

Washington State Association for Justice
1809-7th Ave., Suite 1500
Seattle, WA 98101-1328
(206) 464-1011
wsaj@washingtonjustice.org
www.washingtonjustice.org

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Social media - be careful what you tweet

by James W. Beck

Facebook's company overview proclaims "Millions of people use Facebook every day to keep up with friends, upload an unlimited number of photos, share links and video, and learn more about the people they meet." The mission of the company is to "give people the power to share and make the world more open and connected."

In fact, while connecting through social media sites has become a primary use for the Internet, and sites such as Facebook provide an unparalleled platform to stay in touch with friends and family, they also pose either a powerful tool in litigation or the potential demise of a solid case depending on the circumstances. Everyday communications that used to typically occur by telephone are now memorialized in cyberspace.

The purpose of this article is to highlight some of the current law regarding the discoverability and use of information stored on social media sites as well as outlining a number of considerations each attorney should contemplate at the outset of representation.

What is social media? Social media is defined by Webster's dictionary as follows:

Forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos).

Some of the more popular sites include Facebook, LinkedIn, and Twitter, to name a few. The types of media can include social networking sites and blogs as well as microblogs. For example, Twitter is probably the most widely known form of microblogging where users write brief text updates and share them with the public or a limited group.

Both the Washington court rules as well as the Federal Rules of Civil Procedure allow wide-ranging discovery of any non-privileged matter reasonably calculated to lead to admissible evidence. CR 26(b); FRCP 26(b). Several cases have presented circumstances where courts have been called upon to interpret the boundaries of the rules of discovery related to social media sites.

In *Equal Employment Opportunity Comm'n. v. Simply Storage Mgmt., LLC*,

270 F.R.D. 430 (S.D. Ind. 2010), the EEOC brought suit alleging sexual harassment by a supervisor. The defendant submitted requests for production seeking electronic copies of the claimant's Facebook and MySpace pages. Some of the specific requests asked for copies of all updates, messages, comments, causes joined, and applications including "the Naughty Application." The EEOC objected to the requests arguing, in part, that it was done to harass and improperly infringed on the claimant's privacy. Simply Storage responded contending that it was proper discovery because the claimants were asserting more than just garden-variety emotional distress.

In evaluating this issue, the district court began with the assumption that Rule 26 provides for broad discovery. The Court then acknowledged that "discovery of SNS (Social Networking Service) required the application of basic discovery principles in a novel context." In conducting this application, "the challenge is to define appropriately broad limits but limits nonetheless on the discoverability of social communications in light of a subject as amorphous as emotional and mental health and to do so in a way that provides mental directions to the parties." The court then went on to outline several such principles:

- content is not shielded by discovery merely because it is locked or private;
- SNS content must be produced when relevant to a claim or defense;
- allegations of severe emotional distress does not automatically render all SNS content relevant.

The court then applied these principles, holding that: (1) content related or discussing any emotional state must be produced; (2) third party communications must be produced if they place the client's comments in context; and (3) although not a conclusive order, regarding pictures posted on the site: those photos posted by the plaintiffs should be produced, but those where the plaintiffs were merely "tagged" by someone else need not be produced.

Similarly, in *Romano v. Steelcase, Inc.*, 30 Misc.3d 426, 907 N.Y.S.2d 650 (Sup. Ct. 2010), the defendant in a tort case requested, through discovery, the plaintiff's Facebook and MySpace accounts, including deleted information. The defendant company argued that the public por-

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tions of the social media sites show that, in fact, the plaintiff was physically active and was not injured in the way that she alleged in her lawsuit. There, the trial court also held the information was discoverable.

Likewise, in *McMillen v. Hummingbird Speedway, Inc.*, 2010 WL 4403285 (Pa. Com. Pl. Sept. 9, 2010), another tort action, the public portion of a plaintiff's Facebook page indicated that the plaintiff may have engaged in activities that were inconsistent with his damages claim. There, the trial court allowed discovery of the Facebook site concluding that it was relevant.

In a slightly different context, posts through social media can be the basis of a claim. This was the situation in *TekSystems, Inc. v. Hammernick, et al.*, 2010 WL 1624258 (D. Minn. Mar. 16, 2010). There, a former employer, TekSystems, Inc. sued former employers and its new employer for alleged violations of a non-compete agreement and unlawful solicitation. There, the plaintiff company alleged that these former employees used social networking sites to solicit employees. Specifically, the employees were using LinkedIn to try to steal employees away.

Based on the rulings outlined above, it is clear that discovery is permissible in certain context. However, discovery of information on social media sites must come through the parties, not through a subpoena served directly to the media site. This is due to the Stored Communication Act, 18 U.S.C. § 2701 et seq., which prohibits social media sites from disclosing infor-

mation without the consent of the account owner.

While the courts are hashing out rules and balancing tests for when social media content is discoverable and admissible, attorneys need to provide their clients with practical guidance on how to avoid the unintended consequences of using social media. Advising clients at the outset of representation that they should cease using social media accounts or, at a minimum, change their privacy settings to the most restricted and be careful of what they do write is prudent. It is likely that many clients will see this as an affront and yet another deprivation of their civil rights. Nevertheless, the cold realities show that information posted on a social media site if not thought through can be devastating to a potential case. No doubt, in high stakes cases, the defense is quick to scour the Internet looking for information to use against your clients.

Crafting interrogatories and requests for production seeking social media should be on your checklist. Drafting letters to the opposing party asking that they preserve all social media information is also a consideration. In a last thought, however, as you proceed in discovery related to social media, acting with sensitivity for privacy concerns is certainly smart considering whatever tact you take will likely set the tone for what is appropriate for the other side to do as well.

James W. Beck, WSAJ EAGLE member, practices with the firm of Gordon Thomas Honeywell in Tacoma. His practice is focused on plaintiff's civil rights, personal injury, and employment litigation.