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LegalLOOP

Courts still grapple with social media evidence discovery

As attorneys realize the utility of social media evidence in litigation, broad requests for unfettered access to social media accounts are becoming all the more common. As a result, New York courts have been grappling with social media discovery issues more frequently. More often than not, the courts have done a good job of analyzing the requests within the context of the case and permitting access only when doing so would lead to a reasonable likelihood of obtaining evidence relevant to the issues at hand.

For example, there was *Abrams v. Pecile*, 83 A.D.3d 527 (1st Dept. 2011), where the First Department refused to allow access to the plaintiff's social networking accounts since the defendant failed to show that doing so would lead to the discovery of evidence relevant to the defense of the lawsuit.

Next, in *Patterson v. Turner Construction Company*, 2011 WL 5083155 (1st Dept. 2011), the court likened the plaintiff's private messages on Facebook to a diary and concluded that, if relevant, they were discoverable, but limited access to the Facebook data and required that the trial court first conduct an in camera review to determine if there was evidence relevant to the lawsuit.

By NICOLE BLACK
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In *Fawcett v. Altieri*, 2013 N.Y. Slip Op. 23010, the Richmond County Supreme Court addressed this issue of the discoverability of social media records and denied the defendant's motion to compel the production of the infant plaintiff's social media data, concluding that the request was overly broad and that the defendants had failed to make the necessary showing of relevance. Likewise, in *Kregg v. Muldonado,* 98 A.D.3d 1289 (4th Dept. 2012), the Fourth Department also denied unfettered access to the infant plaintiff's social media accounts.

This issue was again raised in *Del Gallo v. City of New York*, 2014 NY Slip Op 50929, a decision handed down just a few weeks ago. In *Del Gallo,* the plaintiffs brought personal injury and wrongful death lawsuits for injuries sustained by a mother and the death of her infant daughter when a tree limb fell on them in Central Park. During the discovery phase of the lawsuit, the defendants sought access to the entire contents of the mother's LinkedIn account, claiming that it would provide evidence relevant to her post-accident condition.

At the outset, the New York County Supreme Court noted that the medium doesn't change the analysis: "(C)ourts recognize that, generally, … discovery of … social networking postings … requires the application of basic discovery principles in a novel context.'"

Applying this concept and the standards established in the cases set forth above, the court declined to allow access to the plaintiff's LinkedIn account: "Defendants have not shown…that they are entitled to discovery of plaintiff's communications with former colleagues inquiring about her condition, or to all other material on plaintiff's LinkedIn account … (D)efendants offer no more than the mere hope of finding relevant evidence which is insufficient to warrant such disclosure … To be sure, anything that a person says or does might in some theoretical sense be reflective of her emotional state. But that is hardly justification for requiring the production of every thought she may have reduced to writing."

Again, this is yet another wise decision issued by a New York court that avoids a knee jerk reaction to a new medium. The court carefully applied precedent and assessed the discovery request within the context of the claims alleged and the likelihood that the evidence obtained from the LinkedIn account would result in information relevant to the litigation.

Although courts and ethics committees don't always get it right when it comes to social media, it's heartening to see that at least in the context of discovery proceedings, New York courts are consistently handing down decisions that will withstand the test of time.

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