Med Mal Litigation and Social Media Records: Where Is N.J. Headed?

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The issue of the discoverability/admissibility of social media records is incredibly relevant to health care litigation. The ability for a defense attorney to monitor the Twitter, Facebook, Instagram and other social media accounts of a plaintiff for contradictory evidence against claims of injury or physical limitations, can provide significant fuel to a case. While the issue of discoverability/admissibility of social media is still in its infancy in New Jersey, both sides of the aisle have great stakes in the future outcome.

According to a recent study conducted by the Pew Research Center, the chances are high that your client or an opposing party in one of your malpractice cases is actively using Facebook, Twitter, or Instagram. Pew's *Internet Project Library Survey* (2013) indicates that 90% of Internet users aged 18-29 are active social media users; 78% of those aged 30-49 and 65% of those aged 50-64 use it; and even 46% of individuals aged 65 and over utilize social media.

What began as a means of communication between college kids has evolved – or some would say devolved – into a platform for individuals of all ages to share stories, pictures, videos, opinions, and virtually any other nuance of their life with either the entire Facebook-using world or a small select group of friends. It's that information reserved for a person's private group of friends that has become the novel discovery issue in trial courts across the country.

Searching for a New Jersey Standard

Whether a litigant's private social media is discoverable in a civil case has been addressed by the nearby state courts of New York and Pennsylvania. New Jersey, on the other hand, is lacking appellate or trial level opinions that construe the reach of discovery when dealing with private social media records. In 2007, this very journal published a story on what was then a unique protective order granted by Judge Brock in *T.V. v. Union County Board of Education* that prevented the defense from accessing the plaintiff's private Facebook page. This ruling, however, was made without any intent of permanency as the defense attorney was instructed to first take the more conservative step of deposing possible Facebook "friends" of the plaintiff to see if they had any relevant testimony on the plaintiff's psychiatric condition. The case settled before further consideration was given to the issue.

While likely dozens of trial level orders on the issue of discoverability have been handed down since *T.V.*, the only New Jersey judges to issue written opinions mentioning the subject have been sitting on the federal

bench. The 2007 *Beye v. Horizon* federal district court required disclosure of Facebook and MySpace entries after finding that "[t]he privacy concerns are far less where the beneficiary herself chose to disclose the information" to other Facebook friends. *See Beye v. Horizon Blue Cross Blue Shield,* 2007 U.S. Dist. LEXIS 100915 (D.N.J. December 14, 2007). As recently as 2013, the New Jersey district court in *Gatto v. United Air* found the plaintiff guilty of spoliation and permitted an adverse inference charge when the baggage handler deactivated his Facebook account after the court had authorized the defendants to access the information. *See Gatto v. United Air Lines, Inc.*, 2013 U.S. Dist. LEXIS 41909 (D.N.J. March 25, 2013).

The federal cases suggest an acceptance of the use of social media and certainly don't proclaim any outright preclusion of an individual's private data; however, without any analysis from the New Jersey state courts, litigators will likely have to turn to persuasive authority. Fortunately, in the seven years since *T.V.*, courts in New York and Pennsylvania have developed an identifiable test for determining relevancy that is less burdensome and expensive than deposing a host of Facebook friends: if there's some publicly-available social media information that seems relevant to a claim or defense, the opposing party should be permitted to retrieve the private data.

Private Social Media is Not Afforded Special Protection from Disclosure

The starting point for the discoverability of social media in New Jersey is the same as any other piece of potentially admissible evidence: *New Jersey Court Rule* 4:10-2, holds that parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter or a party's claim or defense.

Social media-using litigants have been mostly unsuccessful in their arguments that discovery of private data is tantamount to a privilege or invasion of privacy. The plaintiff's attorney in the 2010 Pennsylvania case *McMillen v. Hummingbird Speedway* opposed the release of the private part of his client's Facebook page claiming that Facebook's privacy settings amounted to the information being "confidential and thus protected against disclosure." *See* 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Ct. Com. Pl., Jefferson 2010). The court shut down any attachment of confidentiality or privilege to social media records by simply invoking the website's own "How We Share User Information" policy which included the following notice: ". . . Facebook's operators may disclose information pursuant to subpoenas, court orders, or other civil or criminal requests if they have a good faith belief that the law requires them to respond . . . ." *Id* at 7.

