BAKER DONELSON
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THREE TYPES OF DISCOVERY ORDERS FOR SOCIAL MEDIA

Social Media Discovery
August 23, 2012
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ADVERSARY FOCUSED

Requesting Party Review. Usually upon a showing of relevance in the public portions of the site, requesting party is given full access to social media site by provision of *usernames and passwords or consent* to the social media company.

***Thompson v. Autoliv ASP, Inc.*, 2012 WL 2342928 (D. Nev. 2012)** (vehicular product defect claim with substantial injuries; plaintiff was ordered to provide all Facebook and MySpace account information to defendant for review under a detailed protocol).

***Leduc v. Roman*, 2009 CarswellOnt 843 (February 20, 2009)** (opposing counsel authorized to review Facebook account in a loss of enjoyment of life claim resulting from a car accident).

***Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (Sup. Ct. 2010)** (Court ordered party to provide opposing counsel a *consent and authorization* for direct access).

***Largent v. Reed*, No. 2009-1823, slip op. (Pa. C.P. Franklin Co. Nov. 8, 2011)** (Party ordered to produce *Facebook username and password* for discovery of physical activity related to damage claims).

***Zimmerman v. Weis Markets, Inc.*, 2011 WL 2065410 (Pa. Com. Pl.)** (Plaintiff ordered to provide opposing party *all passwords and log-in information*).

But See….

***Tompkins v. Detroit Metro. Airport*, 2012 WL 179320 (E.D. Mich. Jan. 18, 2012)** (holding that defendant did not prove that plaintiff giving authorization to her Facebook was reasonably calculated to lead to the discovery of admissible evidence and that this request was overly broad).

COURT FOCUSED

In Camera Review. Judge is given access to the social media site directly (by provision of password or "friending" the litigant), and reviews site content for discoverability. Requires Court time and technological proficiency, as well as exposure to significant irrelevant information.

***Barnes v. CUS Nashville*, LLC, 2010 WL 2265668 (M.D. Tenn.)** (in a personal injury case, Judge offered to "friend" the plaintiff on Facebook to review her account and disseminate relevant information to the parties involved).

***Offenback v. L.M. Bowman, Inc.*, 2011 WL 2491371 (M.D. Pa.)** (after conducting full review of Plaintiff's Facebook account, and a very limited production, Judge opined that the account "reveals little beyond routine communications with family and friends, an interest in bluegrass and country music, a photography hobby, sporadic observations about current events, and a passion for the Philadelphia Phillies that was not dampened after he moved to Kentucky from Pennsylvania.").

***Bass ex rel. Bass v. Miss Porter's School*, 2009 WL 3724968 (D.Conn.)** (Judge ordered plaintiff to release a complete copy of Facebook to the court for review stating that "production should not be limited to Plaintiff's own determination of what may be 'reasonably calculated to lead to the discovery of admissible evidence.'").

***Loporcardo v. City of New York*, 2012 WL 1231021 (Sup. Ct. Richmond Co. April 9, 2012)** (Judge conducts full review of party's Facebook account).

OWNER FOCUSED

Producing Party Review. Fashion a searching and review protocol or methodology that locates relevant information, and pre-production review by site owner or their counsel. Direct access or Court review found to be inappropriate and overly broad.

***EEOC v. Simply Storage Management.*, LLC, 270 F.R.D. 430 (S.D. Ind. 2010)** (in case alleging employment discrimination and emotional damages, employer defendant sought full access to complainants' Facebook accounts; Court ordered that "Discovery is intended to be a self-regulating process that depends on the reasonableness and cooperation of counsel. Here, in the first instance, the EEOC's counsel will make those [relevancy] determinations based on the guidelines the court has provided."). Court also noted that discovery of social media content"

> "requires the application of ***basic discovery principles in a novel context***. … [T]he challenge is to define appropriately broad limits – but limits nonetheless – on the discoverability of social communications in light of a subject as amorphous as emotional and mental health, and to do so in a way that provides meaningful direction to the parties."

***Mackelprang v. Fidelity Nat. Title Agency of Nevada, Inc.*, 2007 WL 119149 (D. Nev.)** (Court denied defendant's discovery request for all of plaintiff's MySpace messages because they were overly broad and "Nothing . . . prevents Defendants from serving such discovery requests on Plaintiff to produce her Myspace.com private messages that contain information regarding her sexual harassment allegations in this lawsuit.").

