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Facing the Impact of Facebook and Other Social Media on Discovery: The Court of Appeals Clarifies

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By the sharing of important and mundane events from the daily lives of people on sites such as Facebook, social media networks have become pervasive in the lives of people of all ages. Vacations, weekend activities, dining adventures, shopping sprees, theater outings, concert events, and luxury purchases appear regularly on social media sites. In fact, many social media participants feel increasingly compelled to post or even boast about their life experiences.

For these reasons, it should come as no surprise that photographs and postings on social media have become a rich and significant source of information regarding the lifestyle analysis of social media participants going through divorce. As a result, pursuing discovery of social media sites, particularly Facebook, is becoming an integral component of matrimonial litigation. Thus, while Facebook and other social media networks may generate happiness by capturing the laughter and joy of participants, it may also sow the seeds of regret for the same people in divorce litigation.

The Factual Predicate for Discovery

Until recently, New York law concerning the production of social media documents was best enunciated in a personal injury matter. In the case of *Tapp v. NYS Urban Development Corp.*, the First Department held that to be entitled to discovery of a Facebook account, the seeking party would be required to set forth a factual predicate for the demand. Specifically, the court would look for information that contradicts or conflicts with the restrictions, disabilities and losses alleged by a plaintiff.[1]

Accordingly, a litigant in a divorce action seeking social media discovery may first have to establish that the party's lifestyle as depicted in his or her Facebook account contradicts or conflicts with that party's claims concerning lifestyle issues in the action for divorce.

Private Postings, Public Postings

To further complicate matters, courts have struggled with discovery issues regarding the distinction between the discovery of a party's private media postings versus public social media postings. This struggle essentially creates a false dichotomy between the public and private portions of an individual's social media account. Many courts following *Tapp* have held that discovery of a party's Facebook account requires that the party seeking discovery of material from the private portion of the party's account demonstrate that there was material in the public portion of the account that contradicted or conflicted with the party's claims.

For example, the First Department found in *Spearin v. Linmar, L.P.* that the "defendant established a factual predicate for discovery of relevant information from private portions of plaintiff's Facebook account based upon its submissions of plaintiff's public profile picture..."[2] Similarly, in another matter, the Appellate Term held that "defendant demonstrated that plaintiff's Facebook profile contained photographs that were probative of the issue of the extent of her alleged injuries and it is reasonable to believe that other portions of her Facebook records contain further evidence relevant to that issue."[3]

However, it is noteworthy that the standard in statutory civil procedure law is for full disclosure of all items that are material and necessary in an action, without regard to the burden of proof.[4] This standard is supported by the Court of Appeals, which has stated that, "the words, 'material and necessary', are, in our view, to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity."[5] The court clarified that the test is "usefulness and reason" and the term "necessary" is thus "held to mean 'needful' and not 'indispensable.'"[6]

Thus, contrary to the traditional liberal discovery standard for full discovery of all information "material and necessary," the courts after *Tapp* restricted the standard for the discovery of social media records to whether there is publicly available proof from within the social media account itself that undermines the social media account user's claims in the litigation. In no other context is a litigant entitled to access to a potential smoking gun from within the category of discovery sought in order to establish a predicate for full disclosure. This standard permits the social media user to determine what, if anything at all, is shared publicly from the account by adjusting the privacy settings on the particular social media network. In the event the settings maximize privacy (or the social media account is deactivated), it could be possible for the litigant to frustrate the purpose of pretrial discovery.

A New Threshold

In the recent case of *Forman v. Henkin*, the Court of Appeals addressed this issue and rejected the precedent that had developed after *Tapp* which allowed a party to essentially "unilaterally obstruct disclosure merely by manipulating 'privacy' settings or curating the materials on the public portion of the account."[7] The Court of Appeals reasoned that: "New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exists; rather the request need only be appropriately tailored and reasonably calculated to yield relevant information."[8]

As such, the Court of Appeals rejected the notion that a party's privacy settings govern the scope of disclosure of social media information. However, the Court of Appeals did caution that simply demanding disclosure of the party's entire Facebook account is an improper demand. Specifically, the Court found that such a demand is overbroad and onerous and would constitute an improper fishing expedition. In determining the propriety of a discovery demand requesting social media information, the Court of Appeals enunciated the following test:

> … courts should first consider the nature of the event giving rise to the litigation… as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account. Second, balancing the potential utility of the information sought against any specific "privacy" or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials… Temporal limitations may also be appropriate… Moreover, to the extent that account may contain sensitive or embarrassing materials of marginal relevance, the account holder can seek protection from the court…[9]

Accordingly, the Court of Appeals has now conclusively confirmed that "for the purpose of disclosure, the threshold inquiry is not whether the materials were private but whether they are reasonably calculated to contain relevant information."[10]

After the Court of Appeal's holding in *Forman*, attorneys may more easily seek discovery of social media documentation to dispute a litigant's claim concerning his or her lifestyle and to dispute specific assertions contained in the party's Statement of Net Worth.

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1. *Tapp v New York State Development Corp.*, 102 A.D.3d 620 (1st Dept. 2013).
2. *Spearin v. Linmar, L.P.*, 129 A.D.3d528 (1st Dept. 2015).
3. *Nieves v. 30 Ellwood Realty LLC*, 39 Misc.3d 63 (App. Term 1st Dep't 2013).
4. CPLR 3101.
5. *Allen v. Cromwell-Collier Pub. Co.*, 21 N.Y.2d 403 (1968).
6. *Id.* at 406-07.
7. *Forman v. Henkin*, 30 N.Y.3d 656 (2018).
8. *Id.*
9. *Id.*
10. *Id.*