

8-2016

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Alexandra D. Jones

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## Recommended Citation

Jones, Alexandra D., "Forman v. Henkin: The Conflict Between Social Media Discovery and User Privacy" (2016). *The Circuit*. 87.  
<http://scholarship.law.berkeley.edu/clrcircuit/87>

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# California Law Review Circuit

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Vol. 7

August 2016

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## *Forman v. Henkin*: The Conflict Between Social Media Discovery and User Privacy

Alexandra D. Jones\*

### INTRODUCTION

When undergoing the mental calculus of whether to post a photo, status, or another update, social media users may consider whether it is something they would mind friends, family members, professors, or prospective employers seeing. The more interesting question is whether judges and attorneys should be added to that list. This question has become increasingly pressing over the past ten years, as social media sites such as Facebook, Twitter, and Instagram have exploded in popularity and usage.<sup>1</sup> Even though most American adults recognize that information posted to their nonpublic social media accounts may not remain private,<sup>2</sup> many people are nevertheless willing to share a significant amount of personal information online, including

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DOI: <http://dx.doi.org/10.15779/Z381P1C>

\* J.D., University of California, Berkeley, School of Law, 2017; B.A., Stanford University, 2012.

1. See Andrew Perrin, *Social Media Usage: 2005-2015*, PEW RES. CTR. (Oct. 8, 2015), <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/> [<https://perma.cc/PUC4-U7HZ>] (finding in 2015 that nearly two-thirds of American adults (65 percent) use social networking sites, up from 7 percent in 2005).

2. See Mary Madden & Lee Rainie, *Americans' Attitudes About Privacy, Security and Surveillance*, PEW RES. CTR. (May 20, 2015), <http://www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/> [<https://perma.cc/8LY3-78SV>] (finding that 69 percent of adults are not confident that records of their activity maintained by social media sites they use will remain private and secure).

photos and videos of themselves.<sup>3</sup> Thus, the extent to which information from nonpublic social media accounts should be discoverable has major implications, for both the personal privacy of prospective litigants and the strength of their cases. The question therefore is how far we should go in protecting litigants' "private" lives, and to what extent (if at all) should social media discovery differ from traditional discovery?

Social media is defined as "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)."<sup>4</sup> Privacy on social media websites is often user-controlled—for example, Facebook users can choose to make certain portions of their social media profile accessible to the general public, or they can choose to restrict portions of their profile to just Facebook friends or to more specific subsets.<sup>5</sup> This distinction between public and private social media content is critical to understanding the discoverability of social media generally.

In *Forman v. Henkin*, the First Appellate Division of the Supreme Court of New York held that information contained in the private portion of the plaintiff's Facebook account was not discoverable to discredit the plaintiff's allegations of cognitive and physical impairment resulting from a horseback riding accident.<sup>6</sup> The reasoning employed in the majority and dissenting opinions is emblematic of the fundamental policy conflict between the huge importance of discovery to litigation, and the new and sometimes unanticipated consequences of social media to prospective litigants. While the majority's opinion is defensible as a matter of precedent, this Comment argues that New York state courts have interpreted social media discovery too narrowly, thereby losing sight of the overall purpose of discovery and its function in litigation.

Part I discusses the background of discovery, and how courts around the country have applied traditional discovery rules to the new frontier of social media. Part II discusses the court's reasoning in *Forman*, as well as the dissent's criticism of the majority opinion. Finally, Part III explores the policy implications of both the majority and dissent's views, and what New York courts should consider going forward as they continue to refine the law of social media discovery.

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3. See Emily Christofides et al., *Information Disclosure and Control on Facebook: Are They Two Sides of the Same Coin or Two Different Processes?*, 12 CYBERPSYCHOLOGY & BEHAV. 341 (2009) (concluding that undergraduate students are very likely to post personal pictures to Facebook, including pictures with friends, pictures at parties, and pictures taken while drinking).

4. *Social Media*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/social%20media> (last visited Apr. 1, 2016).

5. See *Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/terms> (last visited Apr. 1, 2016) ("When you publish content or information using the Public setting, it means that you are allowing everyone, including people off of Facebook, to access and use that information, and to associate it with you (i.e., your name and profile picture).").

6. 22 N.Y.S.3d 178 (N.Y. App. Div. 2015).

