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# INSIGHT: Making Social Media #Discoverable (or Not): Lessons Learned from Forman



By Evan Glassman, Michael Keough, and Meghan Newcomer

Social media, an essential form of communication in our personal lives for over a decade, has only in the last few years become a weapon among the traditional discovery tools available to New York litigators. The delay was largely a result of a lack of clarity in the law. No longer: earlier this year, the New York State Court of Appeals addressed these issues head on in *Forman v. Henkin*, 30 N.Y.3d 656 (2018), and lower courts have now been applying the *Forman* framework for almost a year.

In *Forman*, the Court of Appeals was asked to decide whether non-public social media posts were subject to discovery under New York State's liberal disclosure policy. While the Court declined to find that private social media posts were *per se* discoverable, it did grant the appellant's request for discovery of specific posts. In doing so, the Court announced a two-part test for evaluating discovery requests for private social media posts:

- First, courts should "consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found" in the social media account. *Id.* at 665.
- Second, courts should balance the "utility of the information" against privacy concerns and issue "an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of non-relevant materials." *Id.* As an example, the Court of Appeals in *Forman* cited the lower court's order for production of private social media posts except for those containing "nudity or romantic encounters" in order to address privacy concerns. *Id.*

This two-pronged test marks the first time the Court of Appeals has announced a specific test for the lower courts to apply when evaluating requests for social media discovery. Almost ten months after *Forman* was decided, courts applying the two-pronged test have presented practitioners with several practice tips—both for using social media proactively and for thwarting overly broad social media discovery requests:

- **Limit the scope of demands to "seek specific information material that is necessary to the prosecution or defense of the action."** *Paul v. The Witkoff Group*, No. 151322/2014, 2018 WL 1697285 (Sup. Ct. N.Y. Cnty. Apr. 03, 2018). Where a personal injury plaintiff claimed "severe depression, anxiety, stress,

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anxiousness and suicidal thoughts,'' the court granted social media discovery for the defendant's requests that would ''result in the disclosure of relevant evidence bearing on plaintiff's claim.'' *Id.* at *1. However, the court denied two of defendants' requests, which were ''over-broad and not sufficiently tailored with scopes and temporal limitations.'' *Id.* at *2.

■ **Draft the timeframe of demands carefully – requests must be ''reasonably tailored to obtain discovery relevant to the issues in the case.''** *Doe v. Bronx Preparatory Charter Sch.*, 160 A.D.3d 591 (1st Dep't 2018). In *Doe*, plaintiff student was allegedly attacked on school premises. *Id.* at 591. Plaintiff provided access to her social media accounts for two months prior to the attack. *Id.* Defendant requested the court sanction the plaintiff or compel further discovery of social media and cell phone history for failing to comply with defendant's request for access to social media accounts for five years prior to the incident. *Id.* The court declined to impose sanctions, finding defendant's demand for five years' worth of social media accounts overly broad and not reasonably tailored to obtain relevant discovery. *Id.* Instead, the court found two months prior to the incident to be ''a reasonable period of time'' for which to provide access to social media accounts. *Id.*

■ **Disclosure of private social media can be obtained in discovery before any depositions are taken.** *Christian v. 846 6th Ave. Property Owner, LLC*, No. 157553/2017, 2018 WL 2282883, at *2 (Sup. Ct. N.Y. Cnty. May 18, 2018). In this case the court rejected defendants' contention that *Forman* requires that a ''party must wait until after a deposition before demanding disclosure of the private portions of an individual's social media account.''

■ **If there is a risk of deletion, seek injunctive relief.** *Paul*, 2018 WL 1697285, at *2. In *Paul*, the plaintiff in a personal injury action denied having any social media accounts at a deposition. Medical records later revealed that plaintiff had referenced statements he made on social media to his health care provider, and had deactivated his account on advice of counsel. The court restrained plaintiff from ''modifying, changing or deleting any statements related to this action made on his social media accounts for the duration of this action.''

As courts consider social media discovery issues post-*Forman*, savvy litigators should continue to monitor developments to find ways to leverage this tool for their clients' benefit.