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Article of Note

Compelling Facebook Likes, Twitter Mentions, and Instagram Geo-Tags:
The Discoverability of Social Media and Its Use as a Tool in Defense
by Gillian H. Clow

As explained elsewhere, "Social media content presents a unique challenge for courts due to its relative novelty and their ability to be shared by someone besides the original poster, and the multifarious privacy settings that may be constructed to allow specifically limited viewing." *See Appler v. Mead Johnson & Co., LLC,* No. 3:14-CV-166-RLY-WGH, 2015 WL 5615038, at *2 (S.D. Ind. Sept. 24, 2015). Such content is discoverable if it is reasonably calculated to lead to the discovery of admissible evidence, and it can also prove to be valuable tool in defense litigation.

Federal courts have held that "social networking site content may be subject to discovery" under Federal Rule of Civil Procedure Rule 34 and that "[g]enerally, [social-networking site] content is neither privileged nor protected by any right of privacy." *Mailhoit v. Home Depot, U.S.A., Inc*., 285 F.R.D. 566, 570 (C.D. Cal. 2012) (quoting *Davenport v. State Farm Mut. Auto Ins. Co.,* 2012 WL 555759, at *1 (M.D. Fla., Feb. 21, 2012)). On the other hand, "the Federal Rules do not grant a requesting party 'a generalized right to rummage at will through information that [the responding party] has limited from public view' but instead require 'a threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence.'" *Id.* (citing *Tompkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012)).

Whether specific social media information is relevant depends on the claims or defenses of that case. One example is when social media posts may contradict claims of physical or emotional injury brought by a plaintiff. *Thurmond v. Bowman*, No. 14-CV-6465W, 2016 WL 1295957, at *10 (W.D.N.Y. Mar. 31, 2016), *report and recommendation adopted*, No. 6:14-CV-06465 EAW, 2016 WL 4240050 (W.D.N.Y. Aug. 10, 2016).

- Courts have found certain categories of Facebook posts relevant to a plaintiff's claims of "severe, life-changing, permanent emotional damages." *Lewis v. Bellows Falls Congregation of Jehovah's Witnesses, Bellows Falls, Vt., Inc.,* 2016 WL 589867, at *1–2 (D. Vt. 2016).
- In *Reid v. Ingerman Smith LLP,* the court found that public portions of the plaintiff's account provided "probative evidence of [the plaintiff's] mental and emotional state, as well as reveal the extent of activities in which she engages." 2012 WL 6720752, at *1 (E.D.N.Y. 2012).

That said, "[a] plaintiff's entire social networking account is not necessarily relevant simply because he or she is seeking emotional distress damages." *Giacchetto v. Patchogue–Medford Union Free Sch. Dist*., 293 F.R.D. 112, 115 (S.D.N.Y. 2013). The court there noted, "the relationship of routine expressions of mood [in a social media posting] to a claim for emotional distress damages is much more tenuous" than the relationship between a post "reflecting engagement in a physical activity" to a claim for physical injury damages. *Id*. at 116.

Not only must the requests be reasonably calculated to lead to the discovery of admissible evidence, they must also not be overly broad. *Ye v. Cliff Veissman*, *Inc.,* No. 14-CV-01531, 2016 WL 950948, at *3 (N.D. Ill. Mar. 7, 2016) (denying the defendants' motion to compel the production of the entire archives of the plaintiff's Facebook, as well as that those of her next of kin going back seven years). In that case, the court noted that the request for production at issue was "not tailored to relevant content only." *Id*.

The court's analysis in *Mailhoit* is instructive and provides that the requests must both be reasonably calculated to lead to the discovery of admissible evidence and not be overly broad. There, the court denied the defendant's motion to compel production in three of four categories of documents, finding that although "Plaintiff has placed her emotional state at issue in this action," and thus some social media communication "may support or undermine her claims of emotional distress, . . . the extremely broad description of the material sought by [these] categories fails to put a 'reasonable person of ordinary intelligence' on notice of which specific documents or information would be responsive to the request" and therefore failed to meet Federal Rule 34's reasonable particularity requirement. *Mailhoit*, 285 F.R.D. at 571. The court also noted that the request seeking communications relating to "any emotion" and to "events" was both vague and overbroad. *Id.* at 572.

The court did find, however, that the one category *did* place the plaintiff "on notice of the materials to be produced and [was] reasonably calculated to lead to the discovery of admissible evidence." *Id.* Category 3 sought "all social networking communications between Plaintiff and her current or former Home Depot employees, or which in any way refer [or] pertain to her employment at Home Depot or in this lawsuit." *Id.*

While preparing written discovery, it is important not to discount the potential information that can be gleaned from social media profiles such as LinkedIn, Instagram, Facebook, and Twitter, especially when a plaintiff alleges a physical or emotional injury or both. A motion to compel brought in federal court may be successful if the request is not all-encompassing, but rather, reasonably particular and not overly broad.

Understanding social media can pay off in other ways, too. For example, just this last year, I was able to track down a difficult-to-find, third-party witness and serve a deposition subpoena on her by monitoring her public Instagram profile. It is becoming increasingly important not to discount the value that publicly accessibly social media profiles can afford in providing information about a plaintiff's background, current whereabouts, interests, family relationships, and more.

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