CARLTON FIELDS

OMG! I Have to Produce What? 4 Steps to Tipping the Field With Social Media

August 29, 2013

Not every widower mourns by partying with several young women. And most of those who soothe their pain with a couple cold ones and a few warm shoulders to cry on don't commemorate the occasion with a Facebook photo. But a few do. Though we may disagree with how they grieve, it's really none of our business. When they sue one of our clients for their spouse's death, however, it definitely is our business. We have to make that photo (especially the "I ♥ hot moms" t-shirt) complicate their case just a bit. *See Allied Concrete Co. v. Lester*, 736 S.E.2d 699, 702-03 (Va. 2013) (noting sanctions of $542,000 against counsel, $180,000 against plaintiff, and an adverse-inference instruction, when counsel advised plaintiff to "clean up" his Facebook page, which included a photo of plaintiff drinking beer while wearing said t-shirt in the company of said presumably attractive mothers). Pharma manufacturers face an uneven playing field on e-discovery. The effort and expense of producing electronic material dwarf any corresponding return from plaintiffs with little, if anything, to produce in response. Discovery of plaintiffs' social media presents an opportunity to tip the field in our direction and make the other side negotiate some of the same e-discovery concerns. To wield this tool effectively, defendants must measure their efforts relative to the underlying facts. A staged approach that avoids premature overreaching is best. This post, an earlier version of which appeared in DRI's Rx for the Defense, suggests a four-step plan. **Step 1: Establish a Baseline** Defendants have already won the preliminary skirmish. Most courts agree that a plaintiff's social networking is discoverable. "Generally, [social networking] content is neither privileged nor protected by any right of privacy." *See generally Davenport v. State Farm Mut. Auto. Ins. Co.*, No. 3:11-cv-632-J-JBT, 2012 WL 555759, at *1-*2 (M.D. Fla. Feb. 21, 2012). "[I]nformation that an individual shares through social networking websites like Facebook may be copied and disseminated by another, rendering any expectation of privacy meaningless." *Beswick v. North West Med. Ctr.*, Inc., No. 07-020592 CACE (03), 2011 WL 7005038, at 2 (Fla. Cir. Ct. 17th Jud. Cir. Nov. 3, 2011). Nonetheless, some articulable showing of a basis for discovery is necessary. Defendants get into trouble – and generate needless negative authority – when they prematurely seek court relief. "It is

