Discoverability of Facebook Entries

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On February 13, 2018, New York's Court of Appeals issued a landmark ruling on the discoverability of "private" Facebook entries, reaffirming the liberal application of CPLR §3101 to all relevant information, including social media, that is not otherwise privileged and where requests are reasonable in scope. The case, Foreman v. Henkin, 2018 NY Slip Op 01015, may be viewed at http://www.nycourts.gov/reporter/3dseries/2018/2018_01015.htm.

Privacy settings in question

Significantly, the Court held that merely designating one's Facebook profile as "private" does not shield it from disclosure. Instead, objective standards of privacy dictate what is and is not discoverable. Because a user's private entries can only be viewed by his or her "friends," a party seeking disclosure would have no way of knowing the contents of entries and so cannot and need not specify the entries it seeks. Instead, the party must state a basis for why the material is sought, e.g., to confirm or refute a claim of alleged physical, mental, or emotional damages.

However, the act of commencing a personal injury action does not, in and of itself, subject the plaintiff's entire Facebook account to disclosure. Demands must still be reasonably calculated to lead to the discovery of admissible evidence and be tailored in time and scope so as not to be onerous.

As with the case of medical records, a party that puts his or her physical or mental condition in issue renders records of his/her social activities relevant and discoverable. Thus, barring objectively private information, Facebook entries from a reasonable time before and after the accident, including photographs, will be discoverable.

Context matters

In Foreman, for example, the trial court held that photographs depicting nudity or romantic encounters need not be produced. Note, however, where such information directly impacts a claim or defense (e.g., if plaintiff claims the accident impeded him or her from engaging in romantic encounters) such entries may be discoverable.

Similarly, where a party puts his/her mental, emotional or cognitive state in issue, written entries themselves may be discoverable as well. The court in Foreman did not order this, as the issue was raised below but not preserved for appeal. The Court's discussion of the issue, however, suggests that, had the defendant pursued discovery of the actual entries, the Court would have required their disclosure.

The Court's Decision

In Foreman, the plaintiff fell from a horse and claimed a traumatic brain injury. She alleged cognitive deficits, memory loss, difficulties with written and oral communication, and social isolation. She testified at her deposition that before the accident, she posted "a lot" of photographs on Facebook showing her pre-accident active lifestyle but could not recall whether any post-accident photographs were posted. She claimed that she had become reclusive as a result of her injuries and had difficulty using a computer and composing coherent messages. She contended that a simple email could take "hours to write" because she had to go over written material several times to make sure it made sense.

The defendant moved to compel the production plaintiff's entire "private" Facebook account, contending the photographs and written postings were material and necessary to his defense of the action under CPLR 3101(a). The plaintiff opposed disclosure on privacy grounds. The trial court granted the motion to compel to the limited extent of directing plaintiff to produce all photographs of herself posted on Facebook prior to the accident that she intended to introduce at trial, all photographs of herself privately posted on Facebook after the accident that do not depict nudity or romantic encounters, and an authorization for Facebook records showing each time plaintiff posted a private message after the accident and the number of characters or words in the messages. The trial court did not order disclosure of the content of any of plaintiff's written Facebook posts, whether authored before or after the accident.

The plaintiff appealed the trial court's decision; the defendant did not appeal any portion of the decision.

On appeal, the Appellate Division, First Department, in a 3-2 split, modified the trial court's order by limiting disclosure to photographs posted on Facebook that plaintiff intended to introduce at trial (as opposed to all post-accident photographs) and eliminated the authorization permitting defendant to obtain data relating to post-accident messages. The Court of Appeals reversed the Appellate Court's decision and reinstated the trial court's initial order.

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Rather than creating new or special rules pertaining to Facebook or other social media, the Court rejected a need for heightened scrutiny of social media and applied guidelines that govern discovery in general. The Court began by noting that CPLR 3101 directs that "there shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof", and that the phrase "material and necessary" is to be "interpreted liberally to require disclosure…of any facts bearing on the controversy which will assist preparation for trial", citing Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406 [1968]. It reaffirmed the need balance broad disclosure against privacy concerns and providing protections against burdensome discovery demands.

The Court also noted a user's ability to change privacy settings retroactively, that is, to convert what had originally been a public post to a private post after the fact or to "curate" the materials on the public portion of the account. As a view of the "public" portion of a Facebook profile alone may not provide complete or accurate information, it therefore rejected privacy settings as determinative of discoverability as this potential manipulation could lend itself to "obstruction" of discovery.

