm. In response, the court stated:

> The obligation of good faith to resolve discovery disputes applies with even greater force in the area of electronic discovery (22 NYCRR §202.70, Rule 14). Thus, counsel should endeavor to make the electronic discovery process more cooperative and collaborative (Guideline 4, Best Practices in E-Discovery in New York State and Federal Courts). Counsel are encouraged to have a "meet and confer" to resolve e-discovery issues without court intervention (Guideline 4, Comments). It may be beneficial to have a knowledgeable IT person present to address questions that may arise at the meet and confer, or to explain detailed technical issues (Id).[4] However, lawyers may be uncomfortable with the unpredictability of having a non-lawyer potentially speak for the client on discovery issues (Id).
>
> Accordingly, plaintiff's motion with respect defendant's e-discovery firm is granted only to the extent that counsel shall meet and confer with respect to e-discovery within ten days after production of non-electronically stored documents. At the meet and confer, counsel shall be accompanied by an IT professional, familiar with their client's computer system. Within 20 days after the meet and confer, defendants shall produce all electronically stored documents showing withdrawals by plaintiff, or valuations of securities held by AJW Partners.

In *Boress v. 200 Park*,[5] a special referee was referred an in camera review of "plaintiff's Facebook page" for a "determination of what materials on that page are discoverable." The Special Referee ordered:

> Counsel for all parties appeared…[and p]laintiff's counsel used plaintiff's user ID and password to access Facebook on a court-issued laptop computer and connected to the Internet via the publicly-available wireless system. At my direction, counsel reviewed plaintiff's page, noting on a chart that I had provided them which portions of the page they could stipulate to and which, if any, required a ruling. Counsel noted such material on the chart (enclosed herewith) and at the end of the review, stipulated to everything that will be a part of discovery.
>
> Counsel are commended for working together to efficiently and expeditiously resolve this dispute. The matter took far less time than it would have if the parties had not cooperated. It is thus my report and recommendation that the Court sua sponte confirm this report and so order the accompanying stipulation, without requiring a formal motion of the parties.

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Production of Social Media Denied

In *Flores v. Saravia*,[6] third-party defendant sought an order compelling defendant to provide certain social media information. The court relied upon *Fawcett v. Altieri*,[7] which requires a court to determine whether the content contained on the social media account is material and necessary, and then to balance whether the production of the content would result in a violation of the account holder's privacy rights. The court found that, due to the paucity of information provided by movant, it was unable to conclude that the information sought is material and necessary or if the production would violate defendant's privacy rights. The court found, because movant indicated in its demand that "*if*" defendant was not a registered user of certain social media platforms it required a statement under oath confirming same, the demand to be "overly broad and nonspecific." The court held that such "conditional" demand evidenced that defendant "had no knowledge" as to relevant use of such social media platforms.

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In *Feinberg v. Silverberg*,[8] a dissolution proceeding, respondent moved to compel production of certain disclosure, and it was granted to the extent of requiring the production of all "emails, correspondence and files located as hard copies or on the hard drives of the company and personal computers (including personal handheld devices) of [certain petitioners] which relate to bad faith … or the intentional bases for the specific allegations of deadlock purportedly existing [the parties]…or the intentional bases for the specific allegations of deadlock." The court, however, limited, with respect to the computer discovery, petitioner's consultant to "'re-search the hard drives' to '20 search terms' within the discovery parameters outlined above" with such "re-search" to be completed within 20 days.

Advising to "Take Down" A Posting

The New York County Lawyers' Association in Ethics Opinion 745[9] was asked "[w]hat advice is appropriate to give a client with respect to existing or proposed postings on social media sites." The opinion notes:

> [A]n attorney's obligation to represent clients competently (RPC 1.1) could, in some circumstances, give rise to an obligation to advise clients, within legal and ethical requirements, concerning what steps to take to mitigate any adverse effects on the clients' position emanating from the clients' use of social media. Thus, an attorney may properly review a client's social media pages, and advise the client that certain materials posted on a social media page may be used against the client for impeachment or similar purposes. In advising a client, attorneys should be mindful of their ethical responsibilities under RPC 3.4. That rule provides that a lawyer shall not "(a)(1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce…[nor] (3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal."