not enough to simply state that evidence 'may exist on social networking sites maintained by [p]laintiff.'" *Levine v. Culligan of Fla., Inc.*, No. 50-2011-CA-010339-XXXXMB, 2013 WL 1100404, at 6 (Fla. Cir. Ct. 15th Jud. Cir. Jan. 29, 2013). A "mere hope that [] private text-messages, e-mails, and electronic communication might include an admission against interest, without more, is not a sufficient reason" to compel discovery. *Salvato v. Miley*, No. 5:12-CV-635-Oc-10PRL, 2013 WL 2712206, at *2 (M.D. Fla. June 11, 2013). Some "factual predicate" or "reason to believe that the private portion of a profile contains information relevant to the case" is required. *Levine*, 2013 WL 1100404 at 5-6. "Absent such a showing, [defendant] is not entitled to delve carte blanche into the nonpublic sections of [p]laintiffs' social networking accounts." *Keller v. Nat'l Farmers Union Prop. & Cas. Co.,* No. CV 12-72-M-DLC-JCL, 2013 WL 27731, at *4 (D. Mont. Jan. 2, 2013). Defendants should start to generate that predicate even before serving written discovery. As soon as a case comes in the door, a defendant should establish a baseline of the plaintiff's social media presence by running a comprehensive internet search for any activity, including Facebook, Twitter, MySpace, etc. Any publicly available material should be documented and preserved electronically. Various software programs are available to assist with this step. Some of these programs feature applications geared specifically to social media such as, for example, preserving a plaintiff's public Facebook page. With that baseline established, a defendant should serve written discovery that includes requests to identify and produce plaintiff's social media activity. Most lawyers nowadays have their own set of "standard" requests. The keys are covering the breadth of social media and particularizing the requests for plaintiff's specific circumstances (alleged injuries, relevant dates, etc.). Of course, plaintiff may object and refuse to produce any social media, whether chats, posts, or photos. Some may refuse to acknowledge whether such material even exists. The decision at this first step is whether to involve the court. In some instances, the plaintiff's baseline material may so materially and directly undermine the objections that an immediate motion to compel is justified. For example, excerpts of chats might establish the relevancy of all other chats. *See Glazer v. Fireman's Fund Ins. Co.*, No. 11 Civ. 4374(PGG)(FM), 2012 WL 1197167, at *3 (S.D.N.Y. Apr. 5, 2012). Or, providing the court with "evidence of several internet articles that [p]laintiff had published that related to her health, wellness, and work" might render "indefensible" her discovery responses denying that she had posted any relevant information online. *German v. Micro Elecs., Inc.*, No. 2:12-cv-292, 2013 WL 143377, at *2 (S.D. Ohio Jan. 11, 2013). In these instances, defendants should skip directly to Step III and seek court relief. Absent a clear predicate, however, defendants should gather further support first. **Step 2: Gather Further Support** The plaintiff's deposition is often the next best source of information. The goal is two-fold: (1) further document plaintiff's alleged injuries in contrast with activities described or depicted online, and (2) explore the depth of the plaintiff's social media use. In one instance, "plaintiff's own testimony at his deposition as to the alleged impact of the claimed accident and his alleged injuries" established the basis for compelling the production of Facebook content. *Bianco v. N. Fork Bancorporation, Inc.*, No. 107069/2010, 2012 WL 5199007, at 2-3 (N.Y. Sup. Ct. Oct. 10, 2012). The questioning on social media use should explore at least the types of accounts used, frequency of use, ease of access, content of comments or postings, photos, "friends," timing relative to the alleged injury, changes in content or public access, and whether

plaintiff produced such material to her lawyer. Armed with this information, a defendant has stronger grounds to justify broad production of plaintiff's social media. *Compare Zimmerman v. Weis Markets, Inc.*, No. CV-09-1535, 2011 WL 2065410, at 2-4 (Pa. Ct. Com. Pl. May 19, 2011) (granting motion to compel when plaintiff testified that "he never wears shorts because he is embarrassed by his scar," but photos on his Facebook and MySpace pages showed him in shorts) with *Levine*, 2013 WL 1100404, at 2 (sustaining objections to discovery when defendant failed to link plaintiff's social media material to her deposition testimony). A defendant might also use information gathered at the deposition to broaden the scope of the known baseline. Once the names of plaintiff's family and friends are known, checks on their publicly available social media may reveal posts about the plaintiff or if the plaintiff has chatted or commented on their accounts. **Step 3: Seek and Obtain Court Relief** Once a sufficient basis exists, defendants should enjoy great success in obtaining court relief. The case law bears this out, provided that the material sought is tailored to the specifics of the case. A motion to compel should seek material temporally related to key dates. *See German*, 2013 WL 143377, at *6 (defendant properly narrowed its "requests to blogs, social media sites, postings and similar online activities where [p]laintiff addressed her workplace, health condition, or other issues raised in her [c]omplaint" starting one year before the first relevant date). That is not to say that a defendant should unnecessarily constrain itself. For example, in cases involving claims of mental anguish, courts have compelled disclosure of material as broad as "social media communications and photographs 'that reveal, refer, or relate to any emotion, feeling, or mental state . . . [and] that reveal, refer, or relate to events that could reasonably [be] expected to produce a significant emotion, feeling or mental state.'" *Reid v. Ingerman Smith LL*P, No. CV 2012-0307(ILG)(MDG), 2012 WL 6720752, at *2 (E.D.N.Y. Dec. 27, 2012). A similar breadth should apply to claims for personal injury or lost wages. Indeed, a plaintiff may simply yield to an appropriately tailored motion. *See Scipione v. Advance Stores Co.*, No. 8:12-cv-687-T-24AEP, 2013 WL 646405 (M.D. Fla. Feb. 21, 2013) (plaintiff conceded that she would produce copies of Facebook material limited in substance and time to her alleged injury). In addition to the substantive relief, the motion should request that plaintiff delete no content from the social media account, make no changes to the privacy settings, and take all reasonable measures to preserve the account data. See id. Defendant should then monitor the publicly available baseline information while the motion is pending. **Step 4: Force Complete Compliance** Once the court compels disclosure, plaintiffs often encounter some further difficulty in producing the material. At this step, holding their feet to the fire is key to obtaining complete compliance. Otherwise, a defendant cannot fully leverage the prior steps. For example, a plaintiff cannot claim an inability to download his account material. *See In re White Tail Oilfield Servs.*, L.L.C., No. 11-0009, 2012 WL 4857777, at *2-*3 (E.D. La. Oct. 11, 2012) (ordering download of complete Facebook account by allowing defendant to use plaintiff's password and requiring plaintiff to forward all material to defendant's counsel). Similarly, a plaintiff must produce the material in a useful electronic format. *See German*, 2013 WL 143377, at *7-*11 (rejecting plaintiff's cut-and-paste production and requiring production in a static-image format such as PDF or TIFF). Where appropriate, courts have even forced a plaintiff to open a new account to allow access to previously deleted material. *See Glazer*, 2012 WL 1197167, at *3 (compelling plaintiff to create a new

