

2014

## “Sharing” with the Court: The Discoverability of Private Social Media Accounts in Civil Litigation

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### Recommended Citation

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Available at: <https://ir.lawnet.fordham.edu/iplj/vol25/iss1/5>

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## **“Sharing” with the Court: The Discoverability of Private Social Media Accounts in Civil Litigation**

### **Cover Page Footnote**

J.D. Candidate, Fordham University School of Law, 2015; B.A., cum laude, Bates College, 2010. Thank you to Professor James Kainen for advising me on this Note. Thank you to Adam Phillips for his endless patience and support and to my family for their encouragement and love.

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Zoe Rosenthal\*

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INTRODUCTION: FACEBOOK AND THE PREVALENCE OF  
SOCIAL MEDIA IN LITIGATION DISCOVERY

When Facebook was first founded in 2004, few could have imagined its quick popularity, pervasive use, and cultural prevalence. It was perhaps even more difficult to conceive that Facebook, among other social media networks, would ultimately become a common and increasingly widespread part of litigation discovery proceedings. However, courts, counsel, and adversarial parties quickly realized that, because “an overwhelming majority of adults online . . . use social networking sites,”<sup>1</sup> there is a wealth of information to be found by incorporating social media into traditional discovery requests. Today, there are over 1.19 billion active Facebook users, and one in five page views in the United States occurs on Facebook.<sup>2</sup> As of 2012, adults had also become the most common users of Facebook, with 29.7% of users age 25 to 34.<sup>3</sup> Litigators have realized that Facebook and other social media sites offer a “gold mine of potential evidence,” as these sites are “specifically designed to encourage users to record in writing and share with others what they are thinking or doing—and even where they are located—at any given moment.”<sup>4</sup>

The benefits of social media discovery have become clear, evidenced by the increasing use of social networking in litigation.<sup>5</sup> For example, the American Academy of Matrimonial Lawyers found that 81% of attorneys who responded to its February 2010 study reported using evidence found on social networking sites in their

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<sup>1</sup> Jennifer K. Gregory, *#bewareofovershare: Social Media Discovery and Importance in Intellectual Property Litigation*, 12 J. MARSHALL REV. INTELL. PROP. L. 449, 450 (2013) (citing Maeve Duggan & Joanna Brenner, *The Demographics of Social Media Users—2012*, PEW RESEARCH CTR. 2 (2013), available at [http://pewinternet.org/~media/Files/Reports/2013/PIP\\_SocialMediaUsers.pdf](http://pewinternet.org/~media/Files/Reports/2013/PIP_SocialMediaUsers.pdf) (asserting that “almost seven out of ten” adults using the internet use social networking sites)).

<sup>2</sup> See Dan Noyes, *The Top 20 Valuable Facebook Statistics*, ZEPHORIA, <http://zephoria.com/social-media/top-15-valuable-facebook-statistics/> (last updated Dec. 31, 2013).

<sup>3</sup> See *id.*

<sup>4</sup> Mariel Goetz, *Social Media Evidence in Civil Litigation*, A.B.A. SEC. LITIG. (2013), available at [http://www.ropesgray.com/marielgoetz/~media/Files/articles/2013/08/TrialEvidence\\_ArticleReprint\\_SocialMediaEvidenceInCivilLitigation.ashx](http://www.ropesgray.com/marielgoetz/~media/Files/articles/2013/08/TrialEvidence_ArticleReprint_SocialMediaEvidenceInCivilLitigation.ashx).

<sup>5</sup> *Id.* (“[I]t is becoming standard practice in litigation today to use social media sites to research parties; to establish or refute facts; to determine or rebut state of mind or health; and to identify, impeach or bolster the credibility of witnesses.”).

cases.<sup>6</sup> Facebook was found to be the most popular source of evidence, with 66% of attorneys responding indicating that they had used evidence found on the site.<sup>7</sup>

Still, the introduction of this new technology has presented a unique challenge for the courts, “due to [social networking sites’] relative novelty and their ability to be shared by or with someone besides the original poster.”<sup>8</sup> Furthermore, the varied and changing privacy controls on social media sites like Facebook have raised questions about the appropriate depth of discovery, as well as the correct means of such production. Yet, only recently did there begin to be some “push back against efforts to obtain complete access to an individual’s social networking profile, even those portions restricted as private.”<sup>9</sup>

Nearly all social networking sites offer options to allow portions of a user’s profile to remain “public” while other portions can be set to remain “private.” The “private” portions of a user’s profile are typically only accessible to those other users who are “friends” of the individual user. While it is obvious that any public portions of an individual’s social media account are available and accessible to adversarial parties, courts have struggled to create a coherent, consistent framework for the discoverability of the private content of a user’s social media account. More specifically, courts have not consistently answered the question of whether the entire contents of an individual’s private social media page are discoverable; or, rather, whether only certain “relevant” portions should be produced. This question becomes intertwined with the issue of how to best facilitate production of the content of social media sites, as

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<sup>6</sup> See John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 SMU SCI. & TECH. L. REV. 465, 467 (2011) (citing *Big Surge in Social Networking Evidence Says Survey of Nation’s Top Divorce Lawyers*, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, (Feb. 10, 2010), <http://www.aaml.org/about-the-academy/press/press-releases/e-discovery/big-surge-socialnetworking-evidence-says-survey->).

<sup>7</sup> See *id.*

<sup>8</sup> *Higgins v. Koch Dev. Corp.*, No. 3:11-cv-81-RLY-WGH, 2013 WL 3366278, at \*2 (S.D. Ind. July 5, 2013).

<sup>9</sup> John G. Browning, *With “Friends” Like These, Who Needs Enemies? Passwords, Privacy, and the Discovery of Social Media Content*, 36 AM. J. TRIAL ADVOC. 505, 510 (2013).

certain means of production may inadvertently require broad access to a user's private content. This note aims to address and resolve these issues.

First, in Part I, I will address some of the relevant background pertaining to social media discovery, and specifically, whether it is considered to generally be discoverable. Part II will then address the Stored Communications Act and how it may be applied to social media discovery requests. This will be followed by a discussion of the standards courts have developed to determine when they should permit discovery of an individual's *private* social media account. In Part II, I discuss the various approaches to determine the appropriate depth of social media discovery and how courts have explored different options to prevent "overbroad" discovery requests. Next, in Part III, I address how courts have ruled regarding the actual facilitation of discovery requests involving an individual's private social media account. Finally, in Part IV, I aim to resolve questions about how to treat these types of social media discovery requests. Specifically, I make arguments about how courts should go about ruling on the depth of social media discovery requests and what, if any, determinations such courts should make about the means of facilitating these discovery requests.

## I. IS AN INDIVIDUAL'S PRIVATE SOCIAL MEDIA ACCOUNT DISCOVERABLE?

### *A. Does an Individual Have an Inherent, Protected Privacy Interest in His or Her Private Social Media Account?*

It is well-settled that "[r]elevant information in the private section of [an individual's] social media account is discoverable."<sup>10</sup> The documents, information and photos contained within such an account are "not privileged nor protected from production by a common law right of privacy."<sup>11</sup> Specific attempts have been made

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<sup>10</sup> Howell v. Buckeye Ranch, Inc., No. 2:11-cv-1014, 2012 WL 5265170, at \*1 (S.D. Ohio Oct. 1, 2012) (citing Glazer v. Fireman's Fund Ins. Co., No. 11 Civ. 4374(PGG) (FM), 2012 WL 1197167, at \*3-4 (S.D.N.Y. Apr. 5, 2012)).

<sup>11</sup> *Id.* (citing Tompkins v. Detroit Metro. Airport, 278 F.R.D. 387, 388 (E.D. Mich. 2012)).

to argue that the very fact that an individual has chosen to utilize particular privacy settings should suggest that the private contents of the individual's Facebook page are shielded from discovery by that individual's protected privacy interest in the content of such an account.<sup>12</sup> These arguments rely on the notion that a protected privacy interest exists when individuals deliberately choose to (a) bar access by the general public to their page, and (b) only authorize certain individuals to access their page;<sup>13</sup> however, such arguments have been repeatedly rejected by courts.<sup>14</sup>

As the court noted in *Equal Employment Opportunity Commission v. Simply Storage Management, LLC*, content from social networking websites "is not shielded from discovery simply because it is 'locked' or private."<sup>15</sup> Although an individual's privacy concerns may be relevant in determining whether "requested discovery is burdensome or oppressive, . . . a person's expectation and intent that her communications be maintained as private is not a legitimate basis for shielding those communications from discovery."<sup>16</sup> It therefore becomes irrelevant whether or not an individual believes that he has maintained a "private" Facebook page; for, "information that an individual shares through social networking websites [even while utilizing particular privacy settings,] may be copied and disseminated by another, rendering any expectation of privacy meaningless."<sup>17</sup> In *Patterson v. Turner Construction Co.* the court drew a comparison between private social media pages and a

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<sup>12</sup> See *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650, 657 (N.Y. Sup. Ct. 2010); *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 434 (S.D. Ind. 2010).

<sup>13</sup> See *id.*

<sup>14</sup> See, e.g., *Romano*, 907 N.Y.S.2d at 657 ("[W]hen Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist . . . '[I]n this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking.'") (citations omitted).

<sup>15</sup> *Simply Storage*, 270 F.R.D. at 434.

<sup>16</sup> *Id.*

<sup>17</sup> *Beswick v. N. W. Med. Ctr., Inc.*, No. 07-020592 CACE (03), 2011 WL 7005038 (Trial Order) (Fla. Cir. Ct. Nov. 3, 2011) (citing *Romano*, 907 N.Y.S.2d at 653 ("[A]s neither Facebook nor MySpace guarantee complete privacy, Plaintiff has no legitimate expectation of privacy.")); see also *Moreno v. Hartford Sentinel, Inc.*, 91 Cal. Rptr. 3d 858, 862-63 (Cal. Ct. App. 5th Dist. 2009) (finding "no reasonable expectation of privacy where an individual posted information on MySpace").



person's diary, reasoning that in the same way that "relevant matter" from an individual's diary is discoverable, any relevant material from an individual's Facebook account is discoverable regardless of the privacy settings utilized by the page's creator.<sup>18</sup>

*B. Does the Stored Communications Act Apply to Discovery Requests Made to Individual Social Media Users in Civil Litigation?*

1. What is the Stored Communications Act?

The Stored Communications Act (formally titled "Unlawful access to stored communications" and hereinafter referred to as the "SCA") provides, in pertinent part, that whoever:

(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or

(2) intentionally exceeds an authorization to access that facility;

and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided . . . .

. . . .

(c) Exceptions – Subsection (a) of this section does not apply with respect to conduct authorized –

(1) by the person or entity providing a wire or electronic communications service;

(2) by a user of that service with respect to a communication of or intended for that user . . .<sup>19</sup>

The court interpreted the SCA in *Glazer v. Fireman's Fund Insurance Co.*, finding that the SCA prohibits an entity that provides an electronic communication service from knowingly divulging "to any person or entity the contents of a communication while in elec-

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<sup>18</sup> *Patterson v. Turner Const. Co.*, 931 N.Y.S.2d 311, 312 (N.Y. App. Div. 2011) (citing *Faragiano v. Town of Concord*, 741 N.Y.S.2d 369, 370 (2002)).

