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Forget Privacy: Courts Open to Discovery of Social Media Photos

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With the prevalence of social media, practitioners face not only a new source of evidence but also a new source of discovery disputes.

Florida courts, however, are providing guidance to resolve these disputes. The basic message is that social media is like other sources of evidence—relevant information is required to be disclosed and is not protected by the right to privacy. In seeking information from social media, there are certain considerations to follow.

Tailoring Requests

The Second District Court of Appeal reinforced that documents requests must seek documents relevant to the claims or defenses of the action.

In *Root v. Balfour Beatty Construction*, the plaintiff, a mother, brought a negligence action on behalf of her son, who was hit by a vehicle, and a derivative claim for loss of parental consortium. In response, the defendants raised several affirmative defenses, including negligent entrustment of the son related to an aunt's failure to supervise the child when the accident occurred.

During the litigation, the defendants sought and received an order for the plaintiff to produce postings in her Facebook account — before or after the accident — related to counseling; relationships with her other children; relationships with other family members, boyfriends, husbands or significant others; mental health, alcohol or other substance use; and other lawsuits.

The trial court issued this order even though at least one defendant conceded that the documents might not be relevant and the trial court conceded that "95 percent, or 99 percent of this may not be relevant."

Plaintiff appealed to the Second District Court of Appeal arguing that none of the information in dispute related to the accident, the defendants' affirmative defenses or plaintiffs' claim for loss of consortium. The court agreed with the plaintiff and quashed the trial courts order.

No Right To Privacy

Where the request, however, is tailored to seek relevant information, production will not be protected by the right to privacy.

In *Nucci v. Target*, the Fourth District Court of Appeal heard a personal injury suit arising out of a "slip and fall" alleging that the plaintiff suffered injuries that restricted her activities.

Target Corp., the defendant, moved to compel inspection of the plaintiff's Facebook profile. Target, argued that it was entitled to view the profile because the plaintiff put her physical and mental condition at issue. The plaintiff objected, asserting that because of the privacy setting of her Facebook account (not viewable by the public), she had a reasonable expectation of privacy. The plaintiff also argued that the request was a fishing expedition. The trial court denied Target's motion to compel, in part because the request was "vague, overly broad and unduly burdensome."

Target, then filed narrowed discovery; and plaintiff once again objected. After Target conceded that the request should be limited to photographs of the plaintiff, the trial court ordered the plaintiff to produce from social media all pictures from two years after the accident and all pictures from the accident to the present.

The plaintiff appealed arguing that the documents in question were not relevant, that production would violate her right to privacy, and the document were not discoverable under the federal Stored Communications Act, a law that addresses disclosure of stored internet communications held by third-party Internet service providers. The court disagreed.

The court found that the information was relevant because the fact finder is required to assess any decrease to plaintiff's quality of life. Because "a photograph is worth a thousand words, there is no better portrayal of what an individual's life was like than those photographs the individual has chosen to share through social media."

The court also found that disclosure was not protected by the right to privacy. Noting that the right to privacy under the Florida Constitution is broader than the protection under the U.S. Constitution, the court found that by creating a social media page, a user expects that personal information will be shared with others, regardless of the privacy settings. It reasoned that this distinction makes social media information unlike medical records or communications with a lawyer, where disclosure in confined to a narrow, confidential relationship.

The court also held that the SCA did not apply because it was intended to prevent providers of communications services from providing private communications, but that the act did not apply to individuals who use communication services provided.