Think Before You Tweet: Discoverability of Private Social Media Account Information in Litigation

By Daniel A. Schnapp and Catherine A. Savio

The average person spends approximately two hours on social media every day, outranking the average total time spent eating, drinking, socializing, and grooming.[1] Social media platforms are steadily becoming one of the most commonly used forms of communication and expression. Whether it be the illusory protection of a computer screen, or the appearance of control with regard to where and with whom such information is shared, many people write or post items on the internet that they would not necessarily say in person.

In a realm when people are often tempted to say and do things they would not otherwise do, the result of disclosing such content to an opposing party in litigation could be disastrous. The sheer quantity of information stored on social media websites makes them an attractive source of discoverable information for practitioners and a potential minefield of harmful information for litigants. As a result, the platforms have become fertile ground for practitioners to request disclosure of private messages, posts, and even a party's username and password in discovery. Regardless of any appearance of privacy, practitioners and clients alike should be aware of the very real danger that the content of social media accounts may be discoverable in litigation. In resolving disputes over such disclosure requests, courts appear to employ a fact-based, case-by-case balancing test ensuring both full disclosure of all material relevant to the prosecution or defense of an action but also seeking to protect individual privacy.

The New York Courts' Approach to Disclosure of Contents on Private Social Media Websites

New York Civil Practice Law and Rules (CPLR) 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." Courts in New York have applied this broad statutory scope of disclosure to the discovery of social media websites, such as Facebook, Twitter and Instagram. Under New York law, social media postings relevant to the issues in a case are not necessarily shielded from discovery merely because a party used a social media website's privacy settings to restrict access to certain postings.[2]

The mere fact that a party utilized a social media account is, however, an insufficient basis to provide an opposing party unlimited access to such an account.[3] For example, with regard to a personal injury action, the party requesting access to the social media account has the burden of establishing that the social media account contains information that "contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses and other claims" in order for the posting to be discoverable.[4]

New York courts consistently apply established discovery principles in the context of discovery requests seeking a party's social media information.[5] A party seeking access to social media postings is required to specify the evidence sought and "…establish a factual predicate with respect to the relevancy of the evidence."[6]

In practice, however the broad discovery mandate contained in CPLR 3101(a) may not pave an easy path for parties looking to discover private social media information.

Recent Case Law

In *Forman v. Henkin*,[7] the plaintiff was seeking damages for injuries allegedly incurred while riding one of the defendant's horses. Specifically, the plaintiff claimed, "the accident resulted in cognitive and physical injuries that have limited her ability to participate in social and recreational activities."[8] At her deposition, the plaintiff testified that she had posted and sent messages on her Facebook account during the time period surrounding her injury.[9] As a result, the defendant sought an order compelling the plaintiff to provide the defendant unlimited authorization to obtain records from her Facebook account.[10] The trial court granted the motion to compel and the First Department, in reversing the trial court's order, held that the defendant had not established entitlement to the plaintiff's private Facebook postings merely because the plaintiff had admittedly used the social media website in the past.[11] Although the First Department noted that there hypothetically may be photographs or messages on the plaintiffs account that dispute her claimed injuries, it continued,

> [D]efendant's speculation that the requested information might be relevant to rebut plaintiff's claims of injury or disability is not a proper basis for requiring access to plaintiff's Facebook account. Allowing the unbridled disclosure of such information, based merely on speculation that some relevant information might be found, is the very type of "fishing expedition" that cannot be countenanced.[12]

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On February 3, 2018, the Court of Appeals reversed the First Department's holding in *Forman*, noting that discovery requests, including those involving social media, "must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure."[13] The Court instructed, "[r]ather than applying a one-size-fits-all rule at either of these extremes [full disclosure of social media accounts or no disclosure of social media accounts], 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.'"[14]

The Court noted relevant considerations in relation to social media discovery and concluded, "the Appellate Division erred in concluding that defendant had not met his threshold burden of showing that the materials from plaintiff's Facebook account that were ordered to be disclosed pursuant to the Supreme Court's order were reasonably calculated to contain evidence 'material and necessary' to the litigation."[15]

