Will You Be My Friend?

Social Media Discovery
An overview

by

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I "Unfriend" You – an introduction

The headlines are frightening: "**Teen's Facebook post costs dad $80K**;" "**Reeva texts Pistorius: 'I'm scared of you sometimes**;'" "**Facebook Spoliation Costs Lawyer $522,000**." That teen's dad had to return an $80,000 settlement because his daughter's post violated a settlement's confidentiality clause. Pistorius' murder trial in South Africa is on hold agaom, but more than 1,000 texts are part of the case and they don't paint a pretty picture. That lawyer asked his client to "please, please clean up your Facebook and MySpace!" and was ordered to pay a half a million dollars, cost his client an additional $180,000, lost his job as managing partner of Virginia's largest personal injury firm and no longer practices law. Ain't digital friendship a kick in the head?

Think this is a unique phenomenon holding risk for only the unethical, think again. According to U.S. Magistrate Judge James C. Francis, of New York's Southern District, "you're no longer going to be able to conduct litigation of any complexity without understanding e-discovery." *Catch up with tech or lose your career, judges warn lawyers*, Joe Dysart, ABA Journal, April 1, 2014. Everywhere you look, someone with a smartphone is tapping away at

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keys that aren't actually keys. They post every move to Facebook, to Twitter, to Pinterest or any of hundreds of other internet social media havens. Ask Donald Sterling about Instagram, he'll be unable to describe it, but it cost him the Clippers. According to the Pew Research Center, 57% of all American adults and 73% of those aged 12-17 use Facebook, with 64% of users accessing the site daily.

Don't be mistaken, this is a big subject and while Facebook may be the biggest player now, it isn't the only player. You need to know what technology is out there if you are going to make intelligent, informed discovery requests. Considering only Facebook for a moment, have you considered the evidential value of mood indicators and emoticons? In a New York police brutality case, the offending officer posted that he'd viewed the film Training Day "to brush up on proper police procedure" and punctuated the statement with a "devious" mood indicator and an angry red emoticon licked by flames. *Digging for the Digital Dirt: Discovery and Use of Evidence From Social Media Sites,* John G. Browning, SMU Science and Technology Law Review, Summer 2011 Voume XIV, Number 3. If you don't know what an emoticon is, how will you either ask for it in discovery or recognize its worth at trial when produced automatically in a mountain of discovery?

This article doesn't seek to educate you on the vast array of social media evidence available, that landscape changes hourly, but given Judge Francis' warning and the competency requirement of Rule 1.1 of Professional Conduct, you'd better logon. In my next article, I'll describe all the various forms of social media you should watch for, I'll describe their use and main users, but this article seeks to update the reader on the current status of the law when it comes to the discovery of Social Media. The good news is that while the formats constantly change, the rules really haven't.

Of course, that's not entirely true. In the latest addition of New Hampshire's Superior Court Civil rules, you'll note Rule 25 Discovery Of Electronically Stored Information. This rule covers social media and is brand new. But a social media discovery request, like any other, still must be "reasonably calculated to lead to the discovery of admissible evidence." *NH Superior Court Rule* 21.

When it comes to social media discovery, you need to review the new rule, but you also need to know where the fight is and, maybe more importantly, where it isn't. If opposing counsel has asked for access to your client's Facebook page, don't expect a battle over privacy – at least not for a while. Privacy concerns may be your first thought, but that ship has long since sailed.

Private – Keep Out!

Often, when we try to keep opposing counsel out of our client's social media, we argue that Facebook, and the like, are "private" and not subject to discovery. Often, then, we are wrong. Speaking very generally, most courts have determined that Facebook may be "not public," but, whatever that means, it doesn't mean "private." The postings, pings, pokes and prods on Facebook and other social media are shared, even though often with a small group, and most courts say this sharing makes any expectation of privacy unreasonable. *Largent v. Reed*, No. 2009-1823 (Pa. C.C.P. Nov. 8, 2011) *and Loporcaro v. City of New York*, 2012 N.Y. Misc. LESIX 1659 (N.Y. Sup. Ct. Apr. 9, 2012). As the *Loporcaro* court put it:

> When a person creates a Facebook account, he or she may be found to have consented to the possibility that personal information might be shared with others, notwithstanding his or her privacy settings, as there is no guarantee that the pictures and information posted thereon, whether personal or not, will not be further broadcast and made available to other members of the public. Clearly, our present discovery statutes do not allow that

> the contents of such accounts should be treated differently from the rules applied to any other discovery material.