<sup>19</sup> 18 U.S.C. § 2701 (2012).

tronic storage by that service.”<sup>20</sup> Therefore, even in light of a valid subpoena or court order, the SCA prohibits Facebook (an electronic communication service) from revealing the contents of an individual’s account to any non-governmental entity.<sup>21</sup> Facebook is barred from providing anything more than basic subscriber information.<sup>22</sup> However, the *Glazer* court clarified that an electronic communication service, like Facebook, may provide the contents of communication if the electronic communication service is granted “lawful consent” to do so by the “originator or an intended recipient of [the] communication” in question.<sup>23</sup>

## 2. The Stored Communications Act Does Not Apply to Discovery Requests in Civil Litigation

Parties have made attempts to argue that the SCA fully proscribes Facebook from producing the content of an individual’s account, and further, that it bars any discovery of such accounts at all.<sup>24</sup> Courts have repeatedly ruled that such propositions are misguided.<sup>25</sup> First, the SCA only applies to subpoena requests directed

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<sup>20</sup> *Glazer v. Fireman’s Fund Ins. Co.*, No. 11 Civ. 4374(PGG) (FM), 2012 WL 1197167, at \*2 (S.D.N.Y. Apr. 5, 2012) (citing 18 U.S.C. § 2702(a)(1)); *see also* *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 972–73 (C.D. Cal. 2010).

<sup>21</sup> *See* *Browning*, *supra* note 6, at 473 (The SCA “prohibits Facebook from disclosing the contents of a user’s Facebook account to any non-governmental entity even pursuant to a valid subpoena or court order.”).

<sup>22</sup> *See id.* (“The most Facebook can provide is the basic subscriber information for a particular account.”).

<sup>23</sup> *Glazer*, 2012 WL 1197167, at \*2 (citing 18 U.S.C. § 2702(a)(1)); *see also* *Crispin*, 717 F. Supp. 2d at 972–73.

<sup>24</sup> *See, e.g.*, *Largent v. Reed*, No. 2009-1823, 2011 WL 5632688 (Pa. Ct. C. P. Nov. 8, 2011) (Trial Order) (defendant claimed that disclosure of her Facebook username and password may be in violation of the SCA); *In re Air Crash Near Clarence Ctr., N.Y.*, on Feb. 12, 2009, No. 09-MD-2085, 2011 WL 6370189, at \*6 (W.D.N.Y. Dec. 20, 2011) (“Contrary to Plaintiff’s arguments, disclosure of electronic communications is not barred by the Stored Communications Act, 18 U.S.C. § 2701, which prohibits unauthorized access to stored electronic communications. *See* 18 U.S.C. § 2701(a). The SCA does not apply to the user of the electronic communications service himself, nor does it impose civil or criminal liability when action is taken in good faith pursuant to a court order.”); *Glazer*, 2012 WL 1197167, at \*2 (Plaintiff asserted that the SCA “proscribe[d] any effort to have [an electronic communication service or a remote computing service] produce transcripts of [the plaintiff’s] chats.” The court rejected this argument. *See infra* note 29).

<sup>25</sup> *See Glazer*, 2012 WL 1197167.

specifically at companies like Facebook and is therefore not applicable to discovery requests between adversarial parties in civil litigation.<sup>26</sup> The SCA "is not a catch-all statute designed to protect the privacy of stored Internet communications. Rather it only applies to the enumerated entities. [If an individual party is not an electronic communication service or a remote computing service], the SCA does not protect her Facebook profile from discovery."<sup>27</sup> Second, the SCA allows for an individual to sign a release form permitting Facebook to provide a party with the content of an individual's private account.<sup>28</sup> In such a case, the court may also direct or require an individual to sign such a release form.<sup>29</sup>

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<sup>26</sup> See *Crispin*, 717 F. Supp. 2d at 975-76 (citing *Viacom Int'l, Inc. v. YouTube, Inc.*, 253 F.R.D. 256, 264 (S.D.N.Y. 2008); *In re Subpoena Duces Tecum to AOL, L.L.C.*, 550 F. Supp. 2d 606, 611 (E.D. Va. 2008); *O'Grady v. Super. Ct.*, 139 Cal. App. 4th 1423 (2006)) (holding that civil subpoenas are not permissible under the SCA, and the defendant may not directly request information from Facebook); see also *Levine v. Culligan of Fla., Inc.*, No. 50-2011-CA-010339-XXXXMB, 2013 WL 1100404 (Trial Order) (Fla. Cir. Ct. Jan. 29, 2013) ("[C]ourts seem to be in agreement that the [SCA] prohibits records from being subpoenaed directly from Facebook and other social networking sites.") (citations omitted).

<sup>27</sup> *Largent*, 2011 WL 5632688.

<sup>28</sup> See *Glazer*, 2012 WL 1197167, at \*2 (Electronic communication services and remote computer services may "divulge the contents of a communication with the 'lawful consent' of the originator or an intended recipient of that communication.") (citing 18 U.S.C. § 2702(b)(3)).

<sup>29</sup> See *id.* ("The Court need not determine whether Glazer's communications are electronically stored, or whether Glazer consented to the disclosure of her LivePerson chats by agreeing to the Terms and Conditions, because it may simply *direct* that she consent to disclosure if the chats are likely to contain information relevant to this case. See, e.g., *In re Air Crash near Clarence Ctr., N.Y.*, on Feb. 12, 2009, Nos. 09-MD-2085, 09-CV-961 S, 2011 WL 6370189, at \*6 (W.D.N.Y. Dec. 20, 2011) (directing plaintiff to produce relevant electronic communications, including "social media accounts, emails, text messages, and instant messages," and noting that the defendant may request written authorizations to obtain such communications from third parties if the plaintiff's production is insufficient); *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 434 (S.D. Ind. 2010) (Content from social networking websites "is not shielded from discovery simply because it is 'locked' or 'private.' Although privacy concerns may be germane to the question of whether requested discovery is burdensome or oppressive and whether it has been sought for a proper purpose in the litigation, a person's expectation and intent that her communications be maintained as private is not a legitimate basis for shielding those communications from discovery."); *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650, 657 (N.Y. Sup. Ct. 2010) (requiring personal injury plaintiff to give defendant a properly-executed consent and authorization for her "Facebook and MySpace records, including any records previously deleted or archived by said operators.").

C. *What is Required for a Court to Allow the Discovery of an Individual's Private Social Media Account?*

Courts have generally agreed that, in order to permit the discovery of an individual's private social media account, the requesting party must demonstrate that some threshold of "relevance" exists.<sup>30</sup> Generally, this "relevance" is demonstrated by providing proof that the information available in an individual's public Facebook profile is relevant to the litigation.<sup>31</sup> Often, this means that the requesting party has provided examples of information contained in the individual's public Facebook profile that directly contradicts that individual's claims or specifically relates to the claims in question in the pending litigation.<sup>32</sup> In *Fawcett v. Altieri*, the court sum-

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<sup>30</sup> See *Potts v. Dollar Tree Stores, Inc.*, No. 11-CV-1180, 2013 WL 1176504, at \*3 (M.D. Ten. Mar. 20, 2013); *Keller v. Nat'l Farmers Union Prop. & Casualty Co.*, No. CV 12-72-M-DLC-JCL, 2013 WL 27731, at \*4 (D. Mont. Jan. 2, 2013); *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012); *Romano*, 907 N.Y.S.2d at 655. *Contra Giacchetto v. Patchogue-Medford Union Free Sch. Dist.*, 293 F.R.D. 112, 114 n.1 (E.D.N.Y. 2013). The court disagreed with this approach, stating:

[Th]is approach can lead to results that are both too broad and too narrow. On the one hand, a plaintiff should not be required to turn over the private section of his or her Facebook profile (which may or may not contain relevant information) merely because the public section undermines the plaintiff's claims. On the other hand, a plaintiff should be required to review the private section and produce any relevant information, regardless of what is reflected in the public section. The Federal Rules of Civil Procedure do not require a party to prove the existence of relevant material before requesting it. Furthermore, this approach improperly shields from discovery the information of Facebook users who do not share any information publicly.

*Id.*

<sup>31</sup> See *Brogan v. Rosenn, Jenkins & Greenwald, L.L.P.*, No. 08 CV 6048, 2013 WL 1742689 (Trial Order) (Pa. Ct. C. P. Apr. 22, 2013) ("[A] party may obtain discovery of private Facebook posts, photographs and communications only if the electronically stored information is relevant, and the party may satisfy that relevancy requirement by showing that publicly accessible information posted on the user's Facebook page controverts or challenges the user's claims or defenses in the pending litigation.").

<sup>32</sup> See, e.g., *Loporcaro v. City of N.Y.*, 950 N.Y.S.2d 723, at \*5, \*8 (N.Y. Sup. Ct. 2012) ("[P]laintiffs argue that the moving defendant has not provided a sufficient factual predicate to obtain access to the non-public contents of plaintiff's 'FACEBOOK' account . . . Since it appears that plaintiff has voluntarily posted at least some information about himself on Facebook which may contradict the claims made by him in the present action, he cannot claim that these postings are now somehow privileged or immune from discovery. Therefore, granting [the defendant] access to portions of plaintiff's Facebook

marized this concept of relevance, stating that “[t]he party requesting the discovery of an adversary’s restricted social media accounts should first demonstrate a good faith basis to make the request.”<sup>33</sup> In the federal context, relevancy is defined under Rule 26 of the Federal Rules of Civil Procedure, and is to be “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in th[e] case.”<sup>34</sup>

The court found that the defendant in *Zimmerman v. Weis Markets, Inc.* made this necessary demonstration.<sup>35</sup> Zimmerman sought damages for injuries to his leg resulting from an accident that occurred while he was operating a forklift at the Weis Markets’ warehouse. Specifically, Zimmerman complained that “‘his health in general [had] been seriously and permanently impaired and compromised,’ and that ‘he [had] sustained a permanent diminution in the ability to enjoy life and life’s pleasures.’”<sup>36</sup> However, upon review of Zimmerman’s public Facebook profile, the defendants

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account, including access to certain deleted materials, may well prove relevant and necessary to the defense.”) (citing generally *Patterson v. Turner Const. Co.*, 931 N.Y.S.2d 311 (N.Y. App. Div. 2011); *Romano*, 907 N.Y.S. 2d at 650).

<sup>33</sup> *Fawcett v. Altieri*, 960 N.Y.S.2d 592, 597 (N.Y. Sup. Ct. 2013).

<sup>34</sup> *Giacchetto*, 293 F.R.D. at 113 (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)) (citing *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 882 F.2d 682, 687 (2d Cir. 1989) (holding that “the broad scope of discovery delimited by the Federal Rules of Civil Procedure is designed to achieve disclosure of all the evidence relevant to the merits of a controversy.”); *Barrett v. City of N.Y.*, 237 F.R.D. 39, 40 (E.D.N.Y. 2006) (noting that the information sought “need not be admissible at trial to be discoverable”); *Brown v. City of N.Y.*, No. CV 2008-5095(FB)(MDG), 2011 WL 4594276, \*1 (E.D.N.Y. Sept. 30, 2011) (stating, “when broader discovery is sought by the parties, the Court should determine the scope according to the reasonable needs of the action”)).