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OTHER TRIAL ISSUES FOR SOCIAL MEDIA

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PRIVACY OBJECTIONS

No Established Exceptions. There are no known cases that recognize a broad social media privacy right that would protect social media from civil discovery process served on the social media site owner.

***Tompkins v Detroit Metro. Airport*, 2012 WL 179320 (E.D. Mich. Jan. 18, 2012)** ("I agree that material posted on a 'private' Facebook page, that is accessible to a selected group of recipients but not available for viewing by the general public, is generally not privileged, nor is it protected by common or civil law notions of privacy.").

***Loporcardo v. City of New York*, 2012 WL 1231021 (Sup. Ct. Richmond Co. April 9, 2012)** ("When a person creates a Facebook account, he or she may be found to have consented to the possibility that personal information might be shared with others, notwithstanding his or her privacy settings, as there is no guarantee that the pictures and information posted thereon, whether personal or not, will not be further broadcast and made available to other members of the public.").

***Held v. Ferrellgas, Inc.*, 2011 WL 3896513 (D. Kan.)** ("Defendant . . . mitigate[d] Plaintiff's privacy concerns by allowing Plaintiff to download and produce the information himself, rather than providing login information.").

Compare....

United States v. Jones, 565 U.S. __ (2012) ("I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection." (Sotomeyer, concurring)).

FEDERAL LAW

Barrier to Direct Discovery to Social Media Provider. Federal law will pose a barrier to direct civil subpoenas to many social media providers because of certain restrictions on their ability to produce information.

Stored Communications Act ("SCA"), 18 U.S.C. secs. 2701-11 (imposing various restrictions on the ability of service providers to produce information in civil litigation).

***Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965 (C.D. Cal. 2010)** (Applying the SCA to Facebook wall postings and comments on MySpace and finding that they are in electronic storage for purposes of the SCA).

***Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. Feb. 17, 2004)** ("The subpoena power is a substantial delegation of authority to private parties, and those who invoke it have a grave responsibility to ensure it is not abused.").

Only Applies to Service Providers, not the Litigant. The SCA does not apply to the private party in litigation, and therefore does not act as a barrier to general discovery.

***People v. Harris*, Docket No. 2011NY080158 (NY Crim. Ct. June 30, 2012) (Sciarrino, J.)** (Ordering production from Twitter and noting: "Consider the following: a man walks to his window, opens the window, and screams down to a young lady, 'I'm sorry I hit you, please come back upstairs.' … Well, today, the street is an online, information superhighway, and the witnesses can be the third party providers like Twitter, Facebook, Instagram, Pinterest, or the next hot social media application.").

JUROR MISCONDUCT (EXAMPLES)

***Dimas-Martinez v. State of Arkansas*, 2011 Ark 515, 2011 Ark. LEXIS 593 (Ark. Dec. 8, 2011)** (murder conviction overturned on juror misconduct for accessing Twitter during trial and tweeting "Choices to be made. Hearts to be broken.", "If its wisdom we seek … we should run to the strong tower.", and "It's over" during trial and deliberation). The Court wrote:

> "**Finally, we take this opportunity to recognize the wide array of possible juror misconduct that might result when jurors have unrestricted access to their mobile phones during a trial**. Most mobile phones now allow instant access to a myriad of information. Not only can jurors access Facebook, Twitter, or other social media sites, but they can also access news sites that might have information about a case. There is also a possibility that a juror could conduct research about many aspects of a case."

***State v. Smith*, No. M2010-01384-CCA-R3-CD (Ct. of Crim. App. March 2, 2012)**. Court did not overturn a conviction because of communication between juror (Scott Mitchell) and witness (Adele Lewis) as the Court found the following to be a social communication that did not seek improper information:

> "*Scott Mitchell*: 'A-dele!! I thought you did a great job today on the witness stand … I was on the jury … not sure if you recognized me or not!! You really explained things so great!!'
> *Adele Maurer Lewis*: 'I was thinking that was you. There is a risk of a mistrial if that gets out.'
> *Scott Mitchell*: 'I know … I didn't say anything about you … there are 3 of us on the jury from Vandy and one is a physician (cardiologist) so you may know him as well. It has been an interesting case to say the least.'"