New York Law Journal
A NEW YORK LAW JOURNAL SPECIAL SECTION
E-Discovery
An ALM Publication
WWW.NYLJ.COM
MONDAY, FEBRUARY 1, 2016

Social Media Discovery in Personal Injury Cases: Is Equilibrium Possible?

BY MARK A. BERMAN

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"[1] post or whether it would reveal embarrassing information.

Where, as noted by the dissent in *Forman*, "social media profiles have become virtual windows into subscribers' lives[, t]he breadth of information posted by many people on a daily basis creates ongoing portrayals of those individuals' lives that are sometimes so detailed that they can rival the defense litigation tool referred to as a 'day in the life' surveillance video."

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

Might courts be circumspect about overreaching requests by the defense? But why should that be a concern where plaintiff's counsel can oppose a motion to compel? Perhaps the unspoken problem not addressed directly by the courts is that a personal injury plaintiff may not make available to her counsel damaging social media posts that would undercut her liability or damage claim. Therein lies the issue of a counsel's need, once the preservation obligation has been triggered, to affirmatively ensure the preservation of a plaintiff's social media account, and to then review it for relevance.

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Thus, to deal with a concern that a plaintiff may not have been fulsome in her social media production because doing so would be damaging to her case, there exists the judicially disfavored procedure of an in camera review of a plaintiff's social media account, whether provided to the court directly by the plaintiff or obtained via an authorization. Of course, the alternative of subpoenaing such posts from Facebook is prohibited by the Stored Communications Act, 18 U.S.C. §§2701-2712.

So what are potential solutions that are fair to plaintiff, defendant and the court? Perhaps, plaintiff certifies that all Facebook posts, at the time the duty to preserve arose, have been preserved and collected, and that they have been provided to her counsel! Whether a plaintiff is an active social media poster or not, her counsel would then cull out irrelevant posts and produce the remainder to which plaintiff has no objection.

Assuming the parties, after a "meet and confer," could not agree what social media should be produced, counsel would first provide the court with a categorical log of withheld posts for review and, if that proved to be an ineffective tool to "drill down" to plaintiff's sensitive issues, counsel would then provide a detailed in camera log identifying what social media was being withheld. This detailed log, albeit admittedly potentially costly in time to create where plaintiff's counsel is often paid on a contingency basis, could contain such fields as subject, the detailed nature of the image or written content of the post, who could access each post, and its date. Such log would be accompanied by the unproduced social media. With such a descriptive log, an in camera inspection that should not be too burdensome to the court could take place with the in terrorem risk of sanctions if log entries were drafted to obscure the relevance of the withheld posts.[2]

Alternatively, defendant, if she really wanted plaintiff's social media and if plaintiff's counsel objected to submitting such a log, could offer to pay for the retention of a special master who would review for relevance plaintiff's social media obtained via an authorization. Of course, such rulings would be subject to further court order. Having laid out the above, now the differing views of the majority and dissent in *Forman* can be well appreciated.

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Motion Court Rulings

In *Forman*, the court granted defendant's motion to compel to the extent of directing plaintiff to produce all photographs of plaintiff "privately" posted on Facebook prior to the accident that she intends to introduce at trial, all photographs of plaintiff "privately" posted on Facebook after the accident that do not show nudity or romantic encounters, and authorizations for defendant to obtain records from Facebook showing each time plaintiff posted a private message after the accident and the number of characters or words in those messages, but not the content of such posts.

Posts on Plaintiff's Injuries and Their Effect

Plaintiff alleged serious and debilitating injuries, including traumatic brain injury and spinal injuries, causing cognitive deficits, memory loss, inability to concentrate, difficulty in communicating, and social isolation severely restricting her daily life. At her deposition, plaintiff testified that before the accident she had maintained a Facebook page and had posted photographs showing her doing fun things, but that she deactivated her Facebook page months after the accident (and after the commencement of this action), and that since her injury she has been unable to compose emails and text messages. Plaintiff testified that due to her current difficulties with memory, she could not recall the exact nature or extent of her Facebook activity from the time of the accident until she deactivated the account.