## I.

## BACKGROUND: THE DEVELOPMENT OF SOCIAL MEDIA DISCOVERY

The Supreme Court has long recognized the fundamental role that discovery plays in litigation.<sup>7</sup> It was therefore against this backdrop that state and district courts began to search for acceptable parameters for the discovery of nonpublic social media information. Courts generally attempted to treat social media discovery in the same manner as more traditional forms of discovery—as one court stated, “[T]he resolution of social media discovery disputes pertaining to existing Rules of Procedure is simply new wine in an old bottle.”<sup>8</sup>

However, courts have nonetheless taken a range of positions on how broadly accessible social media discovery should be. Many courts require a “showing of relevance before ordering broad social media discovery,” which generally means that the party seeking discovery must find “relevant information” in the “public portion of the party’s site.”<sup>9</sup> Others take a broader view of relevancy, as one court found that “photographs posted on a social networking site are neither privileged nor protected by any right of privacy, regardless of any privacy setting that the user may have established.”<sup>10</sup>

Once the party has established relevance, most courts limit what that party can access by conducting an in camera review prior to production, or by otherwise limiting production to only clearly relevant information.<sup>11</sup> However, a few courts have chosen to impose no limitations on the production of social media, ordering parties to actually produce their social media login information to the opposing party.<sup>12</sup>

New York follows the narrower view of social media discovery. Once a party demonstrates relevance by finding publicly available information on the opposing party’s social media site that tends to discredit the claim or defense, the court then conducts an in camera review and does not permit the requesting party to access the user’s entire social media account.<sup>13</sup>

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7. See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (“Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.”).

8. *Brogan v. Rosenn, Jenkins & Greenwald, LLP*, No. 08-6048, 2013 WL 1742689, at \*6 (C.P. Lackawanna Cty. Apr. 22, 2013).

9. Rick E. Kubler & Holly A. Miller, *Recent Developments in Discovery of Social Media Content*, ABA 3 (March 2015), [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015\\_inscle\\_materials/written\\_materials/24\\_1\\_recent\\_developments\\_in\\_discovery\\_of\\_social\\_media\\_content.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015_inscle_materials/written_materials/24_1_recent_developments_in_discovery_of_social_media_content.authcheckdam.pdf) [<https://perma.cc/T8TD-RP83>].

10. *Id.* at 3–4 (quoting *Nucci v. Target Corp.*, 162 So. 3d 146, 154 (Fla. Dist. Ct. App. 2015)).

11. Kubler & Miller, *supra* note 9, at 9–10.

12. *Id.* at 4–5.

13. See *Forman v. Henkin*, 22 N.Y.S.3d 178, 180–83 (N.Y. App. Div. 2015).

## II.

*FORMAN V. HENKIN*: THE FIRST IN-DEPTH EXAMINATION OF NEW YORK'S  
RULES FOR SOCIAL MEDIA DISCOVERY

The controversy in *Forman* centered on whether the plaintiff's private Facebook messages and photographs were discoverable.<sup>14</sup> The plaintiff brought a personal injury action against the defendant, claiming negligence, after falling off the defendant's horse due to a malfunction with the saddle.<sup>15</sup> The plaintiff alleged that the accident resulted in "serious and debilitating injuries, including traumatic brain injury and spinal injuries, causing cognitive deficits, memory loss, inability to concentrate, difficulty in communicating, and social isolation, severely restricting her daily life."<sup>16</sup> After a deposition in which the plaintiff stated that her "social network went from huge to nothing," the defendant demanded access to the plaintiff's Facebook records, arguing that the material would be "relevant to the issue of plaintiff's credibility."<sup>17</sup> In response to the defendant's motion to compel plaintiff to provide the defendant "unlimited authorization" to obtain information from the plaintiff's Facebook account, the lower court directed the plaintiff to produce the following: (1) all photographs posted on Facebook prior to the accident that she intended to introduce at trial; (2) all photographs posted on Facebook after the accident that did not show "nudity or romantic encounters;" and (3) authorizations for Facebook records "showing each time plaintiff posted a private message after the accident and the number of characters or words in those messages."<sup>18</sup>

The appellate court disagreed with the lower court, holding that none of this information was discoverable except the photographs posted to Facebook that the plaintiff intended to use at trial.<sup>19</sup> In reaching this decision, the court purported to apply "settled principles" of discovery—namely that "[i]t is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence" so as to avoid "hypothetical speculations calculated to justify a fishing expedition"—to the context of social media discovery requests.<sup>20</sup> Accordingly, the court determined that there must be "some threshold showing before allowing access to a party's private social media information," which the defendant failed to make.<sup>21</sup> Moreover, the court concluded that "defendant's speculation that the

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14. *Id.* at 179–80.

15. *Id.* at 179 ("Plaintiff claims that defendant was negligent because, inter alia, he failed to properly prepare the horse for riding, and neglected to maintain and inspect the equipment.").

16. *Id.* at 183 (Saxe, J., dissenting).

17. *Id.*

18. *Id.* at 179–80 (majority opinion).

