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Discovery of Facebook Content in Florida Cases

By Christopher B. Hopkins and Tracy T. Segal

The constant expansion of social networking websites means that defense practitioners will increasingly have to confront issues of how and when to seek information from these sites during discovery. This article explains how to seek information from Facebook, and describes some recent court orders illustrating the scope of available discovery. Copies of the order in *Beswick v. Northwest Medical Center*, along with other unpublished Florida decisions addressing social media discovery, can be found on the "Members Only" section of the FDLA website, www.fdla.org.

"Facebook helps you connect and share with the people in your life," proclaims the Facebook homepage. As of December 2011, 152.5 million people in the United States were posting monthly on their Facebook accounts.[1] Based on these figures, it is likely that a personal injury plaintiff may have an active Facebook account. But how can you access that information in litigation? Courts around the country, including at least one Florida Circuit Court, have compelled discovery of Facebook and other social networking sites,[2] so long as parties meet the minimum showing that the information sought is relevant. This article will explain the steps to obtain Facebook content in discovery.

Facebook can provide a treasure trove of information in litigation. The American Academy of Matrimonial Lawyers says that 81% of its members have used or defended against evidence from social networking sites.[3] In specific cases, Facebook content revealed that some personal injury plaintiffs may have exaggerated their injuries. For example, a plaintiff whose leg was injured in a forklift accident claimed continued disability and testified at deposition that he never wore shorts because he was embarrassed of scars on his leg; meanwhile, photos on his Facebook page showing him riding a motorcycle and wearing shorts.[4] Similarly, a plaintiff who alleged she was in constant physical pain and needed a cane to walk posted photographs that showed her enjoying life with her family and wrote a status update about visiting the gym.[5] Another plaintiff, who claimed to be largely confined to her home and bed, posted pictures on Facebook and MySpace which revealed she had traveled from up and down the East Coast and enjoyed an active lifestyle.[6] In each of these cases, the courts allowed the defendants access to the plaintiffs' social networking accounts.

At the beginning of a case, counsel should search the internet for plaintiffs' names to determine whether they have accounts with Facebook or other social media websites. The information that the public can view on an individual's Facebook page will vary depending on the privacy settings that he or she has chosen. A person's name, profile pictures, and user ID are always publicly available.[7] Our experience is that most public Facebook profiles reveal some photos, number of friends, and minimal personal content. Print the public profile and ensure you note the date. As your case progresses, it is a good idea to revisit and re-print the person's profile. That public content, and any changes, may be important in persuading a court to permit access to the Facebook account and you should consider attaching these as exhibits to a Motion to Compel.

Discovery requests for social networking information need not be

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complex. The authors of this article have successfully used the following interrogatories:[8]

* Please identify any internet social media websites which Plaintiff has used and/or maintained an account in the last five (5) years. "Internet social media websites" includes but is not limited to Facebook, Twitter, LinkedIn, XboxLive, Foursquare, Gowalla, MySpace, and Windows Live Spaces.

* If Plaintiff has Internet social media website account(s), please provide her username and password or, alternatively, under Florida Rules of Civil Procedure Rule 1.340(c), please provide a copy of all non-privileged content/data shared on the account in the last five (5) years.

The authors' request for production seeking "copies of any document (including online material) which you received or accessed in order to answer Social Media Interrogatories" has also been enforced by a Florida court. To overcome objections that downloading or printing Facebook content is cumbersome, include in your discovery request a reference to Facebook's (simple) instructions for downloading all account content.[9] Finally, as a general practice, the authors request that plaintiffs execute a consent and authorization permitting them to obtain account content directly from the social medial website (this may lead to evidence of alteration or deletion).

Plaintiffs generally object to social media discovery on the basis of relevance, privilege, and the Stored Communications Act. Under Florida rules, "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action..."[10] "Discovery in civil cases must be relevant to the subject matter of the case and must be admissible or reasonably calculated to lead to admissible evidence."[11] Courts across the county have generally found that Facebook and other social media website postings are relevant to actions where a party's physical condition is at issue.[12] Social media accounts have also been found relevant to jurisdictional issues.[13]

In one Florida case, where parents claimed noneconomic damages arising from injuries to their daughter, the court found that social media discovery was clearly relevant to the subject matter of the litigation.[14] A limited number of non-Florida courts have focused on the information publically available on Facebook pages in deciding whether to require that non-public portions be produced in discovery.[15] Only a handful of courts have limited discovery where the public portions of a plaintiff's Facebook page did not provide a basis to expect a review of the entire account it to lead to relevant information.[16] Another court limited production to posts that "concern [Plaintiff's] health, mental or physical ..." because the Plaintiff had put her health at issue in the lawsuit, but presumably not her entire life.[17] Thus a practitioner may need to be prepared to support discovery requests with evidence and argument from publically available Facebook information (and any changes thereto).

