Private Facebook Posts Could Be Fair Game For Discovery

Insights
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New York's highest court recently held that social media users may be required to turn over information from their accounts—regardless of the user's chosen privacy settings—as part of the discovery process (*Forman v. Henkin*). This decision will likely prove useful to employers both in and outside New York, who often seek disclosure of their opponents' posts on Facebook or other social media during litigation with their employees.

Private Facebook Posts Become Critical Evidence

The case arose after a woman named Kelly Forman was injured in a horseback-riding accident. She sued the horse's owner, Mark Henkin, for damages allegedly caused by the mishap, including spinal and traumatic brain injuries. She claimed the injuries led to cognitive defects that impaired her ability to communicate and resulted in social isolation. At her deposition, Forman testified that, prior to the accident, she often documented her life on Facebook, but that her injuries made it difficult to use a computer or compose coherent messages and prevented her from continuing to do so. She claimed that she had since become reclusive.

Henkin sought production of Forman's "private" Facebook posts (i.e., those not shared with the general public) in order to determine whether she was telling the truth, and to determine the full extent of her alleged incapacity. Forman refused to produce the private posts, arguing that it would be an unacceptable intrusion on her personal life.

The defendant moved to compel disclosure, and the lower state court ordered Forman to turn over only some of the requested nonpublic information from her Facebook page. The Appellate Division took a harder line against disclosure, holding that Forman need only produce those posts she intended to use at trial.

New York's Highest Court Permits Discovery

The defendant appealed the decision to New York's highest state court, the Court of Appeals, where it was reversed on February 13, 2018. The court said that "there was nothing so novel about Facebook materials that precludes application of New York's long-standing disclosure rules" permitting discovery of all matter "material and necessary" unless protected by a privilege. In so doing, the court rejected a heightened standard used by some lower courts that require an opposing party to first identify information in the public portion of the account that contradicted the party's allegations before permitting it to compel discovery of the private portion.

The court cautioned, however, that its holding did not mean an entire Facebook account should be rendered automatically discoverable simply because the user commenced a personal injury action. Instead, the Court of Appeals directed the lower courts to analyze disclosure on a case-by-case basis, considering the nature of the event that gave rise to the litigation and the injuries claimed, to assess whether relevant material is likely to be found on the private social media account. The court also advised that disclosure orders should be narrowly tailored to avoid disclosure of non-relevant material.

Decision Advances Social Media Discovery

The court's decision is an arrow in the quiver for employers seeking discovery of private social media during litigation with their current or former employees. It means that New York courts can no longer apply a heightened standard when determining whether private social media content should be disclosed to an opposing party. Instead, they should now require production if the discovery request is reasonably calculated to yield information that is material and necessary.

This decision might also signal the start of a trend whereby courts throughout the country demonstrate a better understanding of the role of social media in discovery. Thus far, courts have shown muddled views on the subject, with some wary of permitting discovery of "private" social media, while others have mandated broad production. With *Forman v. Henkin* in mind, courts across the country may recognize that social media should be subject to the same longstanding local rules applied to all other discovery.

As mentioned previously, courts will not abandon discovery guidelines altogether to allow unbridled discovery of litigants' social media accounts. You should work with your counsel to craft social media discovery requests wisely in order to have the best chances of the court ultimately mandating disclosure. Thus, you should not request production of a person's entire Facebook or other social media account; this will likely be viewed as a fishing expedition.

Instead, you should work with your counsel to draft more tailored discovery requests that seek targeted discovery of social media tied to the specific issues in the case. For example, if the case involves emotional distress damages, you should ask for all social media posts that comment on the employee's mood, feelings, emotions, or state of mind.

Generally speaking, you and your counsel should be familiar with the various and ever-growing array of social media platforms that your employees are likely to use. While there are some stalwarts in social media (e.g. Facebook, LinkedIn, Twitter and Instagram), other platforms like Snapchat, Reddit, and Pinterest are also popular, and new ones are developing regularly. The better you understand what is out there, the easier it will be to formulate discovery requests tailored to address those platforms.

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