Social Media Discovery 101

#federal courts #isdiscoverypermitted?

By Sheri B. Cataldo and Howard S. Weisel

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Over 11 years have now passed since Facebook launched in 2004. Since that time, the number of daily Facebook users has grown to approximately 890 million as of December 2014. *Our Mission*, http://newsroom.fb.com/company-info/.

Following Facebook's rise, other social media sites, such as Instagram and Twitter, have seen their numbers of users explode over the last several years. Instagram's website boasts 300 million users. *300 Million: Sharing Real Moments*, Instagram, http://blog.instagram.com/post/104847837897/141210-300million (last visited May 14, 2015). Twitter's website claims 288 million monthly active users and 500 million Tweets sent per day. *Our Mission*, https://about.twitter.com/company. Many of those Tweets are filled with "hashtags" such as the ones used in the title of this article.

While the number of users of these sites has risen, the number of federal appellate court rulings addressing the discovery of users' material on these sites has not. The Supreme Court and federal circuit courts have not yet ruled on how courts are to handle disputes involving social media discovery, leaving federal trial courts to define discovery parameters. This article provides an overview of various approaches that federal district courts have taken in resolving disagreements about social media discovery. While the majority of cases to date involve Facebook accounts and frequently have arisen from litigation that did not involve purely commercial disputes, such as employment matters, the principles discussed apply no less to commercial litigation and to discovery of materials from other social media sites such as Twitter or Instagram.

Why Social Media Materials Matter

So many people use social media that the amount of material posted on sites such as Facebook is voluminous. Many individuals share online all aspects of their lives, from

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pictures of what they did on a particular day to comments about what they thought and felt. These sites thus contain a treasure trove of information. While the universe of the types of cases that this material could be used in is vast and impossible to list in full, examples include

- A former shareholder sued for stealing trade secrets who has allegedly been posting private company information on social media.
- A former partner alleged to have violated a non-compete agreement who allegedly has openly solicited customers on social media.
- An insured seeking to recover total disability benefits based on an inability to do physical labor who allegedly has posted pictures of himself weightlifting on social media.
- Cases involving claims of fraud, breach of fiduciary duty, or wrongful termination in which a party seeking emotional distress damages allegedly has posted pictures and messages revealing that the person happily has engaged in a wide array of activities.

FRCP 26 Applies to Social Media Discovery

Before delving into the case law, an attorney cannot overlook that requests for social media evidence, just as any other evidence, are subject to Federal Rule of Civil Procedure (FRCP) 26's relevancy requirement. Under FRCP 26(b)(1), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Courts may grant a discovery request if the request "appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* It is well known that social media evidence may contain a wide assortment of personal and private information. However, FRCP 26 on its face does not provide any sort of heightened standard or special exceptions for this type of personal material; as long as requested information is relevant to a claim or defense, it is discoverable under FRCP 26's broad language. In other words, social media evidence is treated no differently under FRCP 26 than any other records containing personal information, such as medical, employment, or educational records.

Courts' Differing Treatment of Social Media Discovery

With FRCP 26's relevancy requirement in mind, federal district courts have adopted a number of different approaches to resolving disputes involving social media requests. These include (1) a threshold approach requiring an initial demonstration that the public portion of someone's social media contains relevant evidence that justifies disclosure of the private portions, (2) a broad approach adopting a time frame and permitting discovery of almost the entirety of a party's postings during the identified time frame, (3) a limited disclosure approach in which courts attempt to set parameters on what a party must disclose, and (4) an *in camera* review approach in which a court reviews a party's social media postings and determines what is discoverable. While courts have used these various approaches, each one is susceptible to various criticisms. Thus, a litigator advocating for a particular approach will want to be prepared to address the likely issues that his or her opponent will identify in response to a request for this evidence. Additionally, although courts handle social media requests differently, the general principle emerging from the case law is that information on a private social media site, which is only accessible to those people who the user permits, is discoverable, subject to limitations that a court may impose.