<sup>35</sup> *Zimmerman v. Weis Mkts., Inc.*, No. 09-1535, 2011 WL 2065410 (Pa. Ct. C. P. May 19, 2011) (Trial Order) (“It is well recognized that the Pennsylvania Rules of Civil Procedure, like New York, provide for liberal discovery: ‘Generally, discovery is liberally allowed with respect to any matter, not privileged, which is relevant to the cause being tried. Pa.R.C.P. 4003.L.’ Zimmerman placed his physical condition in issue, and Weis Markets is entitled to discovery thereon. Based on a review of the publicly accessible portions of his Facebook and MySpace accounts, there is a reasonable likelihood of additional relevant and material information on the non-public portions of these sites. Zimmerman voluntarily posted all of the pictures and information on his Facebook and MySpace sites to share with other users of these social network sites, and he cannot now claim he possesses any reasonable expectation of privacy to prevent Weis Markets from access to such information.”) (citations omitted).

<sup>36</sup> *Id.* (citing Complaint, ¶ 25(b), (e) and (f)).

found that Zimmerman's interests included "'ridin' and 'bike stunts.'"<sup>37</sup> A review of Zimmerman's public MySpace profile also revealed photos of Zimmerman with his motorcycle before and after an accident, as well as a photo of Zimmerman in shorts, where the scar from his accident at Weis Markets was clearly visible.<sup>38</sup> This contradicted Zimmerman's deposition testimony, which stated that he did not wear shorts because he was too embarrassed by the scar on his leg.<sup>39</sup> Adopting the rationale of the opinion in *McMillen v. Hummingbird Speedway, Inc.*,<sup>40</sup> the *Zimmerman* court found that Weis Markets had provided more than the required "good faith basis"<sup>41</sup> to permit discovery of Zimmerman's private Facebook and MySpace accounts.<sup>42</sup>

The court reached an analogous decision in *Richards v. Hertz Corp.*, finding that "[the defendants] made a showing that at least some of the discovery sought [would] result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on [the plaintiff's] claim."<sup>43</sup> In *Richards*, multiple plaintiffs sought to recover damages for personal injuries resulting from an automobile accident.<sup>44</sup> One plaintiff, McCarthy, testified at a deposition that her injuries from the accident "impaired her ability to play sports, and caused her to suffer pain that was exacerbated in cold weather."<sup>45</sup> The defendants conducted a

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at n.4 ("As set forth in *McMillen*: 'Where there is an indication that a person's social network sites contain information relevant to the prosecution or defense of a lawsuit, therefore, and given *Koken's* [*Koken v. One Beacon Ins. Co.*, 911 A.2d 1021 (Pa. Cmwlth. 2006)] admonition that the courts should allow litigants to utilize 'all rational means for ascertaining the truth,' 911 A.2d at 1027, and the law's general dispreference for the allowance of privileges, access to those sites should be freely granted.'") (quoting *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 WL 4403285 (Pa. Ct. C. P. Sept. 9, 2010) (Trial Order)).

<sup>41</sup> See *supra* note 33 and accompanying text.

<sup>42</sup> See *Zimmerman*, 2011 WL 2065410 ("Based on a review of the publicly accessible portions of his Facebook and MySpace accounts, there is a reasonable likelihood of additional relevant and material information on the non-public portions of these sites.").

<sup>43</sup> *Richards v. Hertz Corp.*, 953 N.Y.S.2d 654, 656 (N.Y. App. Div. 2012) (citing *Patterson v. Turner Const. Co.*, 931 N.Y.S.2d 311 (N.Y. App. Div. 2011)).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

search of the portions of McCarthy's Facebook profile that were not blocked by privacy settings and found photographs of McCarthy skiing in the snow, dated six months after her deposition.<sup>46</sup> Accordingly, the court held that the defendants "demonstrated that McCarthy's Facebook profile contained a photograph that was probative of the issue of the extent of her alleged injuries, and it is reasonable to believe that other portions of her Facebook profile may contain further evidence relevant to that issue."<sup>47</sup>

However, in *Tompkins v. Detroit Metropolitan Airport*, the court characterized the defendant's discovery request as a "proverbial fishing expedition" and declined to find such requisite relevance.<sup>48</sup> *Tompkins* was a slip-and-fall case, in which the plaintiff claimed that as a result of injuries sustained at the Detroit Metropolitan Airport she was "impaired in her ability to work and enjoy life."<sup>49</sup> The defendants attempted to show that the plaintiff's public Facebook postings demonstrated the relevance of the plaintiff's private Facebook postings.<sup>50</sup> The court rejected this argument, noting that:

The public postings . . . are photographs showing the Plaintiff holding a very small dog and smiling, and standing with two other people at a birthday party in Florida . . . . [T]hese pictures are not inconsistent with Plaintiffs claim of injury or with the medical information she has provided. She does not claim that she is bed-ridden, or that she is incapable of leaving her house or participating in modest social activities. The dog in the photograph appears to weigh no more than five pounds and could be lifted with minimal effort.<sup>51</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012) ("[T]he Defendant does not have a generalized right to rummage at will through information that Plaintiff has limited from public view. Rather, consistent with Rule 26(b) . . . there must be a threshold showing that the request information is reasonably calculated to lead to the discovery of admissible evidence.").

<sup>49</sup> *Id.* at 387.

<sup>50</sup> *Id.* at 388.

<sup>51</sup> *Id.* at 388-89.

## II. WHAT OPTIONS HAVE COURTS EXPLORED TO PREVENT “OVERBROAD” DISCOVERY REQUESTS? WHEN DOES A REQUEST BECOME “OVERBROAD”?

### A. Complete, or Near-Complete, Discovery of an Individual’s Private Social Media Account

Even after successfully convincing a judge that the necessary “relevance” exists to compel production of an individual’s private social media account, parties are still faced with arguing the appropriate depth of such discovery. Courts have taken varied approaches to this issue, typically framing their inquiry to best prevent “overbroad” discovery. In *Howell v. Buckeye Ranch*, the court articulated at least one circumstance in which it was clear that a discovery request of an individual’s private social media account was overbroad.<sup>52</sup> In response to the defendant’s request for the plaintiff’s username and password, the court reasoned that such access would provide defendant with “all the information in the private sections of [the plaintiff’s] social media accounts—relevant and irrelevant alike.”<sup>53</sup> The court compared the request to a request for all of the information in a file cabinet, finding that “[t]he fact that the information defendants seek is in an electronic file as opposed to a file cabinet does not give them the right to rummage through the entire file.”<sup>54</sup>

Yet, many courts have permitted discovery requests that the *Howell* court may have characterized as “overbroad,” allowing for the complete or near-complete discovery of the entirety of an individual’s private Facebook profile.<sup>55</sup> For example, the plaintiff in

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<sup>52</sup> *Howell v. Buckeye Ranch, Inc.*, No. 2:11-1014, 2012 WL 5265170 (S.D. Ohio Oct. 1, 2012).

<sup>53</sup> *Id.* at \*1.

<sup>54</sup> *Id.*

<sup>55</sup> See, e.g., *Moore v. Miller*, No. 10-651, 2013 WL 2456114, at \*3 (D. Colo. June 6, 2013) (“Mr. Moore shall produce, under shield of the Court’s standard protective order, his entire Facebook history, including his Activity Log, from the date of his arrest forward and continuing to the close of discovery.”); *Bass ex rel. Bass v. Miss Porter’s Sch.*, No. 3:08-1807, 2009 WL 3724968, at \*1-2 (D. Conn. Oct. 27, 2009) (Plaintiff was ordered to provide a complete production of all Facebook data to the defendant.); *Beswick v. N. W. Med. Ctr., Inc.*, No. 07-020592 CACE (03), 2011 WL 7005038 (Fla. Cir. Ct. Nov. 3, 2011) (Trial Order) (Plaintiff was ordered to “identify any internet social media websites which [he] . . . used and/or maintain[ed] an account in the last five (5) years” and to



*Beswick v. North West Medical Center, Inc.* claimed that the defendant's medical negligence caused permanent brain injuries.<sup>56</sup> The defendant's discovery request asked the plaintiff to provide (1) any internet social media website which the plaintiff has used or maintained in the last five years; and (2) the plaintiff's username and password, or a copy of all non-privileged content/data shared on the account in the last five years.<sup>57</sup> The *Beswick* court found first that, overall, this request was relevant to the claims in question.<sup>58</sup> The request also would supply the defendant with the necessary information to effectively refute the plaintiff's noneconomic damages claims.<sup>59</sup> Finally, the request was "reasonably calculated to lead to admissible evidence."<sup>60</sup> The court held that "the interrogatories [were] not overbroad as they specifically delineate the information sought. Furthermore, the interrogatories [were] narrow in scope, as they include a time limitation of five years."<sup>61</sup> The *Beswick* court's holding suggested that the defendant's request "simply asking for" the plaintiff's username and password was sufficient to provide the necessary "specificity"<sup>62</sup> that the court sought.<sup>63</sup> Additionally, the court went so far as to allow discovery of the enti-

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"provide [his] username and password, or, alternatively . . . provide a copy of all non-privileged content/data shared on the account in the last five (5) years." Plaintiff was ordered to provide a privilege log if there was any privilege to assert.); *McCann v. Harleysville Ins. Co. of N.Y.*, 910 N.Y.S.2d 614 (2010); *Robinson v. Jones Lang LaSalle Ams., Inc.*, No. 3:12-0127, 2012 WL 3763545, at \*2 (D. Or. Aug. 29, 2012) (Plaintiff was ordered to produce "(1) any: (a) email or text messages that plaintiff sent to, received from, or exchanged with any current and former employee of defendant, as well as messages forwarding such messages; or (b) online social media communications by plaintiff, including profiles, postings, messages, status updates, wall comments, causes joined, groups joined, activity streams, applications, blog entries, photographs, or media clips, as well as third-party online social media communications that place plaintiff's own communications in context; (2) from [the date of the incident in question] to the [date of the order]; (3) that reveal, refer, or relate to: (a) any significant emotion, feeling, or mental state allegedly caused by defendant's conduct; or (b) events or communications that could reasonably be expected to produce a significant emotion, feeling, or mental state allegedly caused by defendant's conduct.").

<sup>56</sup> *Beswick*, 2011 WL 7005038.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See cases cited *supra* note 32 and accompanying text.

<sup>63</sup> See *Browning*, *supra* note 9, at 513.

rety of the plaintiff's private Facebook account, reasoning, "the entire content of the account was 'clearly relevant.'"<sup>64</sup>

Similarly, in *Bass ex rel. Bass v. Miss Porter's School*, the court ordered the plaintiff to produce *all of the documents* contained within her private Facebook account, reasoning that the "relevance of the content of Plaintiff's Facebook usage as to both liability and damages . . . is more in the eye of the beholder than subject to strict legal demarcations, and production should not be limited to Plaintiff's own determination of what may be 'reasonably calculated to lead to the discovery of admissible evidence.'"<sup>65</sup> The *Bass* plaintiff was a teenager who claimed that Miss Porter's School (an exclusive private school located in Farmington, Connecticut) had failed to protect her from the bullying she experienced while attending the school.<sup>66</sup> Bass initiated the suit after she was expelled from Miss Porter's due to excessive absences—absences, which Bass argued, were the result of the emotional distress she suffered because of the bullying.<sup>67</sup> Facebook provided Bass with approximately 750 pages of documents that contained the entire contents of Bass' private Facebook account; however, prior to the court's order, Bass had only turned over 100 of these pages to the requesting defendants.<sup>68</sup> Bass acknowledged that her claims relied, in part, on certain Facebook postings and related correspondence from her time at Miss Porter's, but she still argued that the documents requested were "irrelevant and immaterial" and therefore should not be produced in full.<sup>69</sup> The court rejected this argument, noting "Facebook usage depicts a snapshot of the user's relationships and state of mind at the time of the content's posting."<sup>70</sup> In this case it seemed that the court rejected the notion that the burden is placed on a responding party to properly, and ethically, determine what information is responsive to a discovery request. Rather, the court concluded that this incident seemed to uniquely require that the

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<sup>64</sup> *Id.* (emphasis added).

