

Think Your “Private” Posts are Private? In New York, “Private” Facebook Posts are No Longer Protected from Discovery

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In a recent unanimous decision, Forman v. Henkin, the New York Court of Appeals, New York’s highest court, removed the heightened requirement set by the lower courts for a party requesting the production of social media posts designated as “private” by the user. Now, the rule in New York is consistent with federal practice in that general rules of discovery apply.

The case involved a personal injury claim resulting from falling from the defendant’s horse, and the plaintiff, in opposing the defendant’s motion to compel, did not claim that

the “private” portion of her Facebook page contained privileged information or information that should be shielded based on privacy grounds. However, the lower court applied a standard in which the defendant must establish a factual predicate by identifying relevant information in the plaintiff’s “public” portion of her Facebook account that contradicts the plaintiff’s alleged “restrictions, disabilities, and losses, and other claims,” in order to access the “private” portion.

Although the court noted that sites like Facebook now offer different levels of privacy the user can control to limit sharing information only with those of their choosing, it decided that New York’s discovery rules favoring liberal disclosure militate against a user’s ability to “unilaterally obstruct disclosure merely by manipulating privacy settings or curating the materials.”

The court recognized that the proper standard for production should continue to be whether the information is “material and necessary to the prosecution of the defense of an action,” “i.e., relevant,” rather than whether the user has manipulated his or her privacy settings. The court acknowledged that some materials on a Facebook account

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may be considered private, but observed there is heavy debate surrounding this characterization. The court specifically noted that even “private materials may be subject to discovery if they are relevant.”

“Private” social media posts are now subject to the same rules as the discovery of a personal diary. Protective orders and redaction are tools that can be employed in the social media context, just as in any other, to prevent the disclosure of embarrassing information. The court agreed that a party’s entire Facebook account is not necessarily discoverable upon the commencement of a personal injury action.

Information from the following three categories continues to be protected from disclosure:

- privileged matter (absolutely immune)
- attorney work product (absolutely immune)
- trial preparation materials (subject to disclosure only on a showing of substantial need and undue hardship)

The court stated that considerations such as the nature of the litigation, the injuries claimed, and any other information specific to the case, should govern whether relevant information is likely to be found on a party’s Facebook (or other social media) account. The court also noted that the utility of the information sought should be balanced against privacy concerns, and that discovery should be tailored to the “particular controversy” while “avoiding disclosure of non-relevant materials.” Potentially embarrassing materials of marginal relevance can also be exempted from disclosure.