Likewise, in *Melissa G v. North Babylon Union Free Sch. Dist.*,[16] the plaintiff alleged that, as a result of injuries stemming from illegal sexual contact with a teacher, the plaintiff missed school, suffered emotional distress, suffered from post-traumatic stress disorder, mental anguish, lost her employment and her educational and employment opportunities were either lost or impaired.[17] In reviewing the public portion of the plaintiff's Facebook page, the defendant discovered photographs of the plaintiff engaged in a number of recreational activities including working, rock climbing and drinking with friends.[18] As a result, the defendant requested "authorizations to obtain full access to and copies of the plaintiff's current and historical records/information on her Facebook and MySpace accounts."[19] The court held that the defendant had established the requisite factual predicate to be granted access to plaintiff's Facebook account explaining,

> [i]n light of the fact that the public portions of Plaintiff's social networking sites contain material that is contrary to her claims and deposition testimony, there is a reasonable likelihood that the private portions of her sites may contain further evidence such as information with regard to her activities and enjoyment of life, all of which are material and relevant to the defense of this action.[20]

The court directed the plaintiff to "print out and to retain all photographs and videos, whether posted by others or by plaintiff herself, as well as status postings and comments posted on plaintiff's Facebook accounts, including all deleted materials."[21]

Method of Disclosing Information Contained on Social Media Accounts

New York courts have taken a variety of approaches concerning the manner in which material stored on social media websites should be disclosed. In some instances, full access to a party's social media account has been granted with no restrictions. For example, in *Romano v. Steelcase Inc.*,[22] the court directed the plaintiff to deliver "a properly executed consent and authorization ... permitting [the] defendant to gain access to plaintiff's Facebook and MySpace records, including any records previously deleted or archived" by the websites.

Alternatively, certain courts have ordered parties to produce physical copies of specific information stored on social media accounts. In *Jennings v. TD Bank*,[23] the court ordered the plaintiff "to produce any and all current and historical Facebook pictures, videos or relevant status postings from her personal Facebook account since the date of the alleged incident, including any records previously deleted or archived ...."[24]

In an effort to protect a litigant's privacy, some New York courts have directed that a party's Facebook postings be submitted to the court for an *in camera* inspection to assess the materiality and relevance of the materials.[25]

New York courts have recognized, however, that in certain situations not all social media communications are relevant to a party's claims.[26] In Melissa G, the court did not grant defendant's request for "the complete, unedited account data" of plaintiff's Facebook accounts, noting that "[t]he fact that an individual may express some degree of joy, happiness, or sociability on certain occasions sheds little light on the issue of whether he or she is actually suffering emotional distress."[27] Accordingly, the court held that not all of plaintiff's personal communications were properly subject to scrutiny in connection with her claims.[28]

Potential Pitfalls in Requesting Unfettered Access of a Party's Social Media Account

Practitioners should be wary of requesting unlimited access to an individual's social media account in the form of a username and password as opposed to a more nuanced request. In a recent case in the state of New Jersey,[29] the defendants moved for an order compelling the plaintiff to provide her username and password for all social media accounts utilized by the plaintiff. The Court held:

> A request that the plaintiff produce the user name and password for all plaintiff's social medical accounts is not "calculated" to lead to the discovery of admissible evidence. There is no information that is available to the defendant that suggests that defendant is privy to some investigation signifying that there is information in plaintiff's social media

> accounts that in any way contradicts any of the information supplied by plaintiff in discovery to date. To compel production of the user name and password of all plaintiff's social media accounts may result in the disclosure of a great deal of potentially personal, sensitive information unrelated to any issue arising in the litigation. Moreover, for the reasons set forth above, entry of the order sought by defense counsel would be an extremely intrusive not only to the plaintiff, but any of plaintiff's Facebook friends.[30]

Potential Constitutional Privacy Issues and Fourth Amendment Protections

Some litigants have turned to the protections provided by the Fourth Amendment in order to prevent the disclosure of information contained on social media accounts. As it became clear that privacy settings on various social media websites were insufficient to protect information from disclosure in litigation, questions arose regarding whether certain circumstances could give rise to a reasonable expectation of privacy on social media accounts in order to invoke the protections of the Fourth Amendment. The Fourth Amendment's right to privacy protects people, not the platform on which an individual choses to express herself.[31] In order for a right to privacy to exist under the Fourth Amendment, courts require, "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable."[32]