<sup>65</sup> *Bass ex rel. Bass v. Miss Porter's Sch.*, No. 3:08-1807, 2009 WL 3724968, at \*1 (D. Conn. Oct. 27, 2009) (emphasis added).

<sup>66</sup> *Id.*; see Browning, *supra* note 6, at 488.

<sup>67</sup> *Bass*, 2009 WL 3724968, at \*1; see Browning, *supra* note 6, at 488.

<sup>68</sup> *Bass*, 2009 WL 3724968, at \*1; see Browning, *supra* note 6, at 488.

<sup>69</sup> *Bass*, 2009 WL 3724968, at \*1; see Browning, *supra* note 6, at 488.

<sup>70</sup> *Bass*, 2009 WL 3724968, at \*1; see Browning, *supra* note 6, at 488.

*requesting* party be able to determine the relevance of requested materials themselves.

The District of Oregon also ordered the production of all content contained within a plaintiff's social media accounts. Yet, the court qualified the request somewhat, limiting discovery production to content that revealed, referred, or related to "(a) any significant emotion, feeling, or mental state allegedly caused by defendant's conduct; or (b) events or communications that could reasonably be expected to produce a significant emotion, feeling, or mental state allegedly caused by defendant's conduct."<sup>71</sup> The plaintiff in this case brought an employment discrimination action against her employer, claiming race discrimination and retaliation.<sup>72</sup> The court's order ultimately required production of "all [of] the plaintiff's social media footprint, including profiles, postings, messages, status updates, wall comments, causes joined, Likes, groups joined, activity streams, applications, blog entries, photographs, and media clips, as well as third-party social media communications that placed the plaintiff's own communications in context."<sup>73</sup> The court justified its ruling by explaining that it was "impossible for the court to define the limits of discovery in such cases with enough precision to satisfy the litigant who is called upon to make a responsive production."<sup>74</sup> Additionally, the court chose to treat all forms of electronic communications similarly, finding "no principled reason" to distinguish between emails, text messages, or social media platforms.<sup>75</sup>

In *McCann v. Harleysville*, the court declined to rule out the possibility of complete social media disclosure, without fully endorsing the practice. First, the court stated that the defendant's initial discovery request was essentially a "fishing expedition" into the plaintiff's private Facebook account, as it was not supported by

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<sup>71</sup> *Robinson v. Jones Lang LaSalle Ams., Inc.*, No. 12-0127, 2012 WL 3763545, \*2 (D. Or. Aug. 29, 2012).

<sup>72</sup> *Id.*

<sup>73</sup> Thomas Roe Frazer II, *Social Media: From Discovery to Marketing—A Primer for Lawyers*, 36 AM. J. TRIAL ADVOC. 539, 549 (2013).

<sup>74</sup> *Robinson*, 2012 WL 3763545, at \*2.

<sup>75</sup> *Id.* at \*1.

a showing of relevance.<sup>76</sup> However, the court acknowledged that the trial court had “abused its discretion in prohibiting defendant from seeking disclosure of plaintiff’s Facebook account at a future date.”<sup>77</sup>

Comparatively, some courts have explicitly stated that full disclosure of an individual’s private social media account is impermissible.<sup>78</sup> In *Winchell v. Lopiccolo*, a plaintiff sought damages resulting from injuries affecting her cognitive function.<sup>79</sup> The defendants requested full access to the plaintiff’s Facebook account (requesting authorization to access the plaintiff’s Facebook themselves—resulting in unrestricted access), asserting that the account’s content might shed light on the plaintiff’s “ability to portray cognitive function.”<sup>80</sup> Specifically, the defendant’s request argued that:

The layout of [the plaintiff’s] Facebook page would demonstrate cognitive function inasmuch as the layout of a Facebook page calls for creativity of some sort as well as thought in providing captions for photographs, narrative posts written by the plaintiff as well as her ability to write and comment. Writings on the page would be direct and circumstantial evidence of her claims. Moreover, lucid and logical writing or a lack thereof, would be useful in the defense and/or assessment of this case.<sup>81</sup>

The court acknowledged that in cases that involve allegations surrounding a plaintiff’s mental capacity, “every bit of information” that was contained within the plaintiff’s Facebook page would, to some extent, present evidence of some level of cognitive

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<sup>76</sup> *McCann v. Harleysville Ins. Co. of N.Y.*, 910 N.Y.S.2d, 614, 615 (N.Y. App. Div. 2010).

<sup>77</sup> *Id.*

<sup>78</sup> *See, e.g., Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 389 (E.D. Mich. 2012) (“[T]he request for the entire account, which may well contain voluminous personal material having nothing to do with this case, is overly broad.”); *Winchell v. Lopiccolo*, 954 N.Y.S.2d 421, 424 (N.Y. Sup. Ct. 2012) (finding that the “Defendants’ Request for unrestricted access to Plaintiff’s Facebook page [was] overbroad.”).

<sup>79</sup> *Winchell*, 954 N.Y.S.2d at 423.

<sup>80</sup> *Id.* (citations omitted).

<sup>81</sup> *Id.*

function.<sup>82</sup> As a result, the court found that the defendant's request for *unrestricted access* to the Plaintiff's Facebook page was overbroad, denying discovery as requested.<sup>83</sup> The court therefore essentially concluded that such unrestricted access should always be deemed overbroad, even in light of acknowledging that the entirety of an individual's Facebook account would be, in fact, relevant. Although it does seem that, intuitively, requesting the entirety of an individual's private social media account is likely "overbroad," the court's reasoning here appears contradictory. For, if a judge is willing to conclude that "every bit of information" contained in an individual's account would be relevant, then the accompanying ruling should permit discovery of *all relevant information*—no matter how broad—thereby allowing discovery of the entire account.

The court's opinion in *Giacchetto v. Patchogue-Medford Union Free School District* further discusses the appropriate depth of discovery in emotional damages cases involving requests for the production of an individual's private social media accounts. The plaintiff in *Giacchetto* claimed that the defendant violated the Americans with Disabilities Act, subjecting the plaintiff to discrimination based on her diagnosis of adult Attention Deficit Hyperactivity Disorder.<sup>84</sup> The defendant moved to compel authorizations for the release of all social media account records, arguing that "information from Plaintiff's social networking accounts is relevant to Plaintiff's claims of physical and emotional damages because it reflects her 'levels of social interaction and daily functioning' and her 'emotional and psychological state.'" <sup>85</sup> The court found that broad discovery of the plaintiff's social media account was not permissible merely because the plaintiff's claims required an inquiry into the plaintiff's alleged emotional distress, stating that, "[i]f the Court were to allow broad discovery of Plaintiff's social networking postings as part of the emotional distress inquiry, then there would

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<sup>82</sup> *Id.* at 424.

<sup>83</sup> *Id.* (noting that "[t]he Court is troubled by the breadth of Defendant's Request for authorization for Plaintiff's Facebook page because it seeks unrestricted access.>").

<sup>84</sup> *Giacchetto v. Patchogue-Medford Union Free Sch. Dist.*, 293 F.R.D. 112, 113 (E.D.N.Y. 2013).

<sup>85</sup> *Id.* at 114 (citations omitted).

be no principled reason to prevent discovery into every other personal communication the Plaintiff had or sent since [the] alleged incident.”<sup>86</sup> Citing *Rozell v. Ross-Holst*, the court noted that, theoretically, a person’s every action could, to some degree, reflect his emotional state; but, this could not justify “requiring the production of every thought [an individual] may have reduced to writing or . . . the deposition of everyone [he or she] might have talked to.”<sup>87</sup>

Additionally, the *Giacchetto* court analyzed the decision in *Offenback v. L.M. Bowman, Inc.*, finding support for different analyses of social media discovery requests, depending on the nature of the claims in question.<sup>88</sup> *Giacchetto* notes that, although the plaintiff’s claims in *Offenback* involved both physical and psychological damages, after an in camera review of the plaintiff’s Facebook and MySpace accounts, the *Offenback* court did not order the production of any content expressing emotion or relating to social activities with friends.<sup>89</sup> The *Offenback* court did, however, compel production of other posts relating to the plaintiff’s alleged physical injuries.<sup>90</sup> Magistrate Judge A. Kathleen Tomlinson found this to suggest that “*Offenback* underscores an important distinction between the relevance of social networking information to claims for physical damages and claims for emotional damages.”<sup>91</sup> Judge Tomlinson explained that, while posts exhibiting physical activity in light of a plaintiff’s claims for physical damages are obviously relevant, it is more difficult to find such clear cut relevance when

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<sup>86</sup> *Id.* at 115.

<sup>87</sup> *Id.* (citing *Rozell v. Ross-Holst*, No. 05 Civ. 2936(JGK)JCF, 2006 WL 163143, at \*3 (S.D.N.Y. Jan. 20, 2006) (motion to compel emails that defendants argued provided a contemporaneous record of plaintiff’s emotional state”); *Kennedy v. Contract Pharmacal Corp.*, No. CV 12-2664(JFB)(ETB), 2013 WL 1966219, at \*2 (E.D.N.Y. May 13, 2013) (denying motion to compel “all documents . . . reflecting and/or regarding Plaintiff’s expression of an emotional feeling while utilizing a social networking site” where there was no specificity and no attempt to limit the requests to any allegedly relevant acts)).

<sup>88</sup> *Id.* at 115-16 (citing *Offenback v. L.M. Bowman, Inc.*, No. 1:10-CV-1789, 2011 WL 2491371 (M.D. Pa. June 22, 2011)).

<sup>89</sup> *Id.*

<sup>90</sup> *Offenback*, 2011 WL 2491371, at \*2-3 (Plaintiff was compelled to produce all information deemed “potentially relevant” by the court after an in camera review, which included comments by the plaintiff and his friends indicating that the plaintiff made long trips on his motorcycle.)

<sup>91</sup> *Giacchetto*, 293 F.R.D. at 115-16.

analyzing “routine expressions of mood” in the context of an emotional distress claim.<sup>92</sup> Ultimately, in light of these considerations, *Giacchetto* called for the production of “limited social networking postings.”<sup>93</sup> Here the court took a position similar to that in *Winchell*; however, the *Giacchetto* court declined to actually conclude (as *Winchell* did) that the entirety of the plaintiff’s private social media account was relevant. This distinction proves to be important because *Giacchetto* clarifies the court’s reasons for concluding that it is perhaps unwise to place too much reliance on what an individual once perceived to be a casual expression of thoughts or emotions.

