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THE BUZZ
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Balancing Relevancy & Privacy Concerns Related To The Production Of Social Media Content

Legal professionals can no longer ignore social media when it comes to the search for relevant information. Courts across the country have faced with the tension between the discovery of potentially relevant social media content and an individual party's rights to privacy. Judges have developed unique ways to try to accommodate both concerns. The following is a brief summary of recent cases involving the discoverability of social media content.

Analysis Based on Relevancy and Scope

Courts have repeatedly held that social media content is no different than any other discoverable information; the producing party must provide relevant and unprivileged information to the requesting party. Nonetheless, in most cases, a request for general access to a party's social media account has been found to be overbroad. In *Tompkins v. Detroit Metropolitan Airport*, the court noted that pursuant to FRCP 26(b), the defendant had to make "a threshold showing that the requested information [general access to the plaintiff's Facebook account] is reasonably calculated to lead to the discovery of admissible evidence. Otherwise, the Defendant would be allowed to engage in the proverbial fishing expedition, in the hope that there might be something of relevance in Plaintiff's Facebook account."[1] In *Howell v. Buckeye Ranch, Inc.*, the defendant sought access to plaintiff's full social media account, arguing that such access would be analogous to obtaining copies of a plaintiff's medical or psychological records.[2] The court held that social media content may be discoverable, but defendant's request was overbroad, and directed the defendants to serve specific request for production.[3]

It is important to note that courts have even denied particularly stated requests that do not comply with the FRCP 26(b) threshold.[4]

Alternately, some courts have suggested that production of an individual's entire social media account may be warranted if the requesting party can meet an increased burden. In *Winchell v. Lopiccolo*, the court denied a motion to compel, finding no precedent for unfettered access to a party's Facebook account, "unless the requesting party first showed that information on the

1 Tompkins v. Detroit Metro. Airport, 278 F.R.D. 387, 388 (E.D. Mich. 2012). Ultimately the court held that the plaintiff's public postings did not show actions inconsistent with her medical claims and therefore were not sufficient to show the plaintiff's private postings were relevant. Id. at 389.
2 Howell v. Buckeye Ranch, Inc., No. 2:11-cv-1014, 2012 WL 5265170, at *1 (S.D. Ohio Oct. 1, 2012).
3 Id.
4 See, e.g., Mailhoit v. Home Depot U.S.A., Inc., 285 F.R.D. 566, 570-571 (C.D. Cal. 2012).

other party's public page contradicted their claims of injury or damages."[5] In at least two cases where the public portion of the individual's Facebook page contained information that clearly contradicted the injury claims alleged, the court granted full access to the injured party's Facebook account.[6]

Analysis Based on Privacy

Courts have also been asked to address whether an individual has an expectation of privacy in regards to social media accounts. Unsurprisingly, courts have differing opinions regarding whether privacy protections apply to social media content. In *E.E.O.C. v. Simply Storage Management, LLC*, the court allowed discovery of plaintiffs' Facebook and MySpace accounts, including discovery regarding groups and applications/games, noting that there is no expectation of privacy in data posted to social media sites, nor is targeted discovery of such data burdensome or oppressive.[7] Similarly, the court in *Zimmerman v. Weis Markets* found no reasonable expectation of privacy in social media because "[a]ll the authorities recognize that Facebook and MySpace do not guarantee complete privacy."[8] In other cases, such as *E.E.O.C. v. Original Honeybaked Ham Co. of Georgia, Inc., Fawcett v. Altieri*, and *Holter v. Wells Fargo & Co.,* courts have tempered discovery of social media content in the light of privacy concerns.[9]

Combined Analysis

The court in *E.E.O.C. v. Original Honeybaked Ham Co.* of Georgia, Inc. came up with a unique way to address both relevance and privacy concerns.[10] The court likened social media content to a folder labeled "Everything About Me" and ordered production, but attempted to accommodate privacy concerns by ordering plaintiffs to provide social media access and mobile phones to a special master for an *in camera* review.[11] In *Fawcett v. Altieri*, the court applied a two-pronged test that required (1) a determination of whether the content contained in/on the social media websites was "material and necessary," and (2) the application of a balancing test as to whether the production of the content would result in a violation of privacy rights.[12] The court ultimately held that in light of privacy concerns, the requesting party must provide a good faith basis for the request, saying that absent specific factual justification the carte blanche discovery of social media websites would be tantamount to a "fishing expedition" which the courts should not condone.[13]

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5 Id. at *2; c.f. Fawcett v. Altieri, 960 N.Y.S.2d 592, 597 (N.Y. Sup. Ct. 2013) (stating that extensive in camera review of social media content is an inappropriate use of court resources).
6 McMillen v. Hummingbird Speedway, Inc., No. 113-2012 CD, 2010 WL 4403285 (Pa.Com.Pl. Sept. 9, 2010), and Romano v. Steelcase, Inc., 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010).
7 E.E.O.C. v. Simply Storage Mgmt., LLC, 270 F.R.D. 430, 434 (S.D. Ind. 2010).
8 Zimmerman v. Weis Mkts., No. CV-09-1535, 2011 WL 2065410 (Trial Order) (Pa. Com. Pl. May 19, 2011).
9 See the discussion in the "Combined Analysis" section below.
10 E.E.O.C. v. Original Honeybaked Ham Co., No. 11-cv-02560-MSK-MEH, 2012 WL 5430974 (D. Colo. Nov. 7, 2012).
11 Id. at *2; c.f. Fawcett v. Altieri, 960 N.Y.S.2d 592, 597 (N.Y. Sup. Ct. 2013) (stating that extensive in camera review of social media content is an inappropriate use of court resources).
12 Fawcett, 960 N.Y.S.2d at 595.
13 Id. at 597-598.

In *Holter v. Wells Fargo & Co.*, the court stopped short of ordering plaintiff to produce all of her social media content, amid privacy concerns, and instead ordered plaintiff's counsel to review plaintiff's social media content and to produce any content or communication that revealed or referred categories relevant to the case.[14]

14 Holter v. Wells Fargo & Co., 281 F.R.D. 340, 344 (D. Minn. 2011).