There is some risk that litigants may delete posts or close their accounts to avoid discovery.[18] For this reason, the authors include in their discovery requests an interrogatory asking: "For any accounts identified in Answer to the Interrogatories above, please describe any changes you have made to your privacy or other account settings, and describe any content which you have deleted or erased after [a relevant date]." Likewise, as stated above, a signed authorization permits defense counsel to request the social media site to produce documentation of account activity. Of course, courts will sanction spoliation if it can be shown.[19] If a plaintiff's public Facebook information is not revealing but you suspect that they are sharing information with their approved "friends," questions in depositions of both the plaintiff and family members about the nature of the plaintiff's posts may be helpful to laying a foundation to compel production.[20] For example, testimony that a plaintiff posts regularly about her activities may provide a basis to require disclosure, whereas evidence that she only plays games or reads others' posts would be less persuasive.

Objections based on privacy, confidentiality or privilege are another common line of attack on social media discovery, but these objections have been uniformly rejected by courts addressing the issue. Long standing principles governing the right to privacy support this conclusion. In the pre-internet era of 1967, the United States Supreme Court noted that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth Amendment protection."[21] Posting information on the internet makes the information "available to any person with a computer and thus open[s] it to the public eye. Under these circumstances, no reasonable person would [have] an expectation of privacy regarding the published material."[22] As a Pennsylvania court wrote in rejecting a privilege claim for Facebook postings, "No court has recognized such privilege, and neither will we. By definition, there can be little privacy on a *social* networking website. ... Only the uninitiated or foolish could believe that Facebook is an online lockbox of secrets."[23] One court went so far as to order the production of Facebook and MySpace entries made by minor children who had been denied health care benefits for their eating disorders because

the minors themselves "chose to disclose the information."[24] The only Florida court known to the authors to have considered the issue rejected a privacy claim for Facebook postings.[25]

Finally, plaintiffs may raise objections to social media discovery based on the Stored Communications Act ("SCA"), 18 U.S.C. § 2701. Part of the Electronic Communications Privacy Act, the SCA adds some Fourth Amendment protections to digital and electronic communications by limiting the government's ability to compel Internet Service Providers ("ISPs") to disclose information about their users, and from restrictions on ISPs voluntary disclosure of customer and subscriber information to the government.[26] Applying the SCA to Facebook and other social media is complicated because the Act uses 1986 computer terminology which fits current technology imperfectly.[27] Nevertheless, at least one court has found that records cannot be subpoenaed directly from Facebook under the SCA.[28]

That said, the SCA is not an impediment to discovery from an individual plaintiff. The SCA does not apply to individuals, only to internet service providers and services which store electronic communications.[29] An individual producing his account information to opposing counsel or printouts of his a social medial account does not implicated the SCA. In addition, Florida courts have authority to compel a party to provide an authorization for release of records.[30] Without triggering the SCA, a court may require a plaintiff to execute a consent and authorization that may be served on Facebook (or another social medial site) to obtain all account information, including any altered or deleted content that may be retrievable.[31]

Although no Florida appellate court decisions have granted or limited discovery of social medial sites as of the date of this article, the trial court opinions are coalescing around three principles: (1) discovery must be relevant and reasonably likely to lead to admissible evidence; (2) there is no privilege or confidentiality for Facebook postings; and (3) the SCA does not apply to individuals providing information about their own social media accounts. The key to unlocking social media information in discovery is establishing the likelihood it will lead to admissible evidence.

1 Facebook, Inc.'s Form S-1 Registration Statement filed February 1, 2012 for Facebook's Initial Public Offering, available at http://www.sec.gov/Archives/edgar/data/1326801/000119312512034517/d287954ds1.htm

2 Although the focus of this article is on obtaining information from Facebook, the same considerations should apply to Twitter, MySpace, photo sharing sites such as Snapfish and Flikr, and any other blog or social networking sites.

3 "Divorce lawyers: Facebook Tops in Online Evidence in Court," USA Today, June 29, 2010. *See* http://ww.usatoday.com/tech/news/2010-06-29-facebook-divorce_N.htm. As this article notes, in family law cases, spouses may have continued access to each other's Facebook postings because they have not been "de-friended," know the password, or have friends in common with their spouse who are willing to provide information. Thus, the evidence is often available without the use of formal discovery.