*B. “Tailored” Requests Permitting Only the Discovery of “Relevant” Material*

The holdings of the aforementioned cases suggest the existence of an alternative approach to assessing the appropriate depth of discovery in requests for private social media content. Timothy C. Quinn argues that private content “should be discoverable only to a certain extent and under certain circumstances,” and such access should not be freely granted.<sup>94</sup> Furthermore, “*at the very least*, [such] discovery requests should be narrowly tailored to seek only relevant information.”<sup>95</sup> John G. Browning similarly asserts that

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<sup>92</sup> *Id.* at 116 (“For example, a severely depressed person may have a good day or several good days and choose to post about those days and avoid posting about moods more reflective of his or her actual emotional state.”) (citing Kathryn R. Brown, *The Risks of Taking Facebook at Face Value: Why the Psychology of Social Networking Should Influence the Evidentiary Relevance of Facebook Photographs*, 14 VAND. J. ENT. & TECH. L. 357, 365 (2012) (“Because social networking websites enable users to craft a desired image to display to others, social scientists have posited that outside observers can misinterpret that impression.”)).

<sup>93</sup> *Id.* (Plaintiff was required to produce “any specific references to the emotional distress she claims she suffered or treatment she received in connection with the incidents underlying her Amended Complaint (e.g., references to a diagnosable condition or visits to medical professionals).” Because the plaintiff, “in seeking emotional distress damages . . . opened the door to discovery into other potential sources/causes of that distress,” she was also ordered to produce “any postings on social networking websites that refer to an alternative potential stressor.”). *See also Offenback*, 2011 WL 2491371, at \*2–3.

<sup>94</sup> Timothy C. Quinn, *The Discoverability of Private Social Media Content: Are Pennsylvania Trial Courts Going too Far by Granting Litigants Unfettered Access to Their Opponents’ Social Media Accounts?*, 51 DUQ. L. REV. 787, 806 (2013).

<sup>95</sup> *Id.* (emphasis added).

practitioners, when drafting social media discovery requests, should refrain from being excessively broad.<sup>96</sup> Instead, he says, requests should be tailored to specify the precise content that is sought, or should be clearly tied to the claims in question.<sup>97</sup> As an example, Browning provides that, “instead of just a blanket request for all content, [litigants should] seek ‘all online profiles, postings, messages (including, but not limited to, tweets, replies, re-tweets, direct messages, status updates, wall comments, groups joined, activity streams, and blog entries), photographs, videos, and online communication’ relating to particular claims, allegations of mental anguish or emotional distress, defenses, et cetera.”<sup>98</sup>

In *Mailhoit v. Home Depot U.S.A., Inc.*, Mailhoit brought suit against her former employer, Home Depot, making claims about her mental and emotional state.<sup>99</sup> The court responded to four discovery requests, three of which were deemed overly broad and were accordingly denied, and, one of which was granted because the request was tailored to the specific claims in question.<sup>100</sup> The court granted the defendant’s request for all social networking site communications “between Plaintiff and any current or former Home Depot employees, or which in any way refer . . . to her employment at Home Depot or this lawsuit,” explaining that the request was “reasonably calculated to lead to the discovery of admissible evidence.”<sup>101</sup> Furthermore, the court found that this request was not overly burdensome and was technically practical.<sup>102</sup>

In contrast, *Mailhoit* denied the defendant’s request for discovery of:

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<sup>96</sup> Browning, *supra* note 6, at 473.

<sup>97</sup> *Id.* at 474.

<sup>98</sup> *Id.* See also *Higgins v. Koch Dev. Corp.*, No. 3:11-cv-81-RLY-WGH, 2013 WL 3366278, at \*3 (S.D. Ind. July 5, 2013) (“[Defendant] only claims that communications ‘relating to the Plaintiff’s enjoyment of life, ability to engage in outdoor activities, and employment activities . . . [are] directly relevant.’ The parties do not appear to disagree about what materials within [Plaintiffs’] Facebook archives would be relevant.” (citing Defendant’s Reply, ¶ 13)).

<sup>99</sup> See *Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 569 (C.D. Cal. 2012).

<sup>100</sup> *Id.* at 569, 571–73.

<sup>101</sup> *Id.* at 572.

<sup>102</sup> See *id.*



(1) Any profiles, postings or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) from social networking sites from October 2005 (the approximate date Plaintiff claims she first was discriminated against by Home Depot) through the present, that reveal, refer, or relate to any emotion, feeling, or mental state of Plaintiff, as well as communications by or from Plaintiff that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state; (2) Third-party communications to Plaintiff that place her own communications in context; . . . (4) Any pictures of Plaintiff taken during the relevant time period and posted on Plaintiff's profile or tagged or otherwise linked to her profile.<sup>103</sup>

The court found such requests to be vague, overbroad, not "reasonably particular," and suggestive of a "fishing expedition."<sup>104</sup>

In *Giacchetto* (the facts of which were articulated in the previous section), the court declined to permit general access to the plaintiff's private social media accounts.<sup>105</sup> Instead, the court limited the scope of permissible discovery, instructing the plaintiff to produce "any specific references to the emotional distress she claims she suffered or treatment she received in connection with the incidents underlying her Amended Complaint (e.g., references to a diagnosable condition or visits to medical professionals)."<sup>106</sup> The plaintiff was also required to produce any social network postings that referred to "an alternative potential stressor," as the plaintiff welcomed such discovery by seeking emotional distress damages (which invites discovery of all potential causes for the alleged distress).<sup>107</sup>

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<sup>103</sup> *Id.* at 569 (citing Joint Stipulation at 2).

<sup>104</sup> *See id.* at 571-72.

<sup>105</sup> *See Giacchetto v. Patchogue-Medford Union Free Sch. Dist.*, 293 F.R.D. 112, 117 (E.D.N.Y. 2013).

<sup>106</sup> *Id.* at 116.

<sup>107</sup> *See id.*

Other cases have articulated a limited, narrowly tailored scope of discovery when physical damages are at issue. The plaintiff in *Scipione v. Advance Stores Co.*, claimed damages relating to an injury to her knee during a purported slip-and-fall at Advance Auto Parts Store.<sup>108</sup> The court ultimately approved an agreement reached by the parties regarding the production of the content of the plaintiff's Facebook account.<sup>109</sup> The plaintiff was required to produce "copies of her Facebook content since [three years prior to the accident] that refers to her knee or her alleged injury, and copies of all photos of her on Facebook since [the date of the accident.]"<sup>110</sup>

In *Davenport v. State Farm Mutual Automobile Insurance Co.*, the court addressed a plaintiff's claim that State Farm Mutual Automobile Insurance Company failed to provide her with settlement benefits stemming from a car accident in which the plaintiff was permanently injured.<sup>111</sup> The defendant sought production of "[a]ll photographs posted, uploaded, or otherwise added to any social networking sites or blogs . . . posted since the date of the accident alleged in the Complaint [including] photographs posted by others in which [the plaintiff] has been tagged or otherwise identified therein."<sup>112</sup> The court found that, because the request asked the plaintiff to produce *all* photographs that had been added to any social networking site since the date of the accident, including those that were not even of the plaintiff, or taken by the plaintiff, the request was "overly broad on its face."<sup>113</sup> Therefore the court granted the request in part, ordering the plaintiff to produce "all photographs added to any [social networking site] since the date of

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<sup>108</sup> See *Scipione v. Advance Stores Co.*, No. 8:12-cv-687-T-24AEP, 2013 WL 646405, at \*1 (M.D. Fla. Feb. 21, 2013).

<sup>109</sup> See *id.* at \*1-2.

<sup>110</sup> *Id.* at \*1.

<sup>111</sup> See *Davenport v. State Farm Mut. Auto. Ins. Co.*, No. 3:11-cv-632-J-12JBT, 2011 WL 7936671 (M.D. Fla. June 28, 2011) ("The Plaintiff's Complaint seeks recovery of uninsured/underinsured motorist coverage benefits under stacking policies of automobile insurance issued by State Farm which provides a total of three hundred thousand dollars (\$300,000.00) in available uninsured/underinsured motorist coverage benefits.").

<sup>112</sup> See *Davenport v. State Farm Mut. Auto. Ins. Co.*, No. 3:11-cv-632-J-12JBT, 2012 WL 555759, at \*1 (M.D. Fla. Feb. 21, 2012).

<sup>113</sup> *Id.* at \*2.

the subject accident that depict Plaintiff, *regardless of who posted the photograph.*"<sup>114</sup>

Although the plaintiff argued that she should not have to produce photographs that were merely "tagged"<sup>115</sup> of her, the court was not persuaded. Citing *Equal Employment Opportunity Commission v. Simply Storage*, the plaintiff asserted that such tagged photos were "less likely to be relevant" than photos that she had posted herself.<sup>116</sup> "Nevertheless," the court stated, "the potential relevancy of such photographs outweighs any burden of production or privacy interest therein."<sup>117</sup>

Courts that have chosen to only permit the production of narrowly tailored discovery requests frequently require that such tailoring provide for a specific, relevant time period (rather than calling for the producing party to sift through the entire contents of an individual's social media account). Such was the case in *Levine v. Culligan of Florida, Inc.*, where the court found the defendant's request to be overly broad, in part, because it was not limited in time.<sup>118</sup> In the context of cases involving a particular accident, courts may also limit production to social media content created on or after the date of the accident.<sup>119</sup>

Limiting production to requests that are both narrowly tailored and limited in time (if possible) provides what is seemingly the most fluid and adaptable means for preventing "overbroad" dis-

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<sup>114</sup> *Id.* (emphasis added).

<sup>115</sup> "'Tagging' is the process by which a third party posts a picture and links people in the picture to their profiles so that the picture will appear in the profiles of the person who 'tagged' the people in the picture, as well as on the profiles of the people who were identified in the picture." *Id.* at n.3 (citing *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 436 n.3 (S.D. Ind. 2010)).

<sup>116</sup> *Id.* at \*2 (citing *EEOC*, 270 F.R.D. at 436).

<sup>117</sup> *Id.*

<sup>118</sup> *See Levine v. Culligan of Florida, Inc.*, No. 50-2011-CA-010339-XXXXMB, 2013 WL 1100404, at \*5 (Trial Order) (Fla. Cir. Ct. Jan. 29, 2013) ("[W]hile Defendant's second request for 'all other social networking sites' is limited form [sic] the date of the incident until present, Defendant's initial request for Plaintiff's Facebook profile is not limited in time and therefore overly broad.").

<sup>119</sup> *See, e.g., Higgins v. Koch Dev. Corp.*, No. 3:11-cv-81-RLY-WGH, 2013 WL 3366278, at \*3 (S.D. Ind. July 5, 2013) ("Since [Defendant] seeks information on the effects of Plaintiff's injuries, the court finds that only the material dated on or after the accident would be relevant to their claim.").

covery requests. By requiring narrowly tailored discovery requests, courts begin to omit some of the difficulties presented by full disclosure. First, such requests must necessarily have some relation to the claims in question (as is also required for the “relevance” inquiry), making it far less likely that the requests turn into a “fishing expedition.” Also, narrowly tailored requests allow the responding party to have an initial framework of requests, providing the opportunity to negotiate or fine-tune the specifics of the discovery request in question (if the party wishes to contest them).