19. *Id.* at 181 (stating that "defendant has failed to establish entitlement to either plaintiff's private Facebook photographs, or information about the times and length of plaintiff's private Facebook messages").

20. *See id.* at 180 (internal citations and quotations omitted).

21. *Id.* at 180–81.

requested information might be relevant to rebut plaintiff's claims of injury or disability" was not sufficient for the defendant to gain access to the plaintiff's Facebook account.<sup>22</sup>

The court emphasized that the discovery standard it applied to social media was "the same as in all other situations—a party must be able to demonstrate that the information sought is likely to result in the disclosure of relevant information bearing on the claims."<sup>23</sup> As Judge Saxe's dissent points out, however, the discovery of nonpublic social media information is subject to additional convoluted rules that do not apply to the discovery of tangible documents. Such information is discoverable "if, and only if, the defendant can first unearth some item from the plaintiff's publicly available social media postings that tends to conflict with or contradict the plaintiff's claims."<sup>24</sup> Additionally, if the requesting party successfully establishes this "factual predicate,"<sup>25</sup> the court is then required to conduct an in camera review of the plaintiff's social media postings to ensure that the defendant only receives relevant materials.<sup>26</sup>

Therefore, the dissent took the position that although the majority's holding comported with New York precedent regarding social media discovery, the court should have reconsidered its recent decisions.<sup>27</sup> Judge Saxe argued that the majority's approach did not in actuality reflect the traditional and "settled" discovery process for tangible documents, as the traditional approach would simply require that the plaintiff conduct a search through their social media profile for relevant documents "[u]pon receipt of an appropriately tailored demand."<sup>28</sup> There would be "no particular difficulty" in applying this traditional approach to social media discovery requests, or in appropriately tailoring discovery demands.<sup>29</sup> Moreover, despite the majority's proclamation that it was bound by stare decisis and therefore unable to revisit the rules for social media discovery,<sup>30</sup> the dissent argued that "the topic is too new to warrant rigid adherence at this time to our initial rulings under the doctrine of stare decisis."<sup>31</sup> The dissent therefore criticized the majority's failure to

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22. *Id.* at 181.

23. *Id.*

24. *Id.* at 184–85 (Saxe, J., dissenting).

25. *Id.* at 185.

26. *Id.* at 185–86 (noting that this requirement "imposes a substantial—and unnecessary—burden on trial courts").

27. *Id.* at 184–89. For example, one recent decision was *McCann v. Harleysville Insurance Company of New York*, where the court first introduced the concept of needing a "factual predicate with respect to the relevancy of the [social media] evidence" before social media discovery can take place. 910 N.Y.S.2d 614, 615 (N.Y. App. Div. 2010).

28. *Forman*, 22 N.Y.S.3d at 188 (Saxe, J., dissenting).

29. *Id.* ("If a plaintiff claims to be physically unable to engage in activities due to the defendant's alleged negligence, posted information . . . that establish[es] or illustrate[s] the plaintiff's former or current activities or abilities will be discoverable.")

30. *See id.* at 182 (majority opinion).

31. *Id.* at 183 (Saxe, J., dissenting).

reconsider the discovery rules for social media, highlighting how “the existing decisions have unfairly created a rule of judicial protectionism for the digital messages and images created by social networking site users, in contrast to how discovery of tangible documents is treated.”<sup>32</sup>

### III.

#### AN OPPORTUNITY MISSED: THE CASE FOR BROADER SOCIAL MEDIA DISCOVERY

Although the majority’s holding was consistent with New York precedent, a reevaluation of the rules regarding social media discovery would have been appropriate. As the dissent points out, the rules for social media discovery do not particularly seem to resemble the rules for traditional paper discovery.<sup>33</sup> There is no corollary in traditional paper discovery for New York’s requirement that the requesting party first find publicly available information on social media that is relevant to their claim or defense *before* being granted access to broader discovery, as “[t]he Federal Rules of Civil Procedure do not require a party to prove the existence of relevant material before requesting it.”<sup>34</sup> A plaintiff’s or defendant’s case should not hinge on whether the opposing party happened to be a little too lax with their privacy settings or happened to have a photo relevant to the current litigation as their profile picture.<sup>35</sup> Such happenstance has no bearing on the likelihood that relevant information would be found among the nonpublic material.

Additionally, it is entirely unclear why social media discovery could not proceed as regular discovery does. Instead of solely searching physical and electronic documents such as email, the party would also have to search and produce social media documents responsive to the other party’s request. As another New York state court stated, “The postings on plaintiff’s online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service’s privacy settings to restrict access, *just as relevant matter from a personal diary is discoverable.*”<sup>36</sup>

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32. *Id.* at 189.