Although courts have held that a reasonable expectation of privacy may exist in the context of social media postings and/or internet communications, it is unclear to what extent such expectation may actually protect material from being discoverable in a litigation. The Second Circuit has held that a reasonable expectation of privacy may exist in postings made on the internet or in email.[33] The District Court of New Jersey likewise addressed privacy expectations in connection with emails and other shared writings such as social media posts. In *Beye v. Horizon Blue Cross Blue Shield of New Jersey,*[34] the court held that in connection with online journals and diary entries of children who had been denied health coverage as a result of alleged eating disorders, "[t]he privacy concerns are far less where the beneficiary herself chose to disclose the information."[35] In *Mellissa G.*, discussed at length *supra,* although the court did grant defendant access to much of plaintiff's social media postings, the First Department appeared to invoke the protection of the Fourth Amendment in limiting the scope of the discoverable information explaining,

> Since there is a reasonable expectation of privacy attached to the one-on-one messaging option that is available through Facebook accounts, private messages sent by or received by plaintiff need not be reviewed, absent any evidence that such routine communications with family and friends contain information that is material and necessary to the defense.[36]

In 2012, a criminal court in the state of New York undertook and in-depth analysis of privacy concerns in relation to social media accounts. In *People v. Har*ris, the court compared certain aspects of individuals social media accounts to bank statements, stating,

> Like bank records, user information and Tweets can contain sensitive personal information. With a click of the mouse or now with even the touch of a finger, Twitter users are able to transmit their personal thoughts, ideas, declarations, schemes, pictures, videos and location, for the public to view. The widely believed (though mistaken) notion that any disclosure of a user's information would first be requested from the user and require approval by the user is understandable, but wrong. While the Fourth Amendment provides protection for our physical homes, we do not have a physical "home" on the Internet * * *As a consequence, some of our most private information is sent to third parties and held far away on remote network servers. A Twitter user may think that the same "home" principle may be applied to their Twitter account. When in reality the user is sending information to the third party, Twitter. At the same time the user is also granting a license for Twitter to distribute that information to anyone, any way and for any reason it chooses.[37]

The Court reasoned that although a great deal of personal information may be contained on an individual's twitter account, because Twitter does not guarantee privacy to its users, and indeed notifies users that their tweets are publicly viewable on default sites, tweets were public.[38] Thus, the defendant had no standing to quash a subpoena for his Twitter records on privacy grounds.[39]

Conclusion

As communications via social media and other electronic formats continue to rise exponentially in popularity, the frequency in which such communications are requested in discovery practice will likewise rise. Accessing the group chat of employees, instant messages of co-workers, an individual's associations and opinions, and even potentially assessing the amount of funds a potential defendant may have access to, can all be obtained through the

disclosure of social media account information. Whether it be in connection with the drafting of a litigation hold notice, discovery requests, or general advice, practitioners should be aware of the dangers and opportunities contained on so-called private social media accounts. The discoverability of information contained on social media accounts may depend upon a balancing of disclosing all relevant material to a litigation, and the degree to which the protection of personal privacy is implicated.

