Social networking and civil discovery (a case study)

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Abstract

Over the past few years, the use of social networking websites, like Facebook and MySpace, has exploded among the general population. However, the use of social networking information in litigation, such as personal injury suits and divorce cases, and the corresponding legal doctrines pertaining to discovery of that information, have unfortunately not kept pace with the technology or popular use of online social networking.

Facebook is by far the most utilized website at this moment in time. As described by the makers of Facebook, it is a social utility that helps people communicate with their friends, family, and coworkers.

Keywords: Facebook, MySpace, social networking, social media and discovery

Introduction

A recent law review article on social networking discovery notes that "it is unlikely. . .the civil litigant not only uses social networking sites, but also does so on a daily basis. . . .In civil lawsuits for damages, especially in the personal injury and insurance litigation context, potentially relevant discoverable information is often abundant on these sites." Even E. North, Comment, Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites, 58 U. Kan. L. Rev. 1279, 1286, (2010).

Accordingly, the scope of discovery into social networking information "requires the application of basic discovery principles in a novel context," and the issue to be addressed by the courts in this regard is to "define appropriately broad limits. . . .on the discoverability of social communications. . . .and to do so in a way that provides meaningful direction to the parties."EEOC v. Simply Storage Mgmt., 270 F.R.D. 430, 434 (S.D. Ind. 2010).

No expectation of privacy exists in the social networking context, perhaps even on the Internet as a whole. A New York State trial court recently noted in Romano v. Steelcase Inc., 907 N.Y.S. 2d 650, 657 (N.Y.Sup. Ct. 2010), regarding Facebook's own terms of use:

You post User Content. . . . on the Site at your own risk. Although we allow you to set privacy options that limit access to your pages, please be aware that no security measures are perfect or impenetrable. . . .When you use Facebook, certain information you post or share with third parties (e.g., a friend or someone in your network), such as personal information, comments, messages, photos, videos. . .may be shared with others in accordance with the privacy settings you select. All such sharing of information is done at your own risk. Please keep in mind that if you disclose personal information in your profile or when posting comments, messages, photos, videos, Marketplace listing or other items, this information may become publicly available.

"Social networking sites, by their very nature, involve the sharing of personal information" North; 58 U. Kan. L. Rev. at p. 1289. Keep in mind that anything you post on the Internet or through social networking websites like Facebook might be disclosed to the public at some point.

Premise

Courts faced with ruling on discovery requests involving social media sites are forging new law. Courts can and do issue discovery orders compelling a party of a lawsuit to grant an opposing party access to his or her Facebook page or to permit in camera review of social media sites set to private settings.

Rules of Civil Procedure in most states provide for liberal discovery, e.g., Generally, discovery is liberally allowed with respect to any matter, not privileged, which is relevant to the cause being tried.

Scenario "A"

In McMillen v. Hummingbird Speedway, Inc., 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, the plaintiff claimed substantial injuries, including possible permanent impairment, loss and impairment of general health, strength, and vitality, and inability to enjoy certain pleasures of life, after he was rear-ended during a cool down lap following a July 7, 2007, stock car race. The

court granted defendants' Motion to Compel Discovery and ordered the plaintiff to provide his Facebook and MySpace user names and passwords to counsel for defendants after defendants reviewed the public portion of plaintiff's Facebook account and discovered comments about his fishing trip and attendance at the Daytona 500 race in Florida, reasoning without more, the complete access afforded to the Facebook and MySpace operators defeats McMillen's proposition that his communications are confidential. The law does not even protect otherwise privileged communications made in the presence of third parties.

When a user communicates through Facebook or MySpace, however, he or she understands and tacitly submits to the possibility that a third-party recipient,

Scenario "B"

In Zimmerman v. Weis Markets, Inc., No. CV-09-1535 (Northumberland Co., May 19, 2011), the plaintiff had claimed serious physical injuries from an on-the-job accident. Photos that he posted to social media sites cast doubt on the severity of his claimed injuries and whether they predated his work-related accident. The publicly available photos induced the defendant to believe that further relevant evidence might exist on the password-protected parts of the site accessible only by the plaintiff's "friends." The plaintiff claimed that he had a privacy interest in the password-protected materials. In ruling against plaintiff on this issue, the court noted that "All the authorities recognize that Facebook and MySpace do not guarantee complete privacy. Facebook's privacy policy explains that users post any content at the site at their own risk and informs users that this information may become publicly available."

Scenario "C"

In Romano v. Steelcase Inc., 30 Misc. 3d 426, 907 N.Y.S.2d 650, 2010 N.Y. Misc. LEXIS 4538, 2010 NY Slip Op 20388 (2010), Defendant filed a motion for access to plaintiff's current and historical social networking pages and accounts, claiming that the plaintiff had placed certain information on the sites that it believed were relevant to the extent and nature of her injuries, especially her claims for loss of enjoyment of life. The court found, inter alia, that in light of the fact that the public portions of the plaintiff's social networking sites contained material that was contrary to her claims and deposition testimony, there was a reasonable likelihood that the private portions of her sites might contain further evidence such as information with regard to her activities and enjoyment of life, all of which were material and relevant to the defense of her personal injury action. The plaintiff's right to privacy was outweighed by the defendant's need for the information. As neither of the social networking sites guaranteed complete privacy, the plaintiff had no legitimate reasonable expectation of privacy. The defendant's attempts to obtain the information via other means were thwarted by the plaintiff's counsel. Consequently, the defendant was entitled to the information.

Discussion Questions

1. Where a litigant voluntarily posts pictures and information on social media sites to share with other users of the sites, he or she cannot claim to possess any reasonable expectation of privacy to prevent a defendant from access to such information. How would you advise a client regarding this problem?

