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LegalCURRENTS

NY courts grapple with social media mining

According to the Pew Internet and American Life survey, as of May 2011, 65 percent of adults in the United States use social media sites. In other words, the majority of Americans participate on social networking sites like Facebook, LinkedIn and Twitter and share the minutiae of their day-to-day lives with their families, friends and even absolute strangers.

Some of the status updates and photos are shared publicly and others are locked away behind the privacy settings of the different networks.

Not surprisingly, the data shared on those sites, whether publicly or privately, creates unimaginable amounts of evidence, ripe for the picking, assuming courts allow litigants access to it.

And that, folks, is the million dollar question: How and when can litigants mine social media for use in litigation?

Although social media use became increasingly common a number of years ago, courts are just now grappling with the discoverability and admissibility of social media evidence, as lawyers begin to realize that the relevance of social media evidence to many different types of litigation is simply undeniable.

For that reason, over the past year, at least two New York cases addressed the issue of whether social media evidence was subject to discovery in civil litigation.

The first was *Abrams v. Pecile*, 83 A.D.3d 527 (1st Dept 2011). In *Abrams*, the plaintiff filed suit seeking damages for, among other things, conversion and intentional infliction of emotional distress arising from the defendant's alleged unauthorized possession of seminude photographs of the plaintiff.

In her demand for discovery, the defendant sought access to the plaintiff's social networking accounts and the trial court ordered the plaintiff to comply with that request.

On appeal, the First Department disagreed, concluding that the defendant failed to show that permitting access would lead to the discovery of evidence relevant to the defense of the lawsuit: "(The defendant has made) no showing ... that 'the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims' ... Because plaintiff admits that she has copies of the photographs contained on the subject CD, defendant has also failed

to show that she needs access to plaintiff's hard drive in order to defeat plaintiff's conversion claim."

In another First Department case handed down in late October, *Patterson v. Turner Construction Company*, 2011 WL 5083155 (1st Dept 2011), the defendant in a personal injury lawsuit sought access to the plaintiff's Facebook records created after the incident that was the basis of the lawsuit, including those that were not publicly available.

The court likened the plaintiff's private Facebook postings to a diary and concluded that, if relevant, they were discoverable: "The postings on plaintiff's online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service's privacy settings to restrict access ... just as relevant matter from a personal diary is discoverable ..."

However, the court limited access to the Facebook data and required that the trial court conduct an *in camera* review "for a more specific identification of plaintiff's Facebook information that is relevant, in that it contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims." The court cited

Abrams (discussed above), explaining that social media evidence is discoverable as long as it leads to relevant evidence or is reasonably likely to result in the discovery of information related to the claims at issue in the lawsuit.

In other words, as I've oft repeated, the medium doesn't change the message. The First Department recognized this fact when it analogized private Facebook postings to a personal diary. The online world of social media, despite being a relatively new and rapidly changing phenomenon, is simply an extension of the offline world and evidence created online should be treated no differently than that created by traditional means.

Nicole Black is of counsel to Fiandach & Fiandach in Rochester. She co-authors the ABA book Social Media for Lawyers: the Next Frontier, co-authors Criminal Law in New York, a West-Thomson treatise, and is currently writing a book about cloud computing for lawyers that will be published by the ABA. She is the founder of lawtechTalk.com and speaks regularly at conferences regarding the intersection of law and technology. She publishes four legal blogs and can be reached at nblack@nicoleblackesq.com.



By **NICOLE BLACK**

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