So, with the expectation of privacy easily undone by the simple concept that the internet is everywhere and everything on the internet is accessible to everyone, courts try to determine whether social media is discoverable through traditional tests with the main distinction being the methods courts allow for providing opposing counsel with discovery.

Before delving further, though, it is important to note that this lack of privacy has led to a large push back from users of social media, to the point where Linked, Facebook and others have started to shift away from privacy policies that simply and straightforwardly assure a total lack of privacy to trying to give users more control in preventing unwanted views of pages. *Facebook: 10 Years Later* by Scott Martin, USA Today, February 3, 2014. In other words, social media, led by Facebook, may be slowing moving toward a more private experience creating another chance for smart lawyers to argue an expectancy of privacy. If you can't see any part of someone's social media, you can't effectively argue that it contains relevant information, but, for now, privacy online isn't a real battleground. The real fight is relevancy.

Can't I Just Take a Quick Peek?

How do you successfully demonstrate to a court that the social media discovery you seek is relevant? After all, without permission, you can't look at someone's non-public postings and there may be something useful and relevant somewhere in there. Your first stop is the party's public postings. Looking at public postings is really just part of competent representation and universally accepted as common and appropriate conduct. If you don't do it, you may be violating your professional duty, the real question is, after you've viewed the public portion, what do you do next? *See Ethics Committee Advisory Opinion* #2012-13/05.

One of the earliest cases answering this question, *Romano v. Steelcase, Inc*., 30 Misc.3d 426, 907 N.Y.S. 2d 650, 210 N.Y. Slip Op. 20388 (N.Y. Sup. Ct. 2010), is often cited as the leading case on the issue of social media discovery, but this New York lower level trial slip opinion is not only 4 years old, a lifetime in social media, but contradicted, in result, by many other New York trial and appellate courts. *Fawcett v. Altieri*, 38 Misc. 3d 1022, 960 N.Y.S. 2d 592, 2013 N.Y. Slip Op. 23010 (N.Y. Sup. Ct. 2013), *Kregg v. Maldonado*, 98 A.D. 3d 1289, 951 N.Y.S. 2d 301, 2012 N.Y. Slip Op. 06454 (N.Y. Sup. Ct. App Division 4th Dept. 2012), *Caraballo v. City of New York, et al*, 2011 N.Y. Slip Op 30605(U) (N.Y. Sup. Ct. 2011). *Romano*, in fact, was so ahead of the rest of the American legal system in evaluating social media discovery requests, it relied heavily on Canadian law, but from *Romano* and the others that have followed, a general rule seems to be evolving, consistent with *NH Superior Court Rule 25* and its comment, requiring a factual predicate that the public portions of social media contradict the claims of the party seeking to prevent discovery. *Id*. The burden rests with the requestor. *Id*. In other words, if the public postings show recent photos of a "disabled" and "homebound" plaintiff running out and about town, you've got a good argument that the non-public posts are likely to be relevant.

It is important to carefully tailor the discovery request and cite the factual predicate, the contradiction, you've found publicly because courts are "troubled by the breadth of Defendants' Request for authorization for Plaintiff's Facebook page because it seeks unrestricted access." *Winchell v. Lopiccolo*, 38 Misc. 3d 458, 954 N.Y.S.2d 421, 2012 N.Y. Slip Op. 22337 (N.Y. Sup. Ct. 2012). Rather than following *Romano's* reliance on Canadian law, Winchell follows the logic of subsequent cases built on the idea that social media discovery is "governed by the same legal principles that guide more traditional forms of discovery and, as one court put it, digital

'fishing expeditions' are no less objectionable than their analog antecedents." *Id*. at 424 *citing Caraballo*, 2011 N.Y. Slip Op. 30605(U) (Sup. Ct. Richmond County 2011). Going further, the *Winchell* Court states, "review of reported decisions in this area has not disclosed any instance where such unfettered access was allowed, unless the requesting party first showed that information on the other party's public page contradicted their claims of injury or damages. *Id*. *citing Romano*. Even in *Romano*, this contradiction was required. That plaintiff alleged she was homebound but photos publically viewable on Facebook clearly showed her outside her home. *Romano*, 30 Mis. 3d at 431. Additionally, the *Romano* court found that plaintiff had thwarted every other effort, including refusal to answer deposition questions relative to social media, of that Defendant to obtain the discovery through less burdensome and invasive means. *Id*. at 435.

