

Civil Practice and Procedure

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New World Order: The Practical and Ethical Challenges of Social Media Discovery

Modern litigation is dominated by discovery, not trial, as a way in which most cases are resolved (as the cost of discovery is a driver in many settlements). Social media is a source of potentially devastating discovery that can be obtained in a party's own words, in a format that jurors will be very familiar with, and more reliably and at a far lower cost than the traditional methods of surveillance. The intersection of discovery and social media has become increasingly common. As discovery disputes rarely reach Illinois reviewing courts, this article will examine two recent non-Illinois state court decisions to provide guidance on the best way to obtain social media information regarding an opposing party and what are potential pitfalls in the methods of obtaining that information.

Ye v. Cliff Veissman, Inc.

How much social media information is discoverable? *Ye v. Cliff Veissman, Inc.*, No. 14-cv-01531, 2016 U.S. Dist. LEXIS 28882 (N.D. Ill. Mar. 7, 2016) provides an example of when a discovery request for social media is too broad to be granted. At issue in *Ye* was the scope of a discovery request for the Facebook information of the decedent and next of kin covering seven years of social media information prior to decedent's death. *Ye*, 2016 U.S. Dist. LEXIS 28882, at *1.

The father of Catherine Cong Ye, decedent, brought a wrongful death action against Cliff Viessman, Inc. and its employee, Kevin Goettl. *Id.* The plaintiff alleged that Goettl was operating a vehicle which struck and killed Catherine as she was standing on the sidewalk. *Id.* at *1. The plaintiff alleged that the decedent's next of kin—Catherine's father, mother, and sister—had suffered pecuniary loss as a result of Catherine's death. *Id.* at *2.

In order to investigate the claim of pecuniary loss, the defendants issued a discovery request seeking the following:

[a] full archive of any documents, notes, messages, photographs, or any other information from any social media account held by the decedent [and by any next of kin of the decedent], including an archive from any Facebook account . . . from 2007 through the date of [the decedent's] death.

Id. at *2-3.

In response, the plaintiff objected, maintaining the request was not limited in scope, and was non-specific, vague, and overly burdensome. *Id.* at *3. The defendants then issued a supplemental request seeking the production of the "complete archive of the Facebook pages" of the decedent and next of kin, and provided the plaintiff with instructions on how to obtain the archived information requested. *Id.* Instead of objecting to the supplemental request, the plaintiff argued that the original discovery request was sufficient and the supplemental discovery request was duplicative of other discovery requests. *Id.*

The defendants moved to compel the plaintiff to respond to the supplemental discovery request. *Id.* at *4. The defendants maintained that the request for the full archives was relevant to the plaintiff's claim of pecuniary loss due to the decedent's death. *Id.* at *6. The defendants argued that information contained in the Facebook archives could provide information pertaining to the decedent's physical and mental characteristics, habits, the relationship between the decedent and her next of kin, and the next of kin's grief, sorrow, and mental suffering. *Id.* at *6-7. The defendants argued that the decedent's mother had testified to utilizing Facebook to keep up with her daughter, and that the defendants' limited ability to publicly view the mother's Facebook page had demonstrated at least one post about the decedent. *Id.* at *7. The defendants pointed to the testimony of the decedent's sister explaining that her last contact with the decedent was through Facebook. *Id.*

The court acknowledged that social media data present challenges for the court. Specifically, social media data is retained for a long period of time, and the contacts of a social media account holder can be unlimited. Therefore, social media data which may be discoverable can be voluminous. *Id.* at *4. The court noted that under such circumstances it is challenging to apply traditional discovery rules to requests for social media content. *Id.* at *5. The court recognized, nevertheless, that despite these challenges a party very well may be compelled to produce social media information if certain requirements are met. *Id.* at *4-5. Without saying what would pass muster or what the requirements were the court stated that discovery is not unfettered, and Rule 26(b)(2)(C) provides that discovery can be limited where it is unreasonably cumulative, overly broad, unduly burdensome, or irrelevant. *Id.* at *5. The court noted that courts are reluctant to compel the production of all-encompassing social media requests unless they are limited to content which is relevant to a claim or defense. *Id.* at *9-10. The court explained that the party seeking the disclosure of social media data must make a threshold showing of relevance, and describe, pursuant to Rule 34(b), with reasonable particularity providing reasonable notice as to what is being requested and what is not. *Id.* at *4. Accordingly, a more narrowly tailored request is likely what is necessary in order to survive an objection.