Special Treatment Denied

The Court rejected mere designation of a Facebook profile as "private" serving as a basis for special treatment of social media or withholding disclosure of material that is otherwise discoverable, explaining:

Defendant argues that the Appellate Division erred in employing a heightened threshold for production of social media records that depends on what the account holder has chosen to share on the public portion of the account. We agree. …Several courts applying this rule appear to have conditioned discovery of material on the "private" portion of a Facebook account on whether the party seeking disclosure demonstrated there was material in the "public" portion that tended to contradict the injured party's allegations in some respect (internal citations omitted)

Before discovery has occurred — and unless the parties are already Facebook "friends" — the party seeking disclosure may view only the materials the account holder happens to have posted on the public portion of the account. …Under such an approach, disclosure turns on the extent to which some of the information sought is already accessible — and not, as it should, on whether it is "material and necessary to the prosecution or defense of an action" (see CPLR 3101[a]).

You don't know what you don't know

The problem with the approach urged by plaintiff and rejected by the Court was that, the party seeking disclosure could not know, and could not articulate, precisely what it sought if the profile was set to 'private.' Thus, the Court "reject[ed] the notion that the account holder's so-called 'privacy settings govern the scope of disclosure of social media materials," and instead applied the same guidelines as govern disclosure of materials from any other source: if it's relevant, and the demand is not overly burdensome, the material must be produced. The Court likened privacy concerns regarding social media to those related to the production of medical records, which, while ordinarily private, are discoverable when a party's physical condition is in issue.

Thus, applying these principles in Foreman, the Court held that the Appellate Division erred in restricting disclosure to only those photographs plaintiff intended to introduce at trial. Discovery would be unreasonably restricted, if not frustrated outright, if discovery was determined by plaintiff's unilateral determination of what information she wished to use at trial rather than permitting defendant an opportunity to have full disclosure of information relevant to her claims. As plaintiff put her physical and mental condition at issue, the defendant was entitled to production of the Facebook photographs depicting her lifestyle before and after the accident.

As to the actual written entries, the Court noted the First Department Decision limited disclosure to time logs of when the entries were made, rather than the written entries themselves but that this was "an aspect of the order we cannot review given defendant's failure to appeal to the Appellate Division". The Court's logic (that the data is relevant), and its seeming disappointment in being unable to address the issue directly, suggests that it may have overturned that portion of the Decision had the defendant appealed it.

Practice Pointers

Simply designating a Facebook profile "private" does not make it immune from discovery. If a party's mental and physical condition is in issue, the Court will require discovery of relevant entries marked "private" so long as the entries are not objectively private, such as photos depicting nudity. Even written entries themselves may be discoverable if the party seeking disclosure can show them to be relevant. In Foreman, for example, the plaintiff claimed she could no longer draft coherent messages. A comparison of her before-and-after written entries likely would have been held discoverable.

For defendants, this holding harmonizes requests for discovery of social media with all other discovery requests under CPLR §3101 so that a showing that "private" Facebook entries are relevant and requests are reasonable in scope should suffice to compel disclosure. The burden will then be on the plaintiff to show why certain entries are objectively private. Of course, a plaintiff may in turn request an in camera review or may produce a privilege log in an effort to justify redaction or exemption from disclosure.

Litigants should avoid potential spoliation by preserving and maintaining all relevant information, including social media. Parties seeking disclosure should serve an immediate demand to preserve all entries in the opposing party's Facebook account and other social media. With or without a formal demand to preserve evidence in anticipation of litigation, however, litigants have an affirmative obligation to preserve all relevant evidence, in whatever medium it is created and maintained, even before an action is commenced. While a plaintiff may be tempted to delete posts that are inconsistent with or which may negatively impact their claims, the consequences for such actions may be dire. Deleted posts may be recovered and, even if they are not, testimony can be used to both establish deletions and provide a basis for sanctions. The Court's literal reference to privacy settings as "obstructing discovery" indicates that a Court would likely not look favorably upon a party that deleted a post or picture harmful to their claim.

In short, Foreman makes the discovery of Facebook information akin to that of medical records. If it's relevant, and not 'invasive', it must be produced. ■