Many social media site users are lulled into a false sense of security and anonymity based on the vast amount of data and information contained on the World Wide Web. People are generally unaware of how much information, which they considered to be private, can be viewed with a simple name search in one of the many online search engines. Although most social media sites have privacy and blocking features these can be notoriously hard to use and navigate so most people choose to ignore them all together. But beware of deleting your social media sites after litigation has commenced or is reasonably anticipated to commence since this could be viewed by the court as destruction of evidence and subject to fines or sanctions. Ultimately the only sure safe bet is to not use social media sites altogether but if you feel you must use them then you should operate under the principle that anything you post or allow to be posted could eventually be viewed by the public no matter how secure or private you feel the information may be.

2. Where a litigant puts physical condition at issue, he or she must anticipate reasonable discovery to rebut the claims. What would you advise a client under these circumstances. Both before and/ or during litigation.

Social media site users generally feel a need to update people about the daily or even hourly occurrences in their lives. Know that although you feel a need to stay connected to as many people as possible that the information you are relating to the public can be detrimental to litigation. Pictures of you out at the club or playing in a recreation sports league can be detrimental to a personal injury case especially if you are claiming damages from a debilitating injury suffered in an auto accident. Again destroying information from social media sites after litigation has commenced or is likely to commence can be viewed as destruction of evidence the best practice is to use the old-fashioned telephone to update friends and loved ones of your condition and avoid an embarrassing revelation in negotiations or court.

3. Courts will not permit a fishing expedition: discovery in the social media context requires a threshold showing that publicly accessible portions of a social networking site contain information that would suggest that further relevant postings are likely to be found by access to the non-public portions. See generally McCann v. Harleysville Insurance Company, 78 A.D.3d 1524 (N.Y.S.2d 2010) Do you believe this to be a fair statement of the law? Why or why not?

This is a fair statement of the law. The purpose behind discovery is to adequately prepare each party for trial not to publicly embarrass the opposing party. Although all discoverable evidence may not be admissible at trial all admissible evidence must be relevant. So if you take this game of logic to its ultimate conclusion although all discoverable evidence is not admissible but all admissible evidence must be relevant, and the ultimate purpose of discovery is to lead to

relevant admissible evidence at trial, then all discoverable evidence should be reasonably calculated to either be relevant or lead to relevant evidence. This is why a threshold showing of relevancy is important and distinguishable from admissible evidence.

4. A court may decline to review materials in camera: 1) strain on court resources, 2) unfair to require court to guess at what may be germane to case. But see Barnes v. CUS Nashville, LLC, 3:09-cv-00764 (M.D. Tenn) (June 3, 2010) (court offers to friend witnesses) How would you address this concern when raised by a Judge ? Give a reasoned thoughtful response.

This should be a red flag for any attorney. By their very nature a Judge must remain a neutral and detached observer throughout the legal process. Their job is to call the "ball and strikes" in the courtroom. Anytime a judge can be viewed as preferring one side over the other before both parties have had an opportunity to present their entire case, as in this example, there should be a cause for concern about his/her ability fairly and impartially decide the issues between the parties. This may be an appropriate time to make a recusal motion. Recusal motions should never be taken lightly, but in a scenario such as this one where the judge appears to be favoring one side over the other by suggesting they should aid in the discovery process, a recusal by the Judge may be the only way to zealously ensure the proper and fair representation of your client.

5. How would you handle the issue of third party rights of confidentiality regarding material subject to a discovery request?

Third party confidentiality is always a concern for the Court. Because they are not a party to the case they enjoy a certain heightened sense of privacy that the parties to the litigation may not necessarily enjoy. Although third party witnesses are often times integral to the legal process the relevant evidence which they can present to the Court is often limited to a very specific area within the overall litigation itself. This is where a pre-trial motion for a protective order or motion in limine may be appropriate for a third party witness. This protective order should address the concerns of the third party witness to limit access to non-relevant information by the parties to the ligation while simultaneously balancing the needs of the Court and parties to elicit relevant information that the third party witness may possess in order effectuate the legal process. One common method employed by Courts is to redact non-relevant information from physical papers or documents or to limit the scope of a third party witness' testimony while on the stand.

6. What, if any, limitations would you place on discovery requests? This would apply to parties of the litigation, as well as non-parties.

Most limits on discovery requests are set forth in the individual states' Rules of Court. This is obviously a good place to start when considering such limitations. Beyond these established rules, and as we have previously discussed, discoverable evidence should lead to or reasonably be calculated to lead to relevant evidence. But as we have seen just because evidence is relevant and discoverable does not necessarily mean it is admissible. While admissibility is a question for the trial court relevancy should always remain the guiding principle of discovery**.**

References List

1. *Even E. North*, Comment, Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites, 58 U. Kan. L. Rev. 1279, 1286, (2010).

2. *EEOC v. Simply Storage Mgmt.*, 270 F.R.D. 430, 434 (S.D. Ind. 2010).

3. *Romano v. Steelcase Inc.*, 907 N.Y.S. 2d 650, 657 (N.Y.Sup. Ct. 2010).

4. *North*; 58 U. Kan. L. Rev. at p. 1289.

5. *McMillen v. Hummingbird Speedway, Inc.*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270.

6. *Zimmerman v. Weis Markets, Inc.*, No. CV-09-1535 (Northumberland Co., May 19, 2011).

7. *Romano v. Steelcase Inc.*, 30 Misc. 3d 426, 907 N.Y.S.2d 650, 2010 N.Y. Misc. LEXIS 4538, 2010 NY Slip Op 20388 (2010).

8. *McCann v. Harleysville Insurance Company*, 78 A.D.3d 1524 (N.Y.S.2d 2010).

9. *Barnes v. CUS Nashville*, LLC, 3:09-cv-00764 (M.D. Tenn) (June 3, 2010).

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