Social Media Discovery in Florida After Nucci v. Target

by Christopher B. Hopkins

Despite the widespread use of internet social networking, there has been little recent case law clarifying social media discovery. This article discusses the few current decisions and trends nationwide, focusing on Florida and Facebook, so that practitioners can better frame requests or sharpen objections. [Due to space constraints, materials below are at www.hopkins.law]

Facebook remains ground zero for most social media discovery battles. In 2015, I wrote *Ten Steps to Obtain Facebook Discovery in Florida* which discussed the development of Florida's social media discovery precedent between 2011-2015. As discussed in that article, the 2015 case of *Nucci v. Target Corp.* was the most recent Florida appellate decision on social media discovery. Therein, the defendant selectively propounded a request for photographs which the plaintiff posted to Facebook. The *Nucci* court approved that limited request, agreeing that "there is no better portrayal of what an individual's life was like than those photographs which the individual has chosen to share through social media…" In injury cases like *Nucci*, images of the plaintiff typically overcome the low hurdle of relevance. To avoid being accused of impermissibly seeking "unfettered access" to the plaintiff's social media in injury cases, *Nucci* confirms that defendants should, at least initially, request photographs which the plaintiff posted online (during a relevant period). If a defendant needs more than pictures, a Louisiana case, *Impson v. Dixie Electric*, provides examples of appropriately tailored social media requests.

Fortunately for defense counsel, some courts have partially sustained objections to overbroad social media discovery and then cured the defendant's defective requests by ordering limited production. In *Hogwood v. HCA Holdings*, the defendant sought all social media content across various platforms (employing a form proposed in my now-outdated 2012 article, *Discovery of Facebook Content in Florida*). In an August 2015 order, circuit court Judge Meenu Sasser determined that the defendant's request was too broad. Post-*Nucci*, the circuit court ordered production of pictures during a limited period, finding that "all content on a Facebook page does not necessarily have the inherent value of a user's photo collection." Borrowing from *Nucci*, downloading images from Facebook was comparable to "a 'day in the life' slideshow produced by the plaintiff before the existence of any motive to manipulate reality."

Similarly, in a 2012 case involving a plaintiff with a jaw injury, the Florida district court in *Chiles v. Novartis* distilled a request for all Facebook content down to production of post-accident pictures of the plaintiff eating (but see *Palma v. Metro PCS*). Outside of Florida, courts have also trimmed social media requests and ordered production (see *Moll v. Telesector* and *Baxter v. Anderson*).

Plaintiff counsel, meanwhile, should combat social media discovery abuse by objecting on the basis of (1) relevance, (2) proportionality, and (3) vagueness/overbreadth. Objections relying on privacy, Stored Communications Act, and undue burden are historically overruled and should be avoided (see *Nucci and Hogwood*).

First, as for relevance, it is frequently argued that the defendant failed to establish that the request is reasonably calculated to lead to discovery of admissible evidence (see *Hogwood, Root v. Balfour*, and *Smith v. Hillshire*). Plaintiff's counsel should rely on *Nucci* to argue that non-photographic content on Facebook is not relevant absent certain circumstances.

Second, in the May 2017 case of *Gordon v. TGR Logistics*, a Wyoming court applied "proportionality" to a broad request for complete access to the plaintiff's two Facebook accounts. Following Federal Rule 26(b)(1), the *Gordon* court considered the amount in controversy, resources, and importance to the case. Similarly, following Rule 26(c)(1), the court stated "discovery can be burdensome even if it is inexpensive" due to annoyance, embarrassment, or oppression. Plaintiff lawyers should be mindful that *Nucci* held that blanket objections along these lines without explanation are insufficient; meanwhile, a Pennsylvania court in *Trail v. Lesko* was a bit more indifferent, noting that almost all discovery is annoying or embarrassing.

Third, almost all social media discovery disputes include claims of vagueness and overbreadth if the requests were not limited to specific time periods, damages, or keywords. Using a practice that is often disliked by practitioners, some courts have defined categories of content to be produced and then left it to the producing party to be sure they produce what was ordered (see *Moll*, *Gordon*, and the 2017 order in *Brown v. City of Ferguson*).

Lawyers should be aware that a party lying about what was posted online may swing social media discovery wide open (see *Gordon, Thurmond v. Bowman*, and *Crowe v. Marquette*). However, at least one court noted that deleted Facebook content must be still relevant to be compelled (*Feaster v. Dopps*). Truthful preservation can also be an issue, as seen in *League of Women Voters v. Detzner*.

Lawyers need to cooperate under local rules and Florida's ESI rules. Requesting counsel should include instructions on how to download content (see *Crowe and Gordon*). To resolve disputes, counsel should consider the two social media production models in *Gordon*: (1) production of Facebook content referencing the subject accident and injuries as well as any "hits" based upon keywords chosen by the parties or (2) creating broad descriptions of content to be produced within temporal limitations. Alternatively, parties should consider retaining counsel experienced in social media discovery to serve as a social media mediator or private special master.

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