The Threshold Approach

As discussed above, FRCP 26(b)(1) permits discovery if a request "appears reasonably calculated to lead to the discovery of admissible evidence." However, some courts addressing requests for social media have imposed an additional requirement on litigants seeking to obtain this evidence. These courts have held that a party seeking to obtain private content from an opponent's social media sites must first show that the public content contains some relevant material; only once the information seeker has met this requirement may a court permit discovery of private information contained within that site.

In *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387 (E.D. Mich. 2012), the defendant sought the plaintiff's Facebook records in a slip-and-fall case in which the plaintiff claimed an impairment in her ability to work and to enjoy life. The court initially made clear that such social media evidence was not shielded by privilege or privacy: "[M]aterial posted on a 'private' Facebook page, that is accessible to a selected group of recipients but not available for viewing by the general public, is generally not privileged, nor is it protected by common law or civil law notions of privacy." *Id.* at 388. However, that did not mean that the defendant was automatically entitled to discovery of the plaintiff's account. The court expressed concern over granting the defendant access to non-public information: "the Defendant does not have a generalized right to rummage at will through information that Plaintiff has limited from public view," nor should the defendant "be allowed to engage in the proverbial fishing expedition, in the hope that there *might* be something of relevance in Plaintiff's Facebook account." *Id.* at 388. Taking these considerations into account, the court examined the public postings of the plaintiff's Facebook page that had been submitted as exhibits. Because the public photos were not, in the court's view, inconsistent with the plain-

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tiff's claimed injury, the court rejected the defendant's claim that the defendant was entitled to the private postings on the page. Since the"[d]efendant has not made a sufficient predicate showing that the material it seeks is reasonably calculated to lead to the discovery of admissible evidence," the defendant was not entitled to the private Facebook materials. *Id.* at 389.

Rather, a defendant had to show that in this *specific case*, the public portion of a Facebook page contained such photographs and postings before a court would be willing to order disclosure.

Thus, a defendant was not entitled to discovery of Facebook materials simply because social media may as a *general proposition* contain photographs and other postings that could potentially have revealed that a plaintiff was capable of working and enjoying life. Rather, a defendant had to show that in this *specific case*, the public portion of a Facebook page contained such photographs and postings before a court would be willing to order disclosure.

Other federal district courts have adopted the *Tompkins* court approach and refused to permit disclosure of private social media content unless the defendant showed that the public portion contained relevant material. For example, in *Keller v. Nat'l Farmers Union Prop & DCas*, 2013 U.S. Dist. Lexis 452 (D. Mont.), the defendant, an insurer, sought full access to the social media sites including, among others, Facebook, Twitter, and Instagram, of an insured suing it for breach of contract. The defendant asserted that that information on the sites "'may very well undermine or contradict'" the plaintiff's allegations that she suffered "'a host of physical and emotional injuries.'" *Id.* at *12. Although the court acknowledged that "[t]he content of social networking sites is not protected from discovery merely because a party deems the content 'private,'" the court rejected the request since the defendant "ha[d] not made the requisite threshold showing" that "the content of either of the [p]laintiff's public postings in any way undermines their claims in this case." *Id.* at *11–13. Without "such a showing, [the defendant was] not entitled to delve carte blanche into the nonpublic section of [the p]laintiff's social networking accounts." *Id.* at *13.

Similarly, in *Potts v. Dollar Tree Stores, Inc.*, 2013 U.S. Dist. Lexis 38795, at *7 (M.D. Tenn.), the court in an employment discrimination matter denied the defendant employer's motion to compel discovery of the plaintiff's Facebook pages and other social media since the defendant "lack[ed] any evidentiary showing that Plaintiff's public Facebook profile contain[ed] information that will reasonably lead to the discovery of admissible evidence." And in *Jewell v. Aaron's, Inc.*, 2013 U.S. Dist. Lexis 102182 (N.D. Ga.), a Fair Labor Standards Act collective action involving claims for unpaid work, the district court also applied this approach in concluding that the "[d]efendant has not made a sufficient predicate showing" entitling it to broad social media access. *Id.* at *11.