Endnotes

1. https://www.socialmediatoday.com/marketing/how-much-time-do-people-spend-social-media-infographic.
2. *Patterson v. Turner Constr. Co.*, 88 A.D.3d 617, 617, 931 N.Y.S.2d 311 (1st Dep't 2011); *Romano v. Steelcase Inc.*, 30 Misc.3d 426-433, 907 N.Y.S.2d 650 (Sup. Ct., Suffolk Co. 2010).
3. *See Tapp v. New York State Urban Dev. Corp*., 102 A.D.3d 620, 958 N.Y.S.2d 392 (1st Dep't 2013).
4. *Tapp v. New York State Urban Dev. Corp.*, 102 A.D.3d 620, 621, 958 N.Y.S.2d 392 (1st Dep't 2013); *McCann v. Harleysville Insurance Company of New York*, 78 A.D.3d 1524, 910 N.Y.S.2d 614 (4th Dep't 2010).
5. *See, e.g., Richards v. Hertz Corp.*, 100 A.D.3d 728, 730–731, 953 N.Y.S.2d 654 (2d Dep't 2012) (refusing to compel the disclosure of Facebook information absent showing that t disclosure would reveal relevant evidence or lead to discovery of information bearing on the claim); *McCann v. Harleysville Ins. Co. of N.Y.*, 78 A.D.3d 1524, 1525, 910 N.Y.S.2d 614 (4th Dep't 2010) (denying access to Facebook information when defendant failed to establish a factual predicate of relevancy, referring to the defendant's request as "a fishing expedition ... based on the mere hope of finding relevant evidence") .
6. *McCann v. Harleysville Insurance Co. of New York*, 78 A.D.3d 1524, 1525, 910 N.Y.S.2d 614 (4th Dep't 2010).
7. *Forman v. Henkin*, 134 A.D.3d 529, 533, 22 N.Y.S.3d 178, 182 (1st Dep't 2015).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 541.
12. *Id.*
13. *Forman v. Henkin*, ___ N.E.3d ___ (2018, 2018 N.Y. Slip Op. 01015.
14. *Id.* at *4.
15. *Id*. at *6.
16. 48 Misc. 3d 389, 6 N.Y.S.3d 445 (Sup. Ct., Suffolk Co. 2015).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id; see also Romano v. Steelcase, Inc.*, 30 Misc. 3d 426, 907 N.Y.S.2d 650 (Sup. Ct., Suffolk Co. 2010) ("Thus, it is reasonable to infer from the limited postings on Plaintiff's public Facebook and MySpace profile pages, that her private pages may contain materials and information that are relevant to her claims or that may lead to the disclosure of admissible evidence. To deny Defendant an opportunity access to these sites not only would go against the liberal discovery policies of New York favoring pre-trial disclosure, but would condone Plaintiff's attempt to hide relevant information behind self-regulated privacy settings.").
22. 30 Misc. 3d 426, 435, 907 N.Y.S.2d 650 (Sup.Ct., Suffolk Co. 2010).
23. 2013 N.Y. Slip Op. 32783(U), 2013 WL 5957882 (Sup.Ct., Nassau Co. 2013).
24. *Id.*
25. *See, e.g., Richards v. Hertz Corp., supra* note 5, 100 A.D.3d 728, 953 N.Y.S.2d 654 (2d Dep't 2012); *see also Nieves v. 30 Ellwood Realty LLC*, 39 Misc.3d 63, 966 N.Y.S.2d 808 (1st Dep't 2013); *Loporcaro v. City of New York*, 35 Misc. 3d 1209(A), 950 N.Y.S.2d 723 (Sup. Ct., Richmond Co. 2012).
26. *See Patterson v. Turner Constr. Co., supra* note 2, 88 A.D.3d 617, 931 N.Y.S.2d 311.
27. *Melissa G v. North Babylon Union Free School District*, 48 Misc. 3d 389, 6 N.Y.S.3d 445 (Sup. Ct., Suffolk Co. 2015); *Giacchetto v. Patchogue–Medford U.F.S.D.*, 293 F.R.D. 112, 115 (E.D.N.Y. 2013).
28. *Id.*
29. *Tameka S. Brown v. Baheejah A. Rasheed, Michael J. Smith and Jessica Smith*, Docket No. L-2011-15 (Atlantic County Superior Court).
30. *Id.*
31. *See Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").
32. *Id.* at 361, 88 S.Ct. 507, 516 (Harlan, J. concurring).
33. *U.S. v. Lifshitz*, 369 F.3d 173, 4 A.L.R.6th 697 (2d Cir. 2004) citing *Guest v. Leis*, 255 F.3d 325, 2001 Fed.App. 0206P (6th Cir. 2001); *but see United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) (holding that individuals do not have a reasonable expectation of privacy in internet postings or e-mails, stating, "Users would logically lack a legitimate expectation of privacy in materials intended for publication or public posting").
34. 568 F. Supp. 2d 556, 06–5337 (D.N.J. December 14, 2007).
35. *See also Moreno v. Hanford Sentinel Inc.*, 172 Cal.App.4th 1125, 91 Cal.Rptr.3d 858 (Ct.App. 5 Dist. 2009) (holding no reasonable expectation of privacy where person took affirmative act of posting own writing on MySpace); *Dexter v. Dexter*, 2007 WL 1532084, 2007 Ohio App. LEXIS 2388 (Ohio Ct. App. Portage Co. 2007).
36. *Melissa G v. N. Babylon Union Free Sch. Dist.*, 48 Misc. 3d 389, 393, 6 N.Y.S.3d 445, 449 (Sup. Ct., Suffolk Co. 2015).
37. *People v. Harris*, 36 Misc. 3d 613, 616–24, 945 N.Y.S.2d 505, 507–13 (Crim. Ct., New York Co. 2012) ("[T]here have been manifestations of an underlying discomfort with the facial unfairness of depriving a bank customer of any recourse, including standing, for disclosure of financial information concerning the customer's personal bank accounts which are widely believed to be confidential.").
38. *Id.* ("Indeed that is the very nature and purpose of Twitter.").
39. *People v. Harris*, 36 Misc. 3d 613, 616–24, 945 N.Y.S.2d 505, 507–13 (Crim. Ct., New York Co. 2012).