LivePerson account). As a general theme, plaintiff cannot shift the burden of compliance to defendant or the court. *See German*, 2013 WL 143377, at *11 (rejecting plaintiff's proposal to grant defendant access to her accounts "because it impermissibly shifts the burden onto [defendant] to sift through her 'prolific collection of writings' for responsive" information). When necessary, courts will appoint a special master to review material and settle disputes, the cost of which is shifted at least equally to the plaintiff. *See EEOC v. Original Honeybaked Ham Co.*, No. 11-cv-02560-MSK-MEH, 2012 WL 5430974, at *2-*3 (D. Colo. Nov. 7, 2012) (appointing a forensic expert to review text message, social media, e-mail, and blog content); *Bianco*, 2012 WL 5199007, at 3 (appointing a special referee to review plaintiff's complete Facebook account). Finally, efforts to force complete compliance should consider sanctions. The developing case law is filled with examples of plaintiffs who simply could not or would not fully produce social media. Courts are more than willing to impose sanctions in this event. *See Gatto v. United Air Lines, Inc.*, No. 10-cv-1090-ES-SCM, 2013 WL 1285285 (D.N.J. Mar. 25, 2013) (awarding adverse-inference instruction in response to deletion of Facebook account); *EEOC v. Original Honeybaked Ham Co.*, No. 11-cv-02560-MSK-MEH, 2013 WL 752912 (D. Colo. Feb. 27, 2013) (awarding fees and costs caused by plaintiff's failure to comply with order compelling discovery); *German*, 2013 WL 143377, at *12 (awarding fees and costs recoverable from plaintiff's counsel for poorly advising plaintiff "on the format and sufficiency of her production"). Of course, any time sanctions are on the table, counsel should be especially vigilant for deletions or "privacy" changes to plaintiff's accounts. Overall, defendants are winning the battles on discovery of social media. Courts properly recognize social media as "a treasure trove for evidence in litigation." *Levine*, 2013 WL 1100404, at 1. The keys to maintaining the momentum from these hard-fought victories are timing and consideration of the case-specific merits. In the wrong case or at the wrong time, pursuing social media is only a CWOT and makes the task tougher for every other defendant. In the right case and at the right time, however, social media may tip the playing field in your favor and make plaintiff say *cul8r*. *Originally published on the Drug and Device Law blog.*

Authored By

Edward W. Gerecke

David J. Walz

Related Practices

Pharmaceuticals and Medical Devices