



How to Navigate Social Media Discovery in New York

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With the increased use of social media, the laws regarding such have been evolving. Discovery of social media has become routine and can be extremely helpful during the discovery phase of litigation. Now that the use of social media discovery has become common, the question becomes how to go about making a request and physically obtaining social media evidence. Through the evolution of the cases involving social media, the courts have established certain requirements that a party must meet to be entitled to production of the opposing party's social media evidence.

First, a party seeking to obtain social media evidence must make a request and in that request, prove to the court that the evidence sought is relevant. In *Kregg v. Maldonado*, the Appellate Division, Fourth Department ruled that a party must make a "factual predicate with respect to the relevancy of the evidence." 98 A.D.3d 1289, 1290 (4th Dep't 2012) (citing *Crazytown Furniture v. Brooklyn Union Gas Co.*, 150 A.D.2d 420 (2d Dep't 1989)). In establishing a "factual predicate," the party requesting the e-discovery must show that posts found on the social media website will likely contradict the plaintiff's claim; thus proving its usefulness in the current litigation. The courts agree that the party seeking the e-discovery must make a showing in its request that "at least some of the discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on her claim." *Richards v. Hertz*, 953 N.Y.S.2d 654, 656 (2d Dep't 2012); see also *Patterson v. Turner Constr. Co.*, 88 A.D.3d 617, 618 (1st Dep't 2011). In making its request, a party seeking discovery of a social media website must keep in mind that the court will not authorize a broad discovery request. The request must be "narrowly-tailored" to seeking social media evidence that relates to the claim at hand. The court will strongly avoid the grant of a fishing expedition when it comes to social media. *Maldonado*, 98 A.D.3d at 1290. To prove that a request is not overbroad, a party should first search the opposing party's public portion of its social media page and inquire as to these portions at a deposition. This will aid the party in proving that its request is indeed relevant. Thus, in order to obtain an order from the court granting access to social media evidence, a party must prove that its request is narrowly-tailored to evidence that is relevant and will contradict plaintiff's claim.

The question then becomes how to physically obtain this discovery after receiving a court order. Generally, in order to avoid an over-broad grant of accessibility to e-discovery, the court in some instances may conduct an in-camera review of the social media pages and only grant the requesting party access to certain portions of the pages that are truly relevant. *People v. Harris*, 36 Misc. 3d 868, 879 (Crim. Ct., N.Y. Cnty. 2012) (ruling that the court would conduct an in camera inspection of the defendant's Twitter account and authorize relevant information for discovery). Once the court decides whether it will grant access to the social media pages and which parts of the

pages it will grant access to, the party from whom that information is sought must comply with the court order and produce that information. Social media discovery may be sought from either the user of the social media website or the host of the social media website itself. *Davids v. Novartis Pharm. Corp.*, No. CV06-0431 (E.D.N.Y. Feb. 24, 2012) (denying request for discovery of plaintiff's social media page sought from plaintiff herself because it was an "overly broad fishing expedition"); *People v. Harris*, 36 Misc. 3d 613, 624 (Crim. Ct., N.Y. Cnty. 2012) (ordering Twitter, a third party social media website, to comply with a subpoena seeking electronic discovery). It should be noted that in some instances, the party may no longer have access to past posts on its social media pages. When this situation arises, the electronic discovery must be sought directly from the social media host, such as Facebook or LinkedIn. In instances where the discovery request is made to the social media website, the social media user must execute an authorization for the records, which is then provided to the social media host. The website is then responsible for producing that information to the requesting party. *Davids v. Novartis Pharm. Corp.*, No. CV06-0431 (E.D.N.Y. Feb. 24, 2012) (requesting party sought plaintiff's signature for release of information from that user's personal social media page).

If you or your company has any questions or concerns regarding social media and e-discovery, contact James G. Ryan at jryan@cullenanddykman.com or via his direct line at 516-357-3750.

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