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State E-Discovery

Social Media Demands Must Be Tailored and Reasonable

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The 2018 decision by the New York State Court of Appeals in *Forman v. Henkin,* 30 N.Y.3d 656 (2018), made clear that the principle that discovery "embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise," equally applies to social media discovery. Since then, courts have become much more sophisticated, as demonstrated below, in how they address social media discovery demands. Such disputes are being "evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure" balanced against the need for the demands to be "appropriately tailored" and "reasonably calculated to yield relevant information."

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Courts are not tolerating lack of compliance with social media discovery demands, but are critically examining the breadth of the demand in order to permit disclosure of information that is material and necessary to the issues in dispute, providing, as appropriate, for redaction and for *in camera* review where the social media had not been previously disclosed to non-parties, as well as the time period for which the information is requested.

The Court of Appeals cautioned that discovery is not unlimited since "[d]irecting disclosure of a party's entire Facebook account is comparable to ordering discovery of every photograph or communication that party shared with any person on any topic prior to or since the incident giving rise to litigation." Thus, so as to avoid sanctioning the oft-referenced "fishing expedition," the *Forman* Court provided the following test: "first should 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;" and "second, balancing the potential utility of the information sought against any specific 'privacy' or other concerns

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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 **o**f non-relevant materials."

Available Alternatives

Recently, the First Department in *Vasquez-Santos v. Mathew,* 2019 N.Y. App. Div. LEXIS 527, 2019 NY Slip Op 00541 (1st Dept. Jan. 29, 2019), reversed the motion court's denial of defendant's motion to compel access by a third-party data mining company to plaintiff's devices, email accounts, and social media accounts so as to obtain photographs, even if taken by others, and other evidence of plaintiff engaging in physical activities. The Court further held that such demand was "appropriately limited in time, i.e., only those items posted or sent after the accident, and in subject matter, i.e., those items discussing or showing defendant engaging in basketball or other similar physical activities."

Appropriate Time Limitations

In *Doe v. Bronx Preparatory Charter Sch.,* 160 A.D.3d 591 (1st Dept. 2018), as in *Vasquez-Santos,* the First Department rejected a demand for access to social media accounts for five years prior to the incident and to cell phone records for two years prior to the incident as "overbroad and not reasonably tailored to obtain discovery relevant to the issues in the case" and instead approved the production for a period of two months before the date on which plaintiffs were allegedly attacked on defendant's premises to the present.

Tailored Demand

In *Renaissance Equity Holdings v. Webber,* 61 Misc.3d 298 (Civ. Ct. Kings Co. 2019), a licensee holdover proceeding, where respondent claimed to be the adopted daughter of a former tenant, the parties moved for a protective order and to compel respondent's "posts whether in her legal name, Benze Lohan or any other aliases (whether posted by or for respondent) to social media including but not limited to Instagram, Twitter, YouTube, and Facebook" because they would show respondent's "travel and endeavors."

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The issue was whether the discovery sought would be "relevant to proving or disproving respondent's defense that she primarily resided with [her mother] at the premises for at least two years prior to her death." The motion court noted that where respondent used the pseudonym, "Benze Lohan," such constitutes "specific information to the case," under *Forman*, as it may show the duration of any stays, if any, outside of the premises.

The motion court found that "[e]ven if 'all' posts [were] limited to the relevant period, the demand is nevertheless overbroad because it fails to state the specific information sought within these posts on the narrow issue of primary residence. Indeed, and within the context of online social media, seeking discovery of posts 'for respondent' may include publications by a third party in an online forum respondent has no access to and, as such, are not in respondent's possession, custody, or control." "Like the personal injury plaintiff in *Forman* who was asked to disclose the 'entirety' of her Facebook profile, directing that respondent on her succession defense produce 'all' social media posts is tantamount to revealing 'every transaction, communication, and photograph that respondent shared with any person on any topic' during a two-year period." Thus, the production of the requested social media was conditioned on:

- if the post contains a location and date, then respondent shall redact all content, including photographs and third-party statements, except for the location and date stated on the post;
- if the post contains any comment or statement made by respondent in which she states a location, then respondent shall redact only the photograph contained within the post; and
- if the post contains a comment or statement made by respondent which contains the word "home," "house," "apartment" or any other synonym of the word "residence," then the entire content of the post shall be produced with no redaction.

In *Mylon v. Leibowitz*, 2019 N.Y. Misc. LEXIS 448, 2019 NY Slip Op 30258(U) (Sup. Ct. Feb. 4, 2019), defendants sought to compel plaintiff

to provide all photos and videos of plaintiff from the date of loss until the present from her smart phone, social media accounts, and computers and to direct plaintiff to preserve all emails, social media accounts, texts, whatsapp accounts, smart phones, apps on smart phones, laptops, tablets, cameras, go cams, photographs, videos, tags, and not deleting any data from the above devices, including but not limited to photographs, emails, texts, tags, from the date of the accident until present.

Defendants asserted that plaintiff may not withhold photographs taken after the accident showing her physical activities post-accident, and that "today's technology stores data about a person's health and physical efforts which would be used during the questioning of plaintiff at her deposition and would lead to the discovery of other evidence."

The motion court denied defendant's motion holding that the demand contained "no limitation on what data defendants would be entitled to [and] there would likely be a significant amount of nonrelevant information stored on such devices."

In Camera Review

In Israeli v. Rappaport, 2019 N.Y. Misc. LEXIS 94, 2019 NY Slip Op 30070(U) (Sup. Ct. Jan. 8, 2019), the motion court found that defendant was entitled to discovery of

> plaintiffs' private Facebook accounts from date of the alleged malpractice to date, limited to all photographs, pictures, videos and other "postings" such as status updates that Ms. and/or Mr. Israeli uploaded or "shared" to their Facebook accounts or were "tagged" which depict or illustrate: (i) Ms. Israeli's physical activities and abilities which relate to her asserted injuries, including her claim of limited range of motion, injuries to her neck, back and chest area, and her inability to lift heavy objects, and (ii) Ms. Israeli's relationship or interactions with Mr. Israeli, as such discovery is reasonably calculated to yield evidence relevant to plaintiffs" allegations of physical injuries and loss of services and companionship. That said, however, as to those Facebook materials within the above categories that relate to communications between the plaintiffs which were not shared or made available to any third party, or any photographs depicting nudity or romantic encounters, plaintiffs shall produce these materials to the court for *in camera* inspection so it can be determined if the usefulness of such information is outweighed by any privacy concerns.

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The motion court further found that the "utility of Facebook materials as a measure of mental or emotional anguish is not sufficiently useful to require plaintiffs to release private Facebook materials showing photographs of Ms. Israeli's demeanor and social interactions."

As for photographs and other postings made by plaintiffs "before the alleged malpractice, defendant fails to provide a particularized basis for, or the relevance of, this request. Under these circumstances, the court finds that the probative value of such postings is outweighed by the potential invasion of privacy, unless plaintiffs intends to introduce such photographs or other postings from their Facebook accounts at trial, in which case defendant would be entitled to such material."