Relevance still matters. In *Bosh v. Cherokee County Governmental Building Authority*, 2013 WL 6150799, (U.S. Dist. Ct., Oklahoma, Nov. 22, 2013), a civil rights claim involving excessive force at a detention center, the plaintiff was granted limited access to a defendant's Facebook account after demonstrating the defendant appeared to have shared information about the incident. A broader request to access the entire Facebook account was denied as a "thinly veiled attempt to gain permission to embark on a 'fishing expedition.'" The court believed that defense counsel would turn over all relevant postings as an officer of the court. Good courts shouldn't allow unfretted access to irrelevant information and should rely upon counsel's longstanding ethical obligations. In fact, this comports with the new automatic disclosure rules. It also helps avoid potential harassment.

In *re Air Crash Near Clarence Center, New York*, 2013 WL 6073635, (U.S. Dist. Ct. New York, Nov. 18, 2013), the defendant sought access to the plaintiff's entire Facebook "friend list" arguing that is was relevant to assessing an alleged disorder by evaluating the plaintiff's

ability to socialize and communicate with others. This request was denied, but the defense was allowed access to other portions of the account. A decent sized "friend list" contains hundreds of names, along with contact information, and it is unlikely even a small percentage of those "friends" has any relevant information. Of course, this is New Hampshire, a much smaller state; our clients must have fewer friends. Our courts must have decided much differently. Several trial courts in the State have addressed social media requests in single sentence orders, but, after exhaustive research, no New Hampshire court appears to have yet produced a written, reasoned opinion.

Here, Read This Instead

New Hampshire, while absent case law directly referencing Facebook, is not absent guidance about social media, a technology that is, at base, simply another form of ESI (electronically stored information). *New Hampshire Superior Court Rule 25* specifically governs the discovery of electronically stored information. In the comments following that rule, "both litigants and judges dealing with the issues of electronically stored information" are encouraged to review NAVIGATING THE HAZARDS OF E-DISCOVERY, a manual for judges in state courts across the nation, by the Institute of the Advancement of the American Legal System. This brief, 37 page, manual, is instructive in its caution against the excesses of electronic discovery and its proportionality to the ventured litigation. In fact, our Superior Court rule requires that ESI discovery requests be made in "proportion to the significance of the issues in dispute." Rule 25(b). In an age when posts are made from desktop PC's, tablets, laptops, cell phones, iPods, Androids and other devices with the greatest of ease by the poster, a simple request for a copy of all social media is likely to amount to thousands upon thousands of pages if produced in a printed format. If the same data was provided on a thumb drive, it would take a

dozen key strokes and cost of some $5.99. And if you don't know what a thumb drive is, you may be dancing mighty close to that competency line.

Whatever form ESI is in, "requests must still be relevant and reasonably tailored" as the costs of e-discovery, such as printing thousands of pages of Facebook or giving a Defendant a user name and password used across dozens of online portals, may lead to costs "hundreds or thousands of times higher than traditional discovery." *Navigating the Hazards* p. 2. The simple fact is, the "potential universe of responsive information can be much greater" than producing the pre-internet, private version of Facebook, a diary. *Id*. at 11. Additionally, often "[r]equesting parties simply assume that e-discovery is "to some degree relevant, and accordingly issue broad, expansive requests … [b]ut in many cases, the parties are arguing from ignorance" as they cannot, without identification, collection and analysis "appreciate, what electronic data, if any, are likely to be available that are relevant to the claims and defenses of the parties." *Id*. at 10. In other words, don't go fishing.