With respect to the showing of relevance, the court noted that relevance is narrowed for purposes of discovery in light of the recent amendments to the Federal Rules of Civil Procedure. *Id.* at *5. Specifically, a party no longer has the ability to obtain discovery of any information relevant to the subject matter of the case on the basis of good cause. Likewise, the amendments eliminated the standard that information is discoverable so long as it is reasonably calculated to lead to the discovery of admissible evidence. *Id.* Despite these recent amendments, however, the court explained that its decision would be the same under both rules. *Id.* at *6.

Turning to the motion to compel, the district court agreed that the information contained in the Facebook archives could contain relevant information to issues in the case to which the defendants were entitled. *Id.* at *7. The court, however, found that the scope of the request was overly broad, and noted that it would have reached the same decision under the pre-amended rules. *Id.* at *6-7. Specifically, the court found that the request was not limited to a relevant time period or to content which was relevant to a claim or defense in the case. *Id.* at *8. The court found that, as phrased, the request sought unfettered access to the Facebook archives. The court further explained that when a party produces a full Facebook archive there is no way to limit by time or content the data which is downloaded. *Id.* The court further noted that allowing discovery of a full Facebook profile would allow a party to explore the information which the account holder had limited to public view. *Id.*

While recognizing that virtually every social media post could reflect an individual's emotional state, the court determined that the defendants could not inquire into every conversation or interaction the decedent and her next of kin

had with any number of contacts. *Id.* at *9. The court found that the defendants' request was not limited to content or communications between specific parties about a particular subject matter. *Id.* at *10.

In addition to not being properly limited in content, the court also found the defendants' request was not limited to a reasonable time period. *Id.* at *11. The request sought information for a six year time period. *Id.* Again, the court agreed that some of the information requested during the time prior to and after the decedent's death could be relevant to the claims. *Id.* at *12. The defendants, however, argued that the six year time period request bore on the issue of loss of society. *Id.* Rejecting this argument, the court found that the defendants failed to show that the time period was in proportion to the needs of the case. *Id.* The court suggested that if the defense intended to present evidence of the relationship going six years back then the ruling may have been different. *Id.*

After denying without prejudice the motion to compel, the district court concluded that a request for social media content could be more narrowly tailored than the one at issue. The court suggested that a request which was limited to a reasonable time period and to specific content relevant to the issues in the case may be an appropriate discovery request. *Id.* at 13. As a consequence of not issuing a narrow and reasonably tailored request, the defendants were denied all discovery-related to the plaintiffs from Facebook and were not permitted to issue new requests.

Robertelli v. New Jersey Office of Attorney Ethics

Just as a discovery request can be too broad, self-help in obtaining information related to a plaintiff from social media, can be fraught with perils. In *Robertelli v. New Jersey Office of Attorney Ethics*, No. 075584, 2016 N.J. LEXIS 323 (N.J. Apr. 19, 2016), the New Jersey Supreme Court held that attorneys could be prosecuted for attorney misconduct in connection with accessing the Facebook page of an opposing party. This case arose out of a claim for personal injuries after a pedestrian was struck by a police car. *Robertelli*, No. 075584, 2016 N.J. LEXIS 323, at *1. The plaintiff in the underlying lawsuit brought a claim for permanent injuries against the city, a police department, and the officer driving the vehicle. *Id.* at *1-2. In the course of the litigation, defense counsel directed their paralegal to obtain information about the plaintiff from the internet. *Id.* at *2. One of the sources the paralegal accessed was the plaintiff's public Facebook page. *Id.*

Subsequently, the plaintiff changed his Facebook settings and made his profile private, limiting access to those Facebook account holders who were his friends. *Id.* Thereafter, the defense attorneys directed their paralegal to access and continue monitoring the non-public pages of the plaintiff's Facebook page. *Id.* The paralegal sent the plaintiff a friend request, but did not inform the plaintiff that she was employed by the defendants' attorneys or that she was investigating him for purposes of the lawsuit. *Id.* The plaintiff accepted the friend request, allowing the paralegal to access the non-public portions of the plaintiff's Facebook page. *Id.*