*C. Provide Adversary With the Individual’s Username and Password*

A number of common pleas courts have, upon the requisite showing of relevance, required a party to provide its adversary with the usernames and passwords for any private social media accounts held by the complaining individual as a means of producing requested social media material.<sup>120</sup> Meanwhile, some federal district courts have found that such requests for an individual’s log-in information are “too broad and [lack] reasonable particularity under Fed. R. Civ. P. 34(b).”<sup>121</sup> In *Mazzarella v. Mount Airy #1, LLC*, the plaintiff objected to a discovery request seeking the plaintiff’s username and password, citing privacy concerns.<sup>122</sup> The court granted the defendant’s motion to compel, stating “[t]he information requested . . . could lead to relevant information. Furthermore, Plaintiff’s argument of an expectation of privacy regarding her use of social media is displaced. Those who elect to use social media, and place things on the internet for viewing, sharing and use with others, waives an expectation of privacy.”<sup>123</sup>

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<sup>120</sup> See *Brogan v. Rosenn, Jenkins & Greenwald, L.L.P.*, No. 08-CV-6048, 2013 WL 1742689 (Trial Order) (Pa. Ct. C. P. Apr. 22, 2013) (“[A] few common pleas courts have required plaintiffs to provide the defense with their Facebook usernames and passwords based upon a threshold showing of relevance.”); see also *Largent v. Reed*, No. 2009-1823, 2011 WL 5632688 (Pa. Ct. C. P. Nov. 8, 2011) (Trial Order); *Zimmerman v. Weis Mkts., Inc.*, No. 09-1535, 2011 WL 2065410 (Pa. Ct. C. P. May 19, 2011) (Trial Order); *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 WL 4403285 (Pa. Ct. C. P. Sept. 9, 2010) (Trial Order).

<sup>121</sup> *Id.* (citations omitted).

<sup>122</sup> See *Browning*, *supra* note 9, at 513-14 (quoting *Mazzarella v. Mount Airy #1, LLC*, No. 1798 Civ. 2009, 2012 WL 6000678, at \*1 (Pa. Ct. C. P. Nov. 7, 2012) (order granting defendant’s motion to compel)).

<sup>123</sup> *Id.*

The court ruled similarly in *Zimmerman v. Weis Markets, Inc.*, *Largent v. Reed* and *Gallagher v. Urbanovich*, requiring in each case that a party provide their requesting adversary with log-in information for all social media accounts in order to facilitate review of the accounts' content. In all three cases, the court also directed the individual account holders to "not take steps to delete or alter existing information and posts on [social media accounts.]"<sup>124</sup> In *Largent*, the court reasoned, "[w]e agree with [the defendant] that information contained on [the plaintiff's] Facebook profile is discoverable. It is relevant and not covered by any privilege, and the request is not unreasonable. We will thus allow [the defendant] access to [the plaintiff's] Facebook account to look for the necessary information."<sup>125</sup> In *Gallagher*, the court provided that access to one's Facebook account should be limited to a seven-day window.<sup>126</sup> *Gallagher* is also distinguished from this line of cases because the requesting party was not the defendant; rather, the court ordered the defendant to produce his Facebook username and password to the plaintiff.<sup>127</sup>

In addition, the production of log-in information has not only been limited to the requesting party. In a Connecticut family law case, *Gallion v. Gallion*, Judge Kenneth Shluger ordered *both parties* in a divorce to "exchange . . . their client's Facebook and dating website passwords."<sup>128</sup> Also, at least one court has specifically stated that this means of production would suggest an unduly burdensome invasion of privacy. In *Higgins v. Koch Development Corp.*, the court found that the defendant had taken "sufficient steps to avoid unduly invading [the plaintiffs'] privacy" precisely because it

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<sup>124</sup> See *Zimmerman*, 2011 WL 2065410; see also *Largent*, 2011 WL 5632688 ("Plaintiff shall not delete or otherwise erase any information on her Facebook account."); *Gallagher v. Urbanovich*, No. 2010-33418 (Pa. Ct. C. P. Feb. 27, 2012) (order granting plaintiff's motion to compel) (Judge William Carpenter ordered the defendant to "not delete or otherwise erase any information on his Facebook account.").

<sup>125</sup> *Largent*, 2011 WL 5632688.

<sup>126</sup> See Browning, *supra* note 9, at 513 (citing *Gallagher*, No. 2010-33418).

<sup>127</sup> See *id.* at 512.

<sup>128</sup> *Id.* (quoting *Gallion v. Gallion*, No. FA114116955S, 2011 WL 4953451, at \*1 (Conn. Super. Ct. Sept. 30, 2011)).

had refrained from requesting the plaintiffs' Facebook passwords.<sup>129</sup>

Ultimately, ordering the production of an individual's username and password presents the same issues as would exist if the court were to simply order full production of that individual's entire private social media account. Clearly, providing an adversary with log-in information inherently grants the requesting party full access to that individual's account. However, granting requests for log-in information may actually give the requesting party much fuller access to the account in question, as it omits the opportunity to redact irrelevant or privileged information.

*D. Require In Camera Review of the Individual's Entire Facebook Account*

In some cases addressing discovery requests for private Facebook account communications, courts have found that "the appropriate course is to remand the matter for an in camera inspection of the plaintiff's Facebook records, to determine which of those records, if any, are relevant."<sup>130</sup> In *Richards v. Hertz Corp.*, although the plaintiffs had already been directed to provide the defendant with copies of a specific category of photos relating to the claim in question, the court still required additional in camera review.<sup>131</sup> The court noted that the plaintiffs' Facebook profile would likely contain content beyond photographs ("such as status reports, emails, and videos that are relevant to the extent of [the plaintiff's] alleged injuries").<sup>132</sup> Citing a need to balance the existence of such additional material with the "likely presence" of other private, yet irrelevant, material within the plaintiffs' Facebook

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<sup>129</sup> *Higgins v. Koch Dev. Corp.*, No. 3:11-cv-81-RLY-WGH, 2013 WL 3366278, at \*2 (S.D. Ind. July 5, 2013).

<sup>130</sup> *Nieves v. 30 Ellwood Realty L.L.C.*, 966 N.Y.S.2d 808, 808-09 (2013); *see also Richards v. Hertz Corp.*, 953 N.Y.S.2d 654, 656 (N.Y. App. Div. 2012); *Pereira v. City of N.Y.*, 975 N.Y.S.2d 711 (N.Y. Sup. Ct. June 19, 2013); *Loporcaro v. City of N.Y.*, 950 N.Y.S.2d 723, at \*8 (N.Y. Sup. Ct. Apr. 9, 2012) ("[P]laintiffs are directed to provide this Court with copies of plaintiff's education, employment, pharmacy, marital counseling records and *Facebook postings, including deleted material*, in order that the Court may perform an in camera inspection to assess the materiality and relevance of these materials" (emphasis added)).

<sup>131</sup> *See Richards*, 953 N.Y.S.2d at 656-57.

<sup>132</sup> *Id.* at 656.

account, the court called for an *in camera* inspection of all content within the plaintiff's Facebook account since the date of the accident at question in the claim.<sup>133</sup>

The court offered similar reasoning in *Pereira v. City of New York*, noting that, "due to the likely presence of material of a private nature [within the plaintiff's social media accounts] that is not relevant to this action, this court shall conduct an *in camera* inspection of copies of all status reports, e-mails, photographs, and videos posted on plaintiff's media sites since the date of the subject accident, to determine which of those materials, if any, are relevant to his alleged injuries."<sup>134</sup> In *Nieves v. 30 Ellwood Realty LLC*, the court noted that if such *in camera* inspection proved too burdensome, the court reserved the discretion to "direct plaintiff to conduct an initial review of her own Facebook account, and limit the *in camera* inspection to items whose discoverability is contested by plaintiff."<sup>135</sup>

In at least one case, a magistrate judge suggested that he could create a Facebook account and become "friends" with the plaintiffs "for the sole purpose of reviewing photographs and related comments *in camera*... [The magistrate judge] would [then] promptly review and disseminate any relevant information to the parties."<sup>136</sup> The court in this case made such a suggestion as a means to expedite the discovery process.<sup>137</sup>

Several courts have disagreed with this approach, finding it to be unnecessary,<sup>138</sup> a waste of "time or resources,"<sup>139</sup> or only per-

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<sup>133</sup> *Id.* at 656-57.

<sup>134</sup> *Pereira*, 975 N.Y.S.2d at \*2; *see also Nieves*, 966 N.Y.S.2d at 808 ("'[S]ince it is possible that not all Facebook communications are related to the events that gave rise to plaintiff's cause of action,' the appropriate course is to remand the matter for an *in camera* inspection." (citations omitted)).

<sup>135</sup> *Nieves*, 966 N.Y.S.2d at 809 (citations omitted).

<sup>136</sup> *Barnes v. CUS Nashville, L.L.C.*, No. 3:09-cv-00764, 2010 WL 2265668, at \*1 (M.D. Tenn. June 3, 2010).

<sup>137</sup> *See id.*

<sup>138</sup> *See Thompson v. Autoliv ASP, Inc.*, No. 2:09-cv-01375-PMP-VCF, 2012 WL 2342928, at \*4 (D. Nev. June 20, 2012) ("Because Plaintiff has not claimed that the requested information is privileged or protected, the Court finds an *in camera* review of Plaintiff's social networking accounts unnecessary.>").

<sup>139</sup> *Fawcett v. Altieri*, 960 N.Y.S.2d 592, 598 (N.Y. Sup. Ct. 2013).

missible when other options have been exhausted.<sup>140</sup> Specifically, *Fawcett* states that “asking courts to review hundreds of transmissions ‘in camera’ should not be the all purpose solution to protect the rights of litigants. Courts do not have the time or resources to be the researchers for advocates seeking some tidbit of information that *may* be relevant in a . . . claim.”<sup>141</sup> The viewpoint in *Fawcett* could be seen as the most prudent, as it appears to align most clearly with the ways in which discovery is typically handled when addressing issues outside of the realm of social media. As *Nieves* points out, it only makes sense to utilize in camera review when there is a specific, contested issue between parties. Otherwise, it seems wholly unnecessary to uniquely require in camera review for social media discovery requests when this burden does not necessarily exist for other types of discovery.

### III. WHAT IS THE APPROPRIATE MEANS TO FACILITATE DISCOVERY OF AN INDIVIDUAL’S PRIVATE SOCIAL MEDIA ACCOUNT?

#### A. *Order That the Individual Provide Adversary with a “Copy” of the Individual’s Account Through the “Download Your Information” Feature Available on Facebook*

Intertwined with issues surrounding the acceptable depth of social media discovery is the question of how to actually facilitate the production of any social media documents. There has been some discussion of utilizing the Download Your Information Expanded Archive mechanism on Facebook as a means of facilitating production of an individual’s private account. This feature allows a user to “preserve [the entirety of] their Facebook data in electronic format,” so that it may be produced in a “pdf” format or in hard copy.<sup>142</sup> Timothy C. Quinn comments:

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<sup>140</sup> See *Moore v. Miller*, No. 10-651, 2013 WL 2456114, at \*2 (D. Col. June 6, 2013) (“*In camera* review should be employed only where no other remedy is adequate. Here, the Court’s standard protective order will adequately address any privacy concerns the parties may have.”).

<sup>141</sup> *Fawcett*, 960 N.Y.S.2d at 597–98 (emphasis in original).