Gone Fishin'

"Defendants' argument that plaintiff's Facebook postings '*may* reveal daily activities that contradict or conflict with' plaintiff's claim of disability amounts to nothing more than a request for permission to conduct a 'fishing expedition.'" *Tapp v. New York State Urban Development Corp.*, 102 A.D.3rd 620, 958 N.Y.S.2d 392 (NY Supreme Court, Appellate Division, 1st Dept. 2013) *citing McCann v. Harleysville Ins. Co. of N.Y.*, 78 A.D.3d 1524, 910 N.Y.S.2d 614 (4th Dept. 2010). *Emphasis Added*.

Requests to access an opposing party's social media require specific identification of relevant information. *Id*. Specifying the type of evidence sought does not satisfy this factual predicate of relevancy, without which "defendant essentially" seeks "permission to conduct 'a

fishing expedition' into plaintiff's Facebook account based on the mere hope of finding relevant evidence." *McCann* at 1525. *Internal quotation omitted*.

In an unreported Kentucky criminal case, a broad, and hopefully natured, request was also rejected by a clearly concerned court. "The trial judge conducted a hearing and found it disturbing to think that a victim's privacy could be invaded simply so that Appellant could investigate to see if she was 'keeping her story straight." *Handle v. Com*., 2013 WL 6729962 (Kent. 2013). *New Hampshire Superior Court Rule 21(b)* allows only for the discovery of information "that *is* relevant to the subject matter," not of information that "may not" be relevant. *Emphasis Added*. It shouldn't matter whether that discovery is electronic or otherwise, but, if you show it's relevant, what then?

THE SOLUTIONS

"At present, there is no universally accepted set of approaches to resolving the issues posed by electronic discovery," but one thing for certain is that as "the parties' concerns rise over the volume of information produced, costs, and privilege, so do the court's concerns about relevance, over breadth, and undue burden." *Navigating the Hazards* p. 28. Because of this, "our comfortably broad definition of what is discoverable may need some practical re-tuning." *Id*. at 29. Since the *Romano* decision, courts have been engaging in this re-tuning. The guide referenced in Rule 25 suggests judges "let the parties convince you that the information is needed in the first place." *Id*. at 28. This, of course, is not the only solution. With specific requests, well-tailored and based upon a factual predicate showing a real contradiction between public social media and claims made, some courts allow broad discovery of social media. *Romano*, 30 Mis.3d 426 (2010). Some judges engage in in-camera review. *Richards v. Hertz Corp.*, 100 A.D. 3d 728, 953 N.Y.S. 2d 654, 2012 N.Y. Slip Op. 07650 (N.Y. Sup. Ct. 2nd App.

Division 2012). Some have narrowed the time frame of a broad request or ordered counsel to jointly examine the social media deciding, post by post, on relevancy. *In re Christus Health Southeast Texas*, 399 S.W. 3d 343 (TX Ct. App. 2013); *James v. Edwards*, 85 Va. Cir. 139 (2012). One court "friended" two people "for the sole purpose of reviewing photographs and related comments in camera." *Barnes v. CUS Nashville*, LLC, 2011 U.S. Dist. LEXIS 143892 (M.D. Tenn. June 3, 2010). The judge reviewed the postings, circulated the relevant material and closed his Facebook account. *Id*.

All Good Things Must Come To An End

With our crowded dockets and overworked court system, it's not likely a New Hampshire Superior Court judge is going to have either the time or inclination to open a Facebook account just to review contested discovery in a car accident case. So, you must know technology and you must be able to explain why you need it. If you didn't know you could check whether a witness really was at an accident scene by accessing his Foursquare account, you might not be ready for the next generation of litigation. In the end, it's our job as trial lawyers to fit new technology into established concepts of justice and fairness learned long ago.

One Last, Off Topic, Warning

It seems I'd be remiss if I didn't close with a word to the wise or is it from the unwise? In any event, you can use social media to scope out potential jurors, it might be malpractice not to do so, but two recent New York ethics opinions state that a "prohibited communication with a juror can occur where the juror learns 'of the attorney's viewing or attempted viewing of the juror's pages, post, or comments." NYCBA, Formal Op. 2012-02 (2012). Did you know I know if you looked at my linked in profile? Yeah, I do. This fine line is why it is so important to understand the different mediums and how they work. View my public Facebook posts and no

problem, view my LinkedIn profile and I see that you did, and you may have tampered with a jury. Well, more on that next time. In the meantime, good virtual hunting.