Appellate Division Ruling

The First Department modified the motion court's decision and vacated those portions directing plaintiff to produce her "private" photographs posted to Facebook after the accident that she does not intend to introduce at trial, and authorizations related to plaintiff's "private" Facebook messages. In seeking a party's social media information, the majority stated that the First Department has consistently applied the principles that "[i]t is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims." The majority noted that the Appellate Divisions have consistently ruled that there needs to be some threshold showing before allowing access to a party's "private" social media. The majority reasoned that ordering disclosure of photographs and information about "private" messages had to be vacated in the absence of a factual predicate that contradicts or conflicts with plaintiff's claims.

The dissent noted two aspects of prior First Department precedent to be "problematic." The dissent questioned the "showing necessary to obtain discovery of relevant information posted on Facebook or other social networking sites." Also questioned by the dissent was "the procedure requiring that once a threshold showing is made, the trial court must conduct an in camera review of the posted contents in each case to ensure that the defendant's access is limited to relevant information." The dissent summarized that the state of the law

> in the last few years regarding discovery of information posted on personal social networking sites holds that a defendant will be permitted to seek discovery of the nonpublic information a plaintiff posted on social media, *if, and only if,* the defendant can first unearth some item from the plaintiff's publicly available social media postings that tends to conflict with or contradict the plaintiff's claims.

The dissent noted that it saw no reason "why the traditional discovery process cannot be used equally well where a defendant wants disclosure of information in digital form and under the plaintiff's control, posted on a social networking site." It noted that such a "demand, like any traditional discovery demand, would have to be limited to reasonably defined categories of items that are relevant to the issues." Thereafter, "[u]pon receipt of an appropriately tailored demand, a plaintiff's obligation would be no different than if the demand concerned hard copies of documents in filing cabinets. A search would be conducted for responsive relevant documents, and, barring legitimate privilege issues, such responsive relevant documents would be turned over; and if they could not be accessed, an authorization for them would be provided" by plaintiff.

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 majority stated that, under the dissent's approach, "[i]f a plaintiff claims to be physically unable to engage in activities due to the defendant's alleged negligence, posted information, including photographs and the various forms of communications (such as status updates and messages) that establish or illustrate the plaintiff's former or current activities or abilities will be discoverable." The majority further noted that "[t]aken to its logical conclusion, the dissent's position would allow for discovery of all photographs of a personal injury plaintiff after the accident, whether stored on social media, a cell phone or a camera, or located in a photo album or file cabinet. Likewise, it would require production of all communications about the plaintiff's activities that exist not only on social media, but in diaries, letters, text messages and emails."

In Camera Review

The majority noted that whether the motion court should have conducted an in camera review was not presented on appeal nor did the parties on appeal request any such relief. Further, the majority noted that the dissent is mistaken that precedent requires a court to conduct an in camera review in all circumstances where a sufficient factual predicate is established. The majority stated that the decision to order an in camera review rests in the court's discretion.

Conclusion

The majority and dissent both seek to make sense of a problematic area that vexes personal injury litigation, and attempt to balance the need to keep personal social media information from being produced, the appropriate standard and procedure required as a predicate for its production, and the desire not to burden the court with in camera reviews. However, as is obvious from the above, neither view is optimal in ensuring that the right balance is achieved.

1. In describing how Facebook works, the dissent stated:

> Every person who subscribes to Facebook has a "public page" containing information that the subscriber allows to be viewed by the general public, which may include content such as photographs, status updates, or shared links. Each subscriber may choose to make each piece of posted content publicly available, or may limit the posted content so that it can only be viewed by a more limited group, such as the individuals identified by the subscriber as "friends," or a customized list of people. Subscribers can also use Facebook to send messages to other subscribers in a manner similar to text messaging. Those messages will not be visible to anyone not involved in them.

2. In *Carpezzi-Leibert Group v. Henn*, 2015 NY Slip Op 30132[U] (Sup. Ct. New York County, Jan. 28, 2015), the court reviewed defendants' production in camera regarding entries that defendants had previously redacted. Defendants' counsel provided the court with copies of the unredacted documents and a redaction log documenting the reasons for the redactions. With respect to that log, the court found that defendants'

> privilege log does not provide sufficient detail for the Court to determine whether the remaining redactions, particularly with respect to Henn's text messages and iphone calendar entries, are properly redacted. Accordingly, Defendants are directed to provide a more detailed privilege log, identifying the names of the individuals with whom Henn exchanged the redacted text messages in the attached documents, and providing further, non-conclusory, explanation as to whether such individuals, as well as the individuals identified in the redacted iphone calendar entries, are CLG clients, prospects, employees, or former employees.

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