

Defense Lawyers Will “Like” this Article; Plaintiff Lawyers Will Not: The Use of Social Media as a Discovery Tool in Civil Defense Litigation

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I. The Scenario

Imagine, for example, Paul Plaintiff, who was recently involved in a car accident in which he was rear-ended by Dan Defendant. After the accident, Paul brings suit against Dan alleging a multitude of injuries resulting from the accident. Particularly, Paul claims that he suffered injuries to his back and that he is no longer able to work. On his Facebook profile, however, Paul posts pictures of himself months after the accident on vacation surfing in Hawaii. Paul also posts numerous “status updates” on his wall about his new-found love of surfing. Obviously, these pictures and posts may potentially undermine Paul’s damages claim in his suit against Dan. However, if Dan is unable to discover this information from Paul’s Facebook page, Dan may never know about this information that could have been crucial in his defense. Thus, the question is: Can Dan discover Paul’s Facebook account information, and if so, how?

II. Background

Before answering those questions, it is important to first gather some background information on social media. Social media has changed the way people interact with each other and the world around them. Social networking sites (“SNS”), like Facebook, allow users to (1) construct a semi-public profile within a bounded system, (2) articulate a list of others with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.¹ These sites “create a potentially permanent record of personal information that becomes a virtual information bonanza about a litigant’s private life and state of

¹ Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, *Journal of Computer-Mediated Communication*, 13(1), article 11, available at <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html>.

mind.”² Given the vast amount of information that can be obtained from these sites, discovering such information can be vital to the early examination and evaluation of potential defenses in any civil litigation.³

Moreover, use of SNS research can supplement or replace the role of the traditional private investigator hired to trail a personal injury plaintiff in the hopes of undermining his or her case through the use of simple still photography.⁴ This is because SNSs contain much more than photos—users and their “friends” can post and share comments and other information about a myriad of topics which may be relevant to defending a particular matter.⁵ However, despite the obvious benefits of discovering this information, courts struggle to define the contours of social communications relevant to a claimant’s mental, emotional and physical health.⁶ Often times, concerns of privacy exist when users “lock” their pages or make them “private.”

III. SNS Discovery and the Courts

Although a recent hot-button topic, few published decisions exist to provide guidance on SNS discovery issues. That said, these issues have been addressed recently by federal courts in employment discrimination cases. These courts have held that information contained on an individual’s Facebook account is discoverable, particularly when a plaintiff has alleged emotional damages.⁷ Further, those courts that have addressed the issue have found that SNS content is not shielded from discovery simply because it is “locked” or “private.”⁸ This is due to

² Ronald J. Levine & Susan L. Swatski, *Are Social Networking Sites Discoverable?*, available at <http://www.law.com/jsp/article.jsp?id=1202425974937&slreturn=1&hbxlogin=1>.

³ *See id.*

⁴ Todd B. Baker, *Symposium: The Internet and the Law: Informal Discovery on the Internet*, 52 *The Advocate* 23 (2010).

⁵ *Id.*

⁶ *See EEOC v. Simply Storage Mgmt.* (S.D.Ind., 2010), 270 F.R.D. 430, 434.

⁷ *See EEOC*, 270 F.R.D. 430; *see also Bass ex rel. Bass v. Mis Porter’s School* (D.Conn., Oct. 27, 2009), No. 3:08cv1807, 2009 U.S. Dist. LEXIS 99916.

⁸ *EEOC*, 270 F.R.D. 430 at 434; *Mackelprang v. Fidelity Nat’l Title Agency of Nevada, Inc.* (D.Nev., Jan. 9, 2007), No. 2:06-cv-007788-JCM-GWF, 2007 U.S. Dist. LEXIS 2379.

the fact that, as one court stated, users of such sites “logically lack a legitimate expectation of privacy in the materials intended for publication or public posting.”⁹

IV. Now What? How to Obtain a Plaintiff’s Facebook Content.

Presumably to prevent an inundation of subpoenas from eager defense lawyers, Facebook created a tool which allows a user to download a complete copy of his or her profile to an easy-to-navigate .zip file. This file contains (1) the users profile information, (2) wall posts and content that the user and the user’s friends have posted to their profile, (3) photos and videos that the user has uploaded to his or her account, (4) the user’s friends list, (5) notes created by the user, (6) events to which the user has RSVP’d, and (7) the user’s sent and received messages. In light of this tool, defense counsel can draft interrogatories which require that the plaintiff identify all social media accounts (i.e., Facebook). If the plaintiff maintains a Facebook account, defense counsel can provide step-by-step instructions in the propounded discovery requests to obtain the .zip file directly from the plaintiff or his/her attorney.

These steps are as follows:¹⁰

1. Log in to account (you may need to enter your password at various points throughout this process).
2. Click on drop-down arrow in the upper right-hand corner, and then click on “Account Settings.”
3. Scroll down and click on “Download a copy of your Facebook data.”
4. Click on the “Start My Archive” button.
5. A box will then appear in the middle of the screen titled “Start My Archive.” Click on this button.
6. You will then be told to wait while your archive is prepared. Facebook will send you an email confirming when your download is ready, and you can

⁹ *Steven Guest v. Simon L. Leis* (C.A.6, 2001), 255 F.3d 325.

¹⁰ These steps presume the use of Microsoft’s Internet Explorer. While other internet browsers work as well, the steps may slightly vary.

just click on the link in the body of the email message sent by Facebook (if you do not get an email, just log on to Facebook after approximately 30 minutes and follow steps 1-3).

7. You will see that your Archive is ready to download. Click the download button, which may prompt you to re-enter your password, and click “continue.”
8. Click on the “Download Archive” button.
9. A box will appear asking you to download a .zip file. Click “save.”
10. A pop-up window will then appear asking you for the path where you would like to save the file. Pick a location where the .zip file is easily able to be found (i.e., My Documents Folder).
11. Send an e-mail to your attorney attaching the .zip file saved in step 10 so that he or she can produce the file.

As one would expect, plaintiffs and their attorneys are hardly eager to produce the above information. And, despite the cases allowing the discovery of SNS content, this issue is by no means settled. As a result, discovery requests for this information are likely to be met with objection. However, at least one federal district court has granted a motion to compel the plaintiff to download and produce his Facebook profile using the aforementioned steps.¹¹

V. Conclusion

By implementing these steps, Dan Defendant has a good chance of discovering Paul Plaintiff’s new-found love of surfing. Quite simply, this information provides Dan contemporaneous evidence of Paul’s mental, emotional and physical condition at the time of the accident and months thereafter. This information can be invaluable to defense counsel in determining how exactly Paul’s lifestyle has been affected by the car accident, and to what extent he was truly injured in the accident.

¹¹ *Cunningham v. Humana Insurance Co.* (W.D.Ky., Jan. 19, 2011), No. 3:10-cv-0056-JGH, doc. 23.