One year later, another Pennsylvania county court in *Largent v. Reed* agreed that "there is no confidential social networking privilege under existing Pennsylvania law . . . and there is no reasonable expectation of privacy in material posted on Facebook." *See Largent v. Reed*, No. 2009-1823 (Ct. Com. Pl., Jefferson 2011). The *Largent* court continued: "we further note that in filing a lawsuit seeking monetary damages, [plaintiff] has placed her health at issue, which vitiates certain privacy interests. Any posts on Facebook that concern Largent's health, mental or physical, are discoverable, and any privilege concerning such information is waived." *See id* at 12.

Determining Relevancy: The "Show Me" States

Once the privilege and confidentiality objections were disposed of, the courts then turned to the remaining component of discoverability: relevancy. The border-state opinions on the subject have produced the following test: the presence of material on an individual's public social media page that calls into question a claim or defense results in a reasonable likelihood that the private page may also include further relevant and discoverable information.

While the courts have mostly agreed on this overall test for discoverability, there are some discrepancies regarding exactly what kind of public post or entry permits further exploration. All it took in a precedential New York case was one seemingly benign photograph and a post about a trip to Florida. In *Romano v. Steelcase,* the court took note that "[i]t appears that Plaintiff's public profile page on Facebook shows her smiling happily in a photograph outside the confines of her home despite her claim that she has sustained permanent injuries and is largely confined to her house and bed." 907 N.Y.S.2d 650, 654 (N.Y. Sup. Ct., Sept. 21, 2010).

In the aforementioned *McMillen* case, it was a Facebook comment that referenced a fishing vacation and a trip to the Daytona 500; participation in which ran counter to the plaintiff's alleged damages of "loss of enjoyment of life's pleasures." The judge provided the following test for all future issues of social media disclosure: "[w]hen there is an indication that a person's social network sites contain information relevant to the prosecution or defense of a lawsuit . . . access to those sites should be freely granted."

Not all the courts have acquiesced, however. After applying the test to its own set of facts, the judge in *Brogan v. Rosenn, Jenkins & Greenwald* decided against permitting further access into a private profile. *See* 2013 Pa. Dist. & Cnty. Dec. LEXIS 171 (Ct. Com. Pl., Lackawanna 2013). According to *Brogan*, the defense attorney's presumption that a particular individual with knowledge relevant to the litigation *may* be a Facebook friend of the plaintiff's was insufficient to satisfy the threshold showing of relevancy. Future courts – in New Jersey and elsewhere – considering whether to adopt the New York and Pennsylvania test for relevancy can certainly appreciate this case-by-case approach as it provides some flexibility and judicial discretion.

Fishing With a Hook—Not a Net

One of the chief concerns of Judge Brock in 2007 was allowing unfettered access to an individual's private social media. As a Michigan federal judge who adopted the tests from *Romano* & *McMillen* warned: steps must be taken to avoid the "proverbial fishing expedition" when permitting exploration. *See Tompkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387 (E.D. Mich. 2012). Likewise, the *Brogan* opinion called for some "reasonable particularity" as to the nature of the contents the requesting party is seeking.

While some courts have required parties to provide the opponents with their username and password, a better method of disclosure that prevents a "fishing expedition" may be for the user to upload the profile on a flash-drive then submit the flash-drive to the court

for an *in camera* review. This limited approach would be consistent with New Jersey's own *Rule* 4:10-2(g) which warns that discovery methods can be limited by the court if the method or request is determined to be "unreasonably cumulative or duplicative." As we learned from *Brogan*, the more tailored a party's request the better its chances for approval.

A Balancing Test: Full Disclosure vs. Invasion of Privacy

The courts which have permitted entry into a litigant's private Facebook page haven't done so without consideration of the potential pitfalls. Before ruling in favor of discoverability, the *McMillen* court weighed the benefits of disclosure against the potential infringement on privacy and decided that the incriminating publicly-viewable Facebook entries suggested "gaining access to [the private portions] could help to prove either the truth or falsity of [the plaintiff's] alleged claims." *See McMillen* at 11-12.

Finding itself again on the same page as its PA counterpart, the court in *Romano* was concerned with what would result should the Facebook material *not* be disclosed; namely, that it "would condone [p]laintiff's attempt to hide relevant information behind self-regulated privacy settings." *Romano*, 907 N.Y.S.2d at 655. The risk of depriving one party of a fair trial due to hidden, relevant information trumped the invasive pursuit of a litigant's private content.

Conclusion

Eventually, a New Jersey appellate court will issue an opinion on the discoverability of social media. Until then, Garden State litigators would be well-served by invoking the threshold relevancy test espoused by our northeastern neighbors and reminding the court that this is, after all, a liberal discovery state.

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