4 *Zimmerman v. Weis Markets, Inc.*, 2011 WL 2065410 (Pa. C.P. Northumberland May 19, 2011).

5 *Largent v. Reid*, No. 2009-1823, slip. op. (Pa. C.P. Franklin Nov. 8, 2011).

6 *Romano v. Steelcase, Inc.*, 30 Misc. 3d 426 (N.Y. Sup Ct. 2010).

7 Facebook Date Use Policy – Sharing and finding you on Facebook, https://www.facebook.com/about/privacy/your-info-on-fb#controlpost.

8 The authors propound additional interrogatories regarding "internet photo, still image or video sharing websites which you have used and/or maintained an account" and "any blog or internet message board, chat room or public forum in which you have participated" tracking this language.

9 www.on.fb.me/downloadfbcontent.

10 Fla. R. Civ. P. 1.280(b).

11 *Allstate Inc. Comp. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995).

12 *See, e.g., Zimmerman v. Weis Markets*, 2011 WL 2065410*; Largent v. Reid, supra* n.5; *Romano v. Steelcase*, 30 Misc. 3d 426.

13 *In re: Air Crash Near Clarence Center, New York, On February 12, 2009*, 09-md-2085 (W.D. N.Y. 2011) (order dated December 17, 2011).

14 *Beswick v. Northwest Medical Center et. al.*, No. 07-020592 (17th Judicial Circuit, Broward Cty, FL, Nov. 3, 2011), available at www.bit.ly/beswickorder.

15 *See e.g., Romano v. Steelcase, Inc.*, 30 Misc. 3d at 430.

16 *Piccolo v. Paterson*, No. 2009-4979 (Pa. C.P. Bucks May 6, 2011) (denying requests to see photographs on plaintiff's Facebook page where defendant had already taken many post-accident pictures of Plaintiff's post-accident scars).

17 *Largent v. Reed, supra* n.5, at 13.

18 "Can Your Facebook Account Be Used Against You in Your Personal Injury Lawsuit?", John Cord Law, LLC, posted January 12, 2012, http://www.charmcitylawyer.com/can-your-facebook-account-be-used-against-you-in-your-personal-injury-lawsuit/; "Social Networking Warning Letter Form for Clients," Karen Koehler, posted May 18, 2011, http://www.karenkoehlerblog.com/2011/05/social-networking-warning-letter-form-for-clients/.

19 *Lester v. Allied Concrete Co.,* Nos. CL.08-150, CL09-223 (Va. Cir. Ct. Sept. 1, 2011); *Lester v. Allied Concrete Co.*, Nos. CL08-15, CL09-223 (Va. Cir. Ct. Oct. 21, 2011) (sanctioning Plaintiff $180,000 and his counsel $542,000 because counsel urged Plaintiff to "clean-up" photos from his Facebook account after discovery had been served. One deleted picture showed Plaintiff drinking with his arm around a young women, months after the traffic death of Plaintiff's young wife, which was the subject of the lawsuit.)

20 Counsel are cautioned against sending a "friend request" to the plaintiff or asking someone else to do so, to avoid ethics issues. *See* Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02, available at http: //www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServer-Resources CMSResources/Opinion 2009-2.pdf.

21 *Katz v. United States*, 389 U.S. 347, 351 (1967) (finding the expectation of privacy applies to phone calls made from a public telephone booth).

22 *Moreno v. Hanford Sentinel, Inc.*, 172 Cal. App. 4th 1125, 1130 (Cal. 5th Dist. 2009) (dismissing invasion of privacy claim where a MySpace post was republished in the newspaper).

23 *Largent v. Reed, supra* n.5, at 10.

24 *Beye v. Horizon Blue Cross Blue Shield of New Jersey*, 2007 WL 7393489 *2 (D.N.J. 2007), *rev'd in part and affi'd in relevant part* 2008 WL 3064757 (D.N.J. 2008).

25 *Beswick v. Northwest Medical Ctr., supra* n.14.

26 Pub. L. No. 99-508, 100 Stat. 1848 (1986).

27 *See Largent v. Reed, supra* n.5, at 10.

28 *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965 (C.D. Cal. 2010).

29 *Largent v. Reed, supra* n.5, at 11.

30 *Rojas v. Ryder Truck Rental, Inc.*, 641 So. 2d. 855, 857 (Fla. 1994).

31 *Beswick v. Northwest Medical Ctr., supra* n. 14, at 4.