The plaintiff first learned of the defense attorneys' actions during discovery in the underlying lawsuit and objected to the use of documents the paralegal obtained from his Facebook page at the time of trial. *Id.* at *2-3. Thereafter, the plaintiff filed a grievance with the ethics committee alleging violations of the Professional Rules of Conduct. Specifically, the plaintiff alleged that the attorneys engaged in unauthorized communication with a represented party when the paralegal sent the plaintiff a friend request. *Id.* at *3. The ethics committee did not docket the grievance and concluded that if the allegations were proven they would not constitute unethical conduct. *Id.*

The plaintiff later contacted the Office of Attorney Ethics and requested the grievance be reviewed. After an investigation, the Office of Attorney Ethics filed a complaint against the defendants' attorneys. The attorneys requested

the Office of Attorney Ethics to withdraw the complaint, as the ethics committee had declined to docket the grievance. The request was refused and the defense attorneys filed a complaint to enjoin the Office of Attorney Ethics to prosecute the matter. *Id.* at *3-4. The trial court dismissed the complaint, finding that the supreme court and its ethics bodies had exclusive jurisdiction over attorney misconduct matters. The appellate court affirmed the trial court. *Id.* The supreme court held that the Office of Attorney Ethics had authority to review a grievance after the ethics committee has declined to docket a grievance, and ruled that the alleged misconduct could be prosecuted. *Id.* at 4.

This case not only highlights the prohibition against contacting a party known to be represented by counsel, but also the duty of the lawyers to properly supervise non-attorney staff. ILL. RULES OF PROF'L CONDUCT 4.2 and 5.3.

Practice Pointers

There are a variety of methods which can be utilized to obtain social media. A forensic data collector could be retained to perform an internet mining investigation. During such an investigation, the consultant searches all social media sites for accounts held by the opposing party and prepares a comprehensive report of findings and preserves any public social media data which may be located. Such an investigation is best undertaken early in the litigation. Another method is to either have the opposing party stipulate to providing, or move the court for an order compelling production of, his or her username and password for all social media accounts for examination by an independent third party forensic data collector. This type of investigation could uncover non-private and archived information and allows the consultant to utilize software to obtain the data and would be useful in the event the opposing party has altered social media information or has privatized social media accounts. Another method to ensure social media information is preserved is by sending the opposing party a letter demanding preservation of all social media data to ensure that the party does not delete or alter social media information. Finally, formal discovery requests can be utilized to obtain social media information.

If the case does not justify the expense of hiring a forensic expert, and the decision is made to use traditional discovery tools in order to avoid costly and time consuming discovery fights, when utilizing traditional discovery requests one must ensure that the requests are appropriately limited in time and content. The *Ye* case illustrates the challenges in applying traditional discovery rules to requests for social media data which would result in the production of voluminous information. Reference to the proportionality of Rule 201(c)(3) would likely be looked at by an Illinois state court to determine extent and means by which social media discovery would be sought. Although the request in that case was denied as phrased, the *Ye* court strongly suggested that had the defendants in that case been able to demonstrate that the time frame in the request could have revealed relevant information, the request might have been granted. *Ye* demonstrates that the party seeking the social media information must establish that the content sought is relevant and the time frame request is reasonable. It is likely that a time frame of a year or two before the incident in question and for a time after the incident coinciding with the recovery of the injury after the incident would be reasonable. In a wrongful death case in which grief is an issue, several months to a year after the death would likely be seen as reasonable.

Above all, counsel must keep their ethical duties in mind when conducting an internet investigation of an opposing party. Though Illinois has not taken a stand on this issue, sending a friend request to an opposing party who is represented by an attorney is likely an unauthorized communication with a represented party and should be eschewed. That said, accessing public information, without “friending” a represented party, has been found to be proper. N.Y. State Bar Ass’n,



Ethics Op. 843 (2010); *see also* ILL. RULES OF PROF'L CONDUCT 4.2 and 5.3. Social media investigation is an essential part of discovery. Doing that investigation ethically is just as essential.

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