The Opinion concludes that "[p]rovided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, an attorney may offer advice as to what may be kept on 'private' social media pages, and what may be 'taken down' or removed." The Opinion notes that "[u]nder some circumstances, where litigation is anticipated, a duty to preserve evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding destruction or spoliation of evidence, there is no ethical bar to 'taking down' such material from social media publications, or prohibiting a client's attorney from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user's computer."

> In 'Romero', the court found that service by Facebook would only be permitted if "plaintiff can demonstrate that service by conventional means is 'impracticable.'"

Receipt of Sent Email Needed

In *Consolidated Constr. Grp. v. RMCC*,[10] a breach of contract action, plaintiff asserted that written notice to cure was sent by facsimile and email, and that defendants failed to cure by the required date. Defendants submitted a sworn denial of receipt of the notice to cure. The court noted that plaintiff had not produced a facsimile transmission confirmation or a copy of the email purportedly sent to defendants. The court noted that "[u]nlike the presumption of receipt that attaches to the service of legal notices by mail, no such presumption attaches to email or facsimile transmissions." Accordingly, the court held that such denial raised a "question of fact as to whether and when such notice was given."

Service by Facebook Denied

In *Romero v. Flores*,[11] plaintiff sought an order permitting service by Facebook in accordance with CPLR Rule 308(5). The court found that plaintiff failed to sufficiently establish that service is "impracticable," and such alternative service would only be permitted if "plaintiff can demonstrate that service by conventional means is 'impracticable' by making diligent, albeit unsuccessful, efforts to obtain information regarding a defendant's current residence, business address, or place of abode."

1. Amended Rule 8(b) of the Commercial Division of the Supreme Court provides:

> Prior to the preliminary conference, counsel shall confer with regard to anticipated electronic discovery issues. Such issues shall be addressed with the court at the preliminary conference and shall include but not be limited to (i) identification of potentially relevant types or categories of electronically stored information ("ESI") and the relevant time frame; (ii) disclosure of the applications and manner in which the ESI is maintained; (iii) identification of potentially relevant sources of ESI and whether the ESI is reasonably accessible; (iv) implementation of a preservation plan for potentially relevant ESI; (v) identification of the individual(s) responsible for preservation of ESI; (vi) the scope, extent, order, and form of production; (vii) identification, redaction, labeling, and logging of privileged or confidential ESI; (viii) claw-back or other provisions for privileged or protected ESI; (ix) the scope or method for searching and reviewing ESI; (x) the anticipated cost and burden of data recovery and proposed initial allocation of such costs; and (xi) designation of experts.

2. See Mark A. Berman, "Proportionality in ESI Spoliation Sanctions and Facebook Discovery," NYLJ, Vol. 250, No. 45, Sept. 3, 2013; Mark A. Berman and Anne Taback, "Social Media Discovery and ESI in Motion Practice," NYLJ, Vol. 249, No. 5, Jan. 8, 2013.

3. Index No. 021522/10 (Sup. Ct. Nassau Co. Oct. 22, 2013).

4. Section 202.12(b) of the Uniform Civil Rules for the Supreme Court and the County Court provides:

> Where a case is reasonably likely to include electronic discovery, counsel for all parties who appear at the preliminary conference must be sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery: counsel may bring a client representative or outside expert to assist in such e-discovery discussions.

5. Index No. 113084/11 (Sup. Ct. N.Y. Co. Oct. 31, 2013).

6. Index No. 12949/11 (Sup. Ct. Suffolk Co. Dec. 4, 2013).

7. 38 Misc. 3d 1022, 960 N.Y.S.2d 592 (Sup. Ct. Richmond Co. 2013).

8. Index Nos. 3120/11 and 7892/12 (Sup. Ct. Nassau Co. Oct. 18, 2013).

9. NYCLA Ethical Opinion 745 (July 2, 2013).

10. Index No. 1638/13 (Sup. Ct. Suffolk Co. Nov. 6, 2013).

11. Index No. 702434/12 (Sup. Ct. Queens Co. Nov. 7, 2013) (citation omitted).

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