<sup>142</sup> See *Higgins v. Koch Dev. Corp.*, No. 3:11-cv-81-RLY-WGH, 2013 WL 3366278, at \*1–3 (S.D. Ind. July 5, 2013) (Defendants requested access to the plaintiffs’ Facebook



A concern with this method is whether the requesting parties will actually receive all of the relevant private content from the opponent in response to their discovery requests. Any argument of this type should fail. As with all discovery requests, litigants have to rely on the other side to produce requested documents or answers to interrogatories in good faith. In any type of discovery request, the opposing party could potentially withhold requested information. That is how discovery works. If the responding party fails to respond properly to a discovery request, he or she could face sanctions or penalties of perjury, because all responses must be "verified" by the responding party under penalties of perjury.<sup>143</sup>

Another case pointed out a clear benefit of this means of production. Although having access to an adversary's Facebook log-in information would allow a requesting party to "simply [print] screens" from the Facebook page in question, in *In re White Tail Oilfield Services, L.L.C.*, the requesting party argued that this "would not capture deleted data," therefore asking the court to use the "'download your information' feature" (which keeps a complete record of all Facebook activity, whether deleted or not).<sup>144</sup>

*B. Require That the Individual Sign a Release Permitting Facebook to Provide the Court/Adversary with Account Information*

Although a party may not personally subpoena information from Facebook due to the SCA,<sup>145</sup> a court may still require an individual to sign a release permitting Facebook to provide the court,

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accounts using "Facebook's 'download your information 'Expanded Archive' mechanism' to preserve their Facebook data in electronic format." The court granted the defendants' motion (although limiting the production in time), finding that the defendants both "made a prima facie showing that the materials sought will reasonably lead to the discovery of admissible evidence; and . . . [that the] privacy rights of parties or non-parties would [not] be violated by disclosing the information.").

<sup>143</sup> Quinn, *supra* note 94, at 827.

<sup>144</sup> *In re White Tail Oilfield Servs., L.L.C.*, No. 11-0009, 2012 WL 4857777, at \*3 (E.D. La. Oct. 11, 2012).

<sup>145</sup> See cases cited *supra* notes 26–27 and accompanying text.

or his adversary, with the contents of his private Facebook account.<sup>146</sup> So long as the account holder, as the “originator or an addressee or intended recipient of [the relevant] communications,” provides lawful consent, Facebook may produce requested account information to a litigating party.<sup>147</sup> Browning notes that “[a] properly drafted consent form should include the account holder or user’s name, any user ID, group ID, or known screen name, along with the person’s date of birth and address, including email address. The consent should also include—much like a well-drafted discovery request—a detailed description of what is being sought.”<sup>148</sup> This approach was taken in *Beswick v. North West Medical Center, Inc.* and *Romano v. Steelcase, Inc.*, both requiring the plaintiff to provide the defendant with an executed consent form (authorizing the production of their social media account records) that could then be presented to Facebook or other social media networks.<sup>149</sup>

*C. Individual Provides Adversary with an Electronic Storage Device with All Information from Individual’s Social Media Account*

*Thompson v. Autoliv ASP, Inc.* uniquely called for the use of an electronic storage device as a means of producing the content of an individual’s social media accounts.<sup>150</sup> The court directed the plaintiff to “upload onto an electronic storage device *all* information from her Facebook and MySpace accounts, from [a certain date] to the present.”<sup>151</sup> In addition to providing the defendant’s counsel with the electronic storage device, the court directed the plaintiff

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<sup>146</sup> See cases cited *supra* note 29 and accompanying text.

<sup>147</sup> See Browning, *supra* note 6, at 475.

<sup>148</sup> *Id.*

<sup>149</sup> See *Beswick v. N. W. Med. Ctr., Inc.*, No. 07-020592 CACE (03), 2011 WL 7005038 (Fla. Cir. Ct. Nov. 3, 2011) (Trial Order) (“Plaintiff shall deliver to Counsel for Defendants a properly executed consent and authorization as may be required by the operators of Facebook, permitting the Defendants to gain access to Plaintiff’s Facebook records.”); *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650, 657 (N.Y. Sup. Ct. 2010) (“Plaintiff shall deliver to Counsel for Defendant . . . a properly executed consent and authorization as may be required by the operators of Facebook and MySpace, permitting said Defendant to gain access to Plaintiff’s Facebook and MySpace records, including any records previously deleted or archived by said operators.”).

<sup>150</sup> *Thompson v. Autoliv ASP, Inc.*, No. 2:09-cv-01375-PMP-VCF, 2012 WL 2342928, at \*5 (D. Nev. June 20, 2012).

<sup>151</sup> *Id.* (emphasis added in original).

to also provide the defendant with an “index of [all] redacted social networking site communications.”<sup>152</sup> Browning is a proponent of this approach and advocates its use by the courts. He argues:

This approach is instructive and should be explored by courts confronted with requests for a party’s social media passwords (or similar unlimited access to all of a party’s social media content) for several reasons. First, it recognizes that the scope of discovery into social media requires, as one court eloquently put it, “the application of basic discovery principles in a novel context,” with “the challenge [being] to define appropriately broad limits . . . on the discoverability of social communications.” It also reflects an understanding of the fact that the sufficiency of discovery responses, like beauty, is often in the eye of the beholder, and the lines of demarcation may be difficult for judges to navigate.<sup>153</sup>

The “index” required by the court in *Thompson*, similar to a conventional privilege log, might also help to ease the strain on judicial resources ordinarily present by in camera review.<sup>154</sup>

*D. Appoint a Special E-Discovery Master to Oversee Electronic Discovery*

Finally, some courts have chosen to utilize an outside, neutral specialist to contend with electronic discovery requests.<sup>155</sup> In *Equal*

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<sup>152</sup> *Id.*

<sup>153</sup> Browning, *supra* note 9, at 535–36 (citations omitted).

<sup>154</sup> *Id.* (“Preparation of a ‘social media index,’ somewhat akin to a privilege log, minimizes the burden that in camera review can represent to already limited judicial resources.”).

<sup>155</sup> *See, e.g.,* Bro-Tech Corp. v. Thermax, Inc., No. 05-CV-2330, 2008 WL 5210346, at \*1 (E.D. Pa. Dec. 11, 2008) (“Plaintiffs were permitted to conduct comprehensive electronic searches of certain data storage devices of the Defendants” after the court ordered the process to be “overseen and directed by [a] special electronic discovery master (‘e-discovery master’), and conducted in accordance with protocols imposed by the e-discovery master or reached by party stipulation—and approved by the Court in either event”); *see also* EEOC v. Original Honeybaked Ham Co. of Ga., No. 11-cv-02560-MSK-MEH, 2012 WL 5430974, at \*2 (D. Col. Nov. 7, 2012); Perrone v. Rose City HMA, L.L.C., No. CI-11-14933, 2013 WL 4011622, at \*1 (Trial Order) (Pa. Ct. C. P. May 3, 2013).

*Employment Opportunity Commission v. Original Honeybaked Ham Co. of Georgia*, Judge Hegarty curbed attempts at unfettered access to a party's private Facebook account instructing a "special master [to] compile the text messages and postings on Facebook and other pages, determine what was and was not relevant, and then give plaintiffs an opportunity to object before the content was produced."<sup>156</sup> The approach has become an increasingly popular way for courts to handle social media discovery disputes.<sup>157</sup> This may include requiring the parties themselves to hire such a "special master," as the court did in *Perrone v. Rose City HMA, L.L.C.*, a Pennsylvania premises liability case.<sup>158</sup> In *Perrone*, the judge ordered that the parties were to:

Hire a "neutral forensic computer expert" to review the plaintiffs' privacy-restricted Facebook account for a seventeen-day period relevant to the person injury claims in the case . . . [The judge] directed that the neutral expert be given plaintiff's user names and password information in order to access the account, download the account contents to a hard drive, and identify and isolate "all photographs of snow and references to snow in any emails and any photographs of the Plaintiff . . . engaged in any physical activity." Copies of the files would then be provided to counsel, and the costs of the neutral expert would be assessed against the defendants.<sup>159</sup>

This approach may offer one means of curbing some of the issues that arise when it seems that the entirety of an individual's Facebook account would be relevant. Furthermore, using a special "e-discovery master" offers some of the same inherent benefits of in camera review, without placing the burden on the court itself. Still, this forces us to ask why these types of requests would necessarily require this type of in-depth, neutral analysis, when such

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<sup>156</sup> See Browning, *supra* note 9, at 516.

<sup>157</sup> See *id.* at n.54.

<sup>158</sup> *Perrone*, 2013 WL 4011622, at \*1.

<sup>159</sup> Browning, *supra* note 9, at n.54 (citations omitted).

precautions are not required to be taken with other non-social media discovery requests.

#### IV. RESOLUTION: DO NOT TREAT SOCIAL MEDIA DISCOVERY ANY DIFFERENTLY THAN ANY OTHER DISCOVERY REQUESTS

##### A. *Social Media Discovery Requests Should Not Uniquely Require a Different Means of Facilitation, Production, or Judicial Assistance*

The conflicts of law articulated throughout this note must lead us to question what in fact the appropriate depth of social media discovery is, and how to facilitate such discovery. The fact that courts have been unable to conclusively agree on a method for approaching social media discovery requests suggests that such requests are often viewed as unique. However, “[t]o the extent social-media discovery presents challenges the existing discovery system cannot adequately deal with,” those challenges are not in fact unique to social media requests specifically.<sup>160</sup> It therefore appears that the best “solution” for appropriately handling social media discovery requests is actually to treat these requests no differently than any other types of discovery.

In the social media context, requesting parties appear to have an increased concern that their adversaries will fail to provide them with *all* relevant and responsive information. However, this concern is misplaced. There is no reason to suggest that counsel has any less of an obligation to provide adversaries with documents that are responsive to a well-tailored discovery request simply because the documents requested include digital communications potentially shielded by a social networking site’s privacy settings. The court highlighted this sentiment in *Simply Storage*, stating that “lawyers are frequently called upon to make judgment calls—in good faith and consistent with their obligations as officers of the court—about what information is responsive to another party’s discovery requests.”<sup>161</sup> The court noted that, should parties believe

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<sup>160</sup> Steven S. Gensler, *Special Rules for Social Media Discovery?*, 65 ARK. L. REV. 7, 11 (2012).

<sup>161</sup> *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 436 (S.D. Ind. 2010).

that the other side failed to produce a full set of discovery documents, there are options available and procedures already set in place to provide for dealing with such shortcomings.<sup>162</sup> Most notably, “a refusal by a plaintiff to produce relevant and discoverable content could be grounds for imposing sanctions.”<sup>163</sup> Quinn explains:

[A]n interested party cannot be the “final arbiter” of relevance. But counsel for the producing party is the judge of relevance in the first interest. Discovery in our adversarial system is based on a good faith response to demands for production by an attorney constrained by the Federal Rules and by ethical obligations. Where the parties disagree as to the contours of relevance in connection with particular discovery demands, they present their dispute to the court . . . When a party can demonstrate that an adversary may be wrongfully withholding relevant information, it can seek relief . . . .<sup>164</sup>

Ultimately, there is no reason that parties should require any particular judicial assistance in order to decide which information contained within an individual’s Facebook account is responsive to a discovery request.<sup>165</sup> This means, first and foremost, that a court

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<sup>162</sup> See Quinn, *supra* note 94, at 827.

<sup>163</sup> *Id.* (citing *Mackelprang v. Fid. Nat’l Title Agency of Nev., Inc.*, No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149, at \*8 (D. Nev. Jan. 9, 2007))

<sup>164</sup> *Id.* at 828 (citing *Rozell v. Ross-Holst*, No. 05 Civ. 2936(JGK) (JCF), 2006 WL 163143, at \*4 (S.D.N.Y. Jan. 20, 2006)).

