Social Media Discovery: Examining the Factual Predicate Standard

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The rise of social media discovery requests has become a major trend over the past 10 years. This is not surprising, as the use and accessibility of the various platforms continues to soar. This potential trove of evidence has placed a significant burden on courts to craft rules regulating this modern form of discovery. While courts have made admirable attempts to bring uniformity out of chaos, the growth and evolution of social media may test the long-term applicability of the current framework.

In Pennsylvania, the most common rule governing social media discovery in the civil litigation context is what has come to be known as the "factual predicate" standard. Under this standard, a party may only access private portions of another party's social media account if they make a threshold showing relevancy based upon the publicly available information of a user's profile, as in *Trail v. Lesko*, No. GD-10-017249 (C.P. Alleg. Co. 2012).

Although this current framework provides a clear guide to attorneys requesting and objecting to social media discovery, heightened user awareness and sophistication raises several issues. User awareness of privacy settings has risen since the birth of social media, and multiple Pew research studies have revealed a continued increase in privacy setting utilization. (www.pewinternet.org/2012/02/24/privacy-management-on-social-media-sites) (www.pewinternet.org/2013/05/21/teens-social-media-and-privacy). These statistics can be attributed, in part, to increased awareness of the potential negative consequences of social media. Today, lectures and presentations on the pitfalls of social media use are commonplace in high schools and colleges throughout the country. It can only be expected that this trend of user awareness and utilization of privacy settings will continue to rise.

It is understood that not all information on an individual's social media account is relevant to a lawsuit. However, statistics show an increase in social media usage, as well as the content of user postings. A Pew research study from 2015 revealed that two thirds of adults are active on social networking websites. By way of comparison, only 11 percent were active in 2006, with that number increasing to 38 percent by 2009. Further, the content shared within these platforms has increased significantly as well, with 70 percent of Facebook users reporting daily usage. Based on the growth in users and user content, it logically follows that an increased amount of evidence exists on these platforms which may be relevant to a lawsuit. Despite this, under the current framework, it will continue to be increasingly difficult to obtain such evidence as user sophistication and awareness regarding privacy settings continues to grow.

Accompanying the increase in individual user awareness of privacy settings is the role attorneys play in counseling clients. Attorneys today are far more versed in social media than they were ten years ago. In fact, the Pennsylvania Bar Association's formal opinion on social media ethics in 2014 stated: "a competent lawyer should advise clients about the content that they post publicly online and how it can affect a case or other legal dispute." The opinion further read that a lawyer may ethically instruct a client to make his or her profile private.

Because the rules permit litigants to change their social media privacy settings following the commencement of a lawsuit, relevant information may be actively concealed. It is a rather interesting dichotomy, where the Bar Association suggests competent attorneys should advise clients against maintaining public profiles, while at the same time the state's courts continue to rule that the threshold showing of relevancy required under the factual predicate standard must come through a user's public profile. Under the current standards, a lawyer's only means of gaining access to potentially relevant social media evidence is dependent on the hope that opposing counsel did not properly advise his or her client.

It is fascinating that this appears to be the only area of civil discovery where such a high burden of threshold relevancy is required. The scope of permissible discovery in all other contexts is broad, and is based on the content being requested, rather than the source from which it is being sought.

As an example, if a party were to send a letter to a friend containing relevant information, that party would not be shielded from producing the correspondence by arguing the letter was only meant to be shared with the recipient, nor would the requesting party be required to bring forth letters open to the public in order to gain access to the private letter.

The factual predicate standard may be further tested as the virtual application world continues its rapid and continuing evolution. Many of the current opinions on this type of discovery have been limited to disputes about access to Facebook material. While the existence of other social media applications has been acknowledged in those opinions, the current definition of what constitutes "social media" is vague.

Five years ago, defining social media was a fairly simple task. In 2011, social media consisted primarily of three platforms, Facebook, Twitter, and Instagram. Today, there exists an endless list of various social media platforms, website commenting applications, and virtual communities. It is unclear whether all of these types of programs or applications can be considered "social media." This raises new and unexplored questions, such as:

- Is a review site, such as Yelp, considered social media and therefore discoverable?
- Can e-commerce websites that are not purely transactional in nature be considered social media?
- Are comment applications, such as Disqus, that allow users to create profiles for the sole purpose of commenting and interacting with other users about internet articles considered social media?

Further, many of the newer social media applications contain no public/private distinction, which would render the factual predicate standard meaningless. It is likely that these and other questions raised by new types of applications, as well as their impact on litigation, will continue to multiply.

The time may be fast approaching where social media discovery issues will be reviewed at the appellate level. While the factual predicate standard may currently be an effective way of handling social media discovery disputes, the growth of user-privacy awareness in conjunction with emerging technology will continue to test its long-term viability.

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