33. *See id.* at 188-89.

34. *See id.* at 186-87 (quoting *Giacchetto v. Patchogue-Medford Union Free Sch. Dist.*, 293 F.R.D. 112, 114 n.1 (E.D.N.Y. 2013)).

35. *See, e.g., Spearin v. Linmar, L.P.*, 11 N.Y.S.3d 156 (N.Y. App. Div. 2015) (holding that the defendant could obtain relevant information from the plaintiff’s private Facebook account because the plaintiff claimed that he could no longer play the piano as a result of an accident, and the plaintiff’s public profile picture on Facebook, uploaded after the accident, showed the plaintiff sitting in front of a piano).

36. *Patterson v. Turner Constr. Co.*, 931 N.Y.S.2d 311 (N.Y. App. Div. 2011) (emphasis added). Notably, the majority in *Forman* seems to take an entirely contrary position. *See* 22 N.Y.S.3d at 182 (claiming that the dissent’s position “would require production of all communications about the plaintiff’s activities that exist not only on social media, but in diaries, letters, text messages and emails. . . . [This] is the very type of ‘fishing expedition’ that cannot be countenanced”).

Moreover, while the majority opinion accurately represents the complexity of New York's social media discovery rules, it simultaneously seems to lose sight of the overarching purpose of discovery and its importance to litigation. New York's discovery process is governed by the Civil Practice Law and Rules Section 3101(a), which states that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action."<sup>37</sup> The Court of Appeals of New York has interpreted "material and necessary" to "require disclosure, upon request, of *any* facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason."<sup>38</sup>

Particularly in the personal injury context, where disputes generally involve proving or rebutting claims of some sort of diminution in the plaintiff's quality of life, it is difficult to argue that information found on a social media account—which exists specifically for documenting individual's lives—is not material or necessary to the lawsuit.<sup>39</sup> Accordingly, because information on social media is potentially incredibly relevant to the disposition of civil suits, a new social media discovery rule should be developed that is not reliant on what amounts to luck—whether the party is adept with privacy settings or not.

It is true that there have long been concerns about discovery being used as a "fishing expedition," and these concerns could be especially salient in the social media context. However, as other courts have established, allowing access to information on social media does not instantaneously convert a discovery request into a fishing expedition. For example, in *EEOC v. Simply Storage Management, LLC*, a case involving emotional distress, the court ordered claimants to produce specific Facebook or Myspace activity that "reveal[ed], refer[ed], or relate[d] to any emotion, feeling, or mental state."<sup>40</sup> It is, accordingly, possible to allow targeted discovery of relevant social media information without opening a party's entire social media account up to attack. This idea, however, is in direct contrast to the majority's assumption that changing or lowering the bar for social media discovery would allow "unbridled disclosure" of social media information, "based merely on the speculation that some relevant information might be found."<sup>41</sup> Because courts themselves set the parameters for "material and necessary" discovery, there is no support for this assumption and nothing standing in the way of more reasonable and targeted social media discovery rules.

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37. N.Y. C.P.L.R. 3101(a) (McKinney 2014).

38. *Allen v. Crowell-Collier Pub. Co.*, 235 N.E.2d 430, 452 (N.Y. 1968) (emphasis added).

39. *See Forman*, 22 N.Y.S.3d at 189 (Saxe, J., dissenting) (noting that "the contents of a self-made portrait of a plaintiff's day-to-day life may contain information appropriate for discovery in personal injury litigation").

40. 270 F.R.D. 430, 436 (S.D. Ind. 2010).

41. *See Forman*, 22 N.Y.S.3d at 182.

## CONCLUSION

The idea of a social media “fishing expedition” has subsumed the general concept of discovery, making the bar for the *limited* discovery of social media information far too high. As the dissent in *Forman* argued, social media discovery is ripe for reevaluation because the rules are not yet settled and the consequences of varying approaches not yet known.<sup>42</sup> Perhaps the rules regarding social media discovery should again reflect discovery’s origins: in one of the first cases interpreting Rule 26 of the Federal Rules of Civil Procedure, the Supreme Court proclaimed that “[n]o longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case.”<sup>43</sup>

The advent of social media merely presents a new way for plaintiffs and defendants to prove their claims or defenses. Although accessing an entire social media account is unreasonable, courts should establish a simpler way for parties to access relevant social media information in accordance with the rules governing traditional discovery methods.

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42. *See id.* at 189 (Saxe, J., dissenting) (arguing that the “so-called ‘well-settled body of case law’ is not so long-established that it is deserving of immutable stare decisis treatment. ‘[T]he relevant factors in deciding whether to adhere to the principle of stare decisis include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.’”) (quoting *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009)).

43. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).