The threshold showing approach has been criticized. The approach appears to impose a heightened standard for disclosure of evidence that is not set forth in FRCP 26(a)(1). As the district court in a disability discrimination case, *Giacchetto v. Patchogue-Medford Union Free Sch. Dist.*, 293 F.R.D. 112, 114 n.1 (E.D.N.Y. 2013), observed, "The Federal Rules of Civil Procedure do not require a party to prove the existence of relevant material before requesting it." In other words, FRCP 26(a)(1) does not state that a party is required to make an evidentiary showing that materials contain relevant information; rather, a request for documents and information must only be "reasonably calculated to lead to the discovery of admissible evidence." Additionally, the *Giacchetto* court observed that "this approach improperly shields from discovery the information of Facebook users who do not share any information publicly." *Id.* at 114 n.1. The approach seems to reward litigants who attempt to remove all public content at the outset of litigation in an effort to avoid disclosure of any social media information. Finally, the *Giacchetto* court acknowledged,

> This approach can lead to results that are both too broad and too narrow. On the one hand, a plaintiff should not be required to turn over the private section of his or her Facebook profile (which may or may not contain relevant information) merely because the public section undermines the plaintiff's claims. On the other hand, a plaintiff should be required to review the private section and produce any relevant information, regardless of what is reflected in the public section."

Id. at 114 n.1.

The *Giacchetto* court ultimately settled on the limited disclosure approach discussed below.

Moreover, other forms of evidence are not subject to this heightened approach. A party seeking another party's complete medical or employment records is not first required to present a court with several pages of the records to gain access to all of the documents. A demand for this type of evidentiary showing could serve as an insurmountable bar to obtaining evidence in a wide variety of cases since a requesting party may not have any of the medical, employment, or educational records of the opposing party before requesting such materials.

The Time Frame-Related Broad Approach

Rather than attempting to draw lines delineating which materials are or are not discoverable, some federal courts are willing to permit broad disclosure of social media information, subject solely to the limitation that the information covers only the relevant time frame at issue in the lawsuit. The district court in a Title VII employment discrimination case, *Kear v. Kohl's Dep't Stores, Inc.*, 2013 U.S. Dist. Lexis 84943 at *17–18 (D. Kan.), applied this approach, concluding, "Given the broad scope of relevancy in the discovery process, the Court finds that Plaintiff's activity on social media sites may lead to relevant information regarding" the allegations at issue. Since in this instance the "[d]efen-

dant has sufficiently limited the scope of this request by seeking limited access during the relevant time frame rather than seeking unfettered or unlimited access to [the p]laintiff's social media accounts," the court permitted discovery. *Id.* at *17–18. Similarly, in another employment discrimination case, *Held v. Ferrellgas*, Case No. 10-2393-EFM (D. Kan. Aug. 31, 2011), the court, in granting the defendant's motion to compel Facebook materials, observed that the defendant had not sought "unfettered or unlimited access to Plaintiff's Facebook, but rather limited access during the relevant time frame." However, ordering litigants to disclose all social media content likely would force the litigants to disclose irrelevant material.

The Limited Disclosure Approach

Other courts have attempted to find a middle ground between the two approaches described above. Rather than requiring parties to make an initial threshold showing or permitting parties wide access to their opponents' social media accounts for the relevant time frames, these courts have attempted to draw lines permitting discovery of social media information as long as such information is relevant to the claims at issue. However, drawing these lines is not always easy and may sometimes lead to production of irrelevant materials.

For example, in several cases addressing employment disputes in which emotional distress was at issue, courts have attempted to limit disclosure to social media information related to that emotional distress. In *EEOC v. Simply Storage Mgmt.*, 270 F.R.D. 430 (S.D. Ind. 2010), the defendant in a sexual harassment suit sought the claimants' Facebook and Myspace content to dispute the claimants' emotional distress claims. Similar to decisions mentioned above, the district court initially concluded that privacy "is not a legitimate basis for shielding [social media content] from discovery." *Id.* at 434. Yet that did not mean that all social media evidence was discoverable; "the simple fact that a claimant has *had* social communications is not necessarily probative of the particular mental and emotional health matters at issue in the case. Rather, it must be the substance of the communication that determines relevance." *Id.* at 435. Although emotional distress allegations "do not automatically render all [social media] communications relevant," the court concluded that "[i]t is reasonable to expect severe emotional or mental injury to manifest itself in some" social media content. *Id.* at 435. Concerned that ordering the discovery of "only communications that directly reference the matters alleged in the complaint" might fail to "yield information inconsistent with the claimants" emotional distress allegations, the court ordered that the claimants produce "any profiles, postings, or message (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and [social networking site] applications" for approximately the three previous years "through the present that reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state." *Id.* at 435–436. It was left to counsel "to make judgment calls… about what information [was] responsive" to the court's ruling. *Id.* at 436.

Federal courts in jurisdictions throughout the country have used the *Simply Storage* court's approach and limited social media discovery in employment matters to the emotional content found on the sites. *Smith v. Hillshire Brands*, 2014 U.S. Dist. Lexis 83953 at *19–20 (D. Kan.); *Reid v. Ingerman Smith LLP*, 2012 U.S. Dist. Lexis 182439, at *7 (E.D.N.Y.); *Robinson v. Jones Lang LaSalle Ams., Inc.*, 2012 U.S. Dist. Lexis 123883, at *5–6 (D. Ore.); *Holter v. Wells Fargo*, 281 F.R.D. 340, 344 (D. Minn. 2011).

However, courts criticizing this approach have deemed this framework as providing an "extremely broad description" that fails to put parties "on notice of which specific documents or information would be responsive to the request," thus failing Federal "Rule 34(b)(1)(A)'s requirement that production requests be stated with reasonable particularity." *Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 571 (C.D. Cal. 2012). Indeed, this type of limitation may be so broad as not to serve as a real limit at all. Ordering production of all social media content relating to "any emotion" could encompass someone's entire social media content since, in theory, any picture or message could relate to an emotion. As the *Mailhoit* court observed, "the category would still arguably require the production of many materials of doubtful relevance, such as a posting with the statement "I hate it when my cable goes out." *Id.* at 572. *See also Kennedy v. Contract Pharmacal Corp.*, 2013 U.S. Dist. Lexis 67839, at *4 (E.D.N.Y. 2013) (rejecting the above approach since "the requests are vague, overly broad and unduly burdensome"). Even the *Simply Storage* court recognized in establishing these parameters that "it has not drawn these lines with the precision litigants and their counsel typically seek." 270 F.R.D. at 436.

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Perhaps recognizing the inherent problems with this kind of line drawing, other courts permitting limited disclosure of social media materials regarding emotional distress simply require that parties produce evidence related to the specific events at issue in the case. In *Giacchetto*, rather than ordering the plaintiff seeking emotional distress damages to produce all social media relating to any emotion or feeling, the court required her to provide "any specific [social media] references to the emotional distress she claims she suffered or treatment she received in connection with the incidents underlying her Amended Complaint" and "any postings on social networking websites that refer to an alternative potential stressor." *Id.*, 293 F.R.D. at 116.

Courts dealing with cases involving other issues have handled social media requests similarly to *Giacchetto* and required that the requested social media content only have a relation to the claims at issue in the case. In *Higgins v. Koch Dev. Corp.*, 2013 U.S. Dist. Lexis 94139 (S.D. Ind. 2013), the plaintiffs alleged that they suffered serious physical injuries as a result of the defendant's negligence. The court ordered production only of social media content posted after the events at issue in the lawsuit and of content concerning the plaintiffs' injuries and "employment activities, outdoor activities, and enjoyment of life reasonably related to those injuries and their effects." *Id.* at *9. Likewise, in *Mailhoit*, 285 F.R.D. 566, 571 (C.D. Cal. 2012), the plaintiff claimed her employer discriminated against her. In response to the defendant's request for the plaintiff's social media, the court ordered production of social media communications "'which in any way refer to… her employment [with defendant] or this lawsuit.'" *Id.* at 572.

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The *In Camera Review* Approach

Rather than leaving it to counsel to make relevancy assessments, some district courts have ordered *in camera* review of the materials to determine relevancy before ordering that a party produce its social media content to its opponent. In *Douglas v. Riverwalk Grill, LLC*, 2012 U.S. Dist. Lexis 120538 (E.D. Mich.), the court reviewed *in camera* thousands of entries on the plaintiff's Facebook page to determine whether the page contained material relevant to the case issues, while the court in *Bass v. Miss. Porter's Sch.*, 2009 U.S. Dist. Lexis 99916 (D. Conn.) reviewed *in camera* more than 750 pages of the plaintiff's Facebook entries in assessing relevancy. Another court, rather than reviewing hard copies of the plaintiff's social media that the plaintiff provided, ordered the plaintiff to provide the court with log-in information for his Facebook and Myspace accounts so that the court could access the sites directly. *Offenback v. L.M. Bowman, Inc.*, 2011 U.S. Dist. Lexis 66432 (M.D. Pa.). At least one court has used a forensic expert as a special master to access directly the plaintiff class members' social media, obtain information from the sites, and then provide the court with the collected information for *in camera* review. *EEOC v. Original Honeybaked Ham Co.*, 2012 U.S. Dist. Lexis 160285 (D. Colo.).

While this approach may have some appeal to a party seeking to protect his or her social media against discovery, federal district courts might hesitate to adopt such an approach, which would require them to take on the burden of examining hundreds or thousands of pages of a party's Facebook or other social media account every time a request for this material arises. Moreover, *in camera* review is typically only used in matters involving privilege. As one court pointed out in rejecting the parties' suggestion that the court conduct an *in camera* review of social media materials, "'Such review is ordinarily utilized only when necessary to resolve disputes concerning privilege; it is rarely used to determine relevance'" *Tompkins*, 278 F.R.D. at 389 n.4 (quoting *Collens v. City of New York*, 2004 U.S. Dist. LEXIS 11374 (S.D.N.Y.)).

Finally, it is unnecessary for courts in all instances to make relevancy determinations *in camera* regarding social media evidence since attorneys should be capable of making such relevancy determinations without a court's assistance—just as attorneys do for other types of materials requested in discovery. As the *Simply Storage* court indicated, "Lawyers are frequently called upon to make judgment calls—in good faith and consistent with their obligations as officers of the court"—about what information is responsive to another party's discovery requests. Discovery is intended to be a self-regulating process that depends on the reasonableness and cooperation of counsel." *Id.*, 270 F.R.D. at 436; *Robinson*, 2012 U.S. Dist. Lexis, at *7. Thus, parties receiving social media requests limited to particular information can assess what is responsive to the request and produce it. Should an opponent believe that certain information is being improperly withheld, the concerned party could request that the court address it. *Simply Storage*, 270 F.R.D. at 436; *Robinson*, 2012 U.S. Dist. Lexis, at *7.

Conclusion

In time, federal appellate courts may render rulings providing additional guidance to district courts and practitioners on the discovery of social media material. How they may rule is of course a matter of speculation at this point. Based on the number of available opinions addressing these issues, the current trend appears to be that courts favor permitting limited disclosure of social media materials, while protecting against disclosure of the entirety of a litigant's social media accounts. Moreover, courts appear inclined first to rely on attorneys to make reasonable determinations as to whether social media material are relevant to particular discovery requests before intervening in the form of *in camera* review.

Until the appellate courts issue rulings, trial courts across the country will continue to set their own limits (or not set limits) regarding disclosure of this material. Defense counsel seeking this information from a party opponent will want to be cognizant of the various approaches that courts have taken to frame their requests successfully so the courts will be convinced to order disclosure. On the other hand, litigators will also want to keep these approaches in mind when seeking to defend a client against an opponent's request for broad social media access.