<sup>165</sup> See *Offenback v. L.M. Bowman, Inc.*, No. 1:10-CV-1789, 2011 WL 2491371, n.3 (M.D. Pa. June 22, 2011). (“[W]e express some confusion about why the parties required the Court’s assistance in deciding what information within Plaintiff’s Facebook account is responsive to Defendants’ discovery requests and therefore properly discoverable. Although Defendants have taken a broad view of the potential relevance of Plaintiff’s Facebook account, Plaintiffs do not appear to have argued that the information in the bulleted paragraphs above should be protected from disclosure in this lawsuit. It is thus unclear why the Court was called upon to conduct an initial review of Plaintiff’s entire Facebook account to determine whether it contained potentially responsive, non-privileged information that should be produced as part of discovery in this case. Given that the Plaintiff is the party with the greatest familiarity with his own Facebook account, we submit that it would have been appropriate and substantially more efficient for Plaintiff to have conducted this initial review and then, if he deemed it warranted, to object to disclosure of some or all of the potentially responsive information included in his

should not be asked to intervene to conduct an initial review of an individual's *entire* Facebook account (private or otherwise).<sup>166</sup> Requesting this type of judicial intervention is, essentially, requesting that the court do the job of the counsel for the responding party. This also suggests that counsel for the requesting party has some misplaced belief that the other party is somehow less capable of adequately responding to a discovery request when private social media is involved.

In *Offenback*, the court expressed "some confusion" about why the parties required the court's assistance at all.<sup>167</sup> Magistrate Judge Martin C. Carlson stated, "[g]iven that the Plaintiff is the party with the greatest familiarity with his own Facebook account, we submit that it would have been appropriate and substantially more efficient for Plaintiff to have conducted this initial review and then, if he deemed it warranted, to object to disclosure of some or all of the potentially responsive information included in his account."<sup>168</sup>

*B. Discovery Requests Should Be Drafted in a Way to Be Wholly Inclusive of All Social Media, Such That the Means of Facilitation/Production Becomes Irrelevant*

In order to best ensure that counsel is able to produce relevant, potentially admissible documents, discovery requests must merely be drafted in a way that is both inclusive of all forms of social media

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account. The Court recognizes that the scope of discovery into social media sites 'requires the application of basic discovery principles in a novel context,' and that the challenge is to 'define appropriately broad limits . . . on the discovery ability of social communications.' However, in this case it appears that Defendants backed away from their initial position that they should be entitled to a general release of all information and data from Plaintiff's social networking sites, and that instead of engaging in a broad fishing expedition, were attempting to discover potentially relevant information such as that described in their May 2, 2011, letter to the Court. If Defendants had, in fact, narrowed their discovery requests in this fashion, we believe it would have been both possible and proper for Plaintiff to have undertaken the initial review of his Facebook account to determine whether it contained potentially relevant and responsive information, and thereafter to solicit the Court's assistance if a dispute remained as to whether he should be required to produce the information identified." (citations omitted)).

<sup>166</sup> *See id.*

<sup>167</sup> *See id.*

<sup>168</sup> *Id.*

and also specifies a narrowly tailored area of requested content. Essentially, this is treating social media discovery requests in a way that is no different than other discovery requests. Most notably, this will still yield the same, if not better, results. This resonated with the *Offenback* court, which stated that, if the defendants had narrowed their discovery request, rather than “engaging in a broad fishing expedition,”

it would have been both possible and proper for Plaintiff to have undertaken the initial review of his Facebook account to determine whether it contained potentially relevant and responsive information, and thereafter to solicit the Court’s assistance [only] if a dispute remained as to whether he should be required to produce the information identified.<sup>169</sup>

This approach requires only that the rules that govern the discovery of information held in hard copy similarly apply to the content of electronic communications from social media sites.<sup>170</sup> The court prescribed this in *Howell*, stating:

Defendants are free to serve interrogatories and document requests that seek information from the accounts that is relevant to the claims and defenses in this lawsuit. Plaintiff’s counsel can then access the private sections of Howell’s social media accounts and provide the information and documents responsive to the discovery requests.<sup>171</sup>

Accordingly, all discovery requests that seek to collect evidence from social media sites should be specified to closely relate to the litigation at hand.<sup>172</sup>

*In re Air Crash Near Clarence Center* is an example of one case in which the court treated a social media discovery request no dif-

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<sup>169</sup> *Id.*

<sup>170</sup> *See, e.g.,* *Howell v. Buckeye Ranch, Inc.*, No. 2:11-cv-1014, 2012 WL 5265170, at \*1 (S.D. Ohio Oct. 1, 2012) (“The same rules that govern the discovery of information in hard copy documents apply to electronic files.”).

<sup>171</sup> *Id.*

<sup>172</sup> *See* Gregory, *supra* note 1, at 451 (“A discovery request to garner evidence from social media sources should, therefore, be particularized as much as possible to the claim or defense at issue in order to pass judicial scrutiny.”).



ferently than any other type of discovery request.<sup>173</sup> The defendant requested the production of all electronic communications during a certain time period, "including social media accounts, emails, text messages, and instant messages," that may have related to the plaintiff's domicile on the date of the crash in question.<sup>174</sup> The court's ruling stated only that the "[p]laintiff shall produce responsive documents as ordered herein within 30 days of the entry date of this decision."<sup>175</sup> This request was narrowly tailored such that judicial intervention was not required to either determine the relevancy of potential documents, or to determine the means of production.

Additionally, if courts apply the same discovery standards to social media discovery requests as they do to requests for all other types of documents, there will no longer be a need for courts to conduct a separate "relevance" inquiry. A court will not need to determine whether the requesting party has provided evidence of "relevant" information on an individual's public Facebook page, such that a court may permit discovery of that individual's private Facebook account. The relevance inquiry<sup>176</sup> appears only necessary in contexts where a defendant is, for example, requesting the *entire* (or nearly entire) contents of a plaintiff's private Facebook or social media account. However, the Federal Rules of Civil Procedure<sup>177</sup> do not actually "require a party prove the existence of relevant material before requesting it."<sup>178</sup> Therefore, as noted in *Giacchetto*, this relevance inquiry has the danger of "improperly shield[ing] from discovery"<sup>179</sup> information that should otherwise be discoverable. If we require relevance to be proved by showing that information relating to the claims in question exists on some part of the public profile of the party in question, we may inadvertently protect items from discovery merely because the social media account has a well-protected public profile. However, a proper, narrowly

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<sup>173</sup> See *In re Air Crash Near Clarence Ctr.*, N.Y. on Feb. 12, 2009, Nos. 09-MD-2085, 09-CV-961 S, 2011 WL 6370189, at \*6 (W.D.N.Y. Dec. 20, 2011).

<sup>174</sup> *Id.* at \*5.

<sup>175</sup> *Id.* at \*7.

<sup>176</sup> See *supra* notes 30–34.

<sup>177</sup> See FED. R. CIV. P. 26(b); *supra* note 34.

<sup>178</sup> See *supra* note 34.

<sup>179</sup> *Id.*

tailored social media discovery request (that would be handled by the court no differently than any other request), would, by default, skip such an inquiry, leading instead directly to the production of all pertinent and discoverable content.

Finally, this approach makes many considerations about how to determine the depth of discovery and the means of discovery production moot. First, an individual would never be required to provide a requesting party with his username and password<sup>180</sup> because the burden would be placed upon the responding individual instead to simply produce only the *responsive material* in whatever form is reasonable. Because the entire content of an individual's private Facebook account would not likely be part of a narrowly tailored discovery request, it would be unnecessarily broad to provide an adversary with account log-in information. Similarly, in camera review<sup>181</sup> would become applicable only in contexts in which the parties were unable to agree about what content should be discoverable. Although the Download Your Information<sup>182</sup> feature available on Facebook may prove useful when producing documents, it would not necessarily be required. Because this feature provides the account holder with an electronic copy ("pdf") of everything that is contained in an account, it could prove to be a useful way for a responding party to conduct an initial review of the content of his account. Then, whichever content is deemed responsive could actually be taken from this pdf, with redactions as applicable. This same reasoning would also hold true for the use of special e-discovery masters.<sup>183</sup> While such "masters" may be of use in resolving actual disputes about the discoverable content of social media, if all discovery requests are narrowly tailored to actually relate to the litigation and claims at hand, there should be no need to utilize these "masters" to conduct any type of initial review to assist in determining which content is responsive.

The court would also not need to, in ordinary circumstances, direct an individual to sign a release permitting Facebook to pro-

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<sup>180</sup> See *supra* notes 120–129.

<sup>181</sup> See *supra* notes 130–41.

<sup>182</sup> See *supra* notes 142–44.

<sup>183</sup> See *supra* notes 161–64.

vide the court or his adversary with account content.<sup>184</sup> With the approach described herein as the new standard, a responding party would have the burden to review all social media accounts (whether they are private or not) for any potentially responsive content. Because an individual would already have access to his own account information, there would be no reason to request account content from Facebook. A release would, therefore, only be required if a responding party refused to comply with a valid discovery request or if there were reason to believe that the account holder had deleted potentially responsive information that could only be retrieved by Facebook. Finally, an electronic storage device<sup>185</sup> could potentially be a useful means of production but should not by any means be the sole means of production for social media discovery requests. An electronic storage device could be helpful if the responsive material is so voluminous that it would not be reasonable to turn over discovery in hard copy (or by any other requested means); however, there would be no reason to insist on this method, given that the entirety of an individual's account would not need to somehow be transferred to an adversarial party (or to the court).

Furthermore, there is also no reason to draft new or unique social media discovery rules, either governing the depth of discovery or the means of document production. It is clear that social media discovery requests are able to fit within the current framework of discovery rules;<sup>186</sup> therefore, "any effort to draft special rules for social-media discovery would probably ask more of the current rulemaking process than it can deliver."<sup>187</sup> In light of the existence of exponentially increasing technology, any social media discovery rules created today would likely seem entirely antiquated even a decade from now.<sup>188</sup> Therefore, the answer should not just be to

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<sup>184</sup> See *supra* notes 146–49.

<sup>185</sup> See *supra* notes 155–59.

<sup>186</sup> Gensler, *supra* note 160, at 10 ("Not only do I think social-media discovery fits easily into the existing discovery scheme, I think judges have, for the most part, already figured out how to fit it in.").

<sup>187</sup> *Id.* at 38.

<sup>188</sup> *Id.* ("Facebook' discovery rules written today would probably look archaic, if not silly, ten years from now. Young lawyers then might even laugh at them—probably using

stick with the status quo, but rather to truly embrace the procedures that have already worked for the judicial system for so many years. It seems likely that many of the more troubling cases that permitted extremely broad discovery (and the full production of private social media accounts) would have been better resolved had these courts seen the “documentation” in question for what it really was—content that, legally speaking, presented no different challenges than giant stacks of papers from a room full of filing cabinets.<sup>189</sup> Although one can infer that the courts of *Beswick* or *Bass* reached the conclusions that they did in part due to a lack of familiarity with social media or a general sentiment that new media should require new rules, any of these arguably old-fashioned ideas are misplaced. Ultimately, so long as courts work within the current framework of discovery rules, the judicial system would not only benefit by proceeding with one, unified approach to social media discovery requests, but it would also allow litigating parties to have a fuller picture of what to expect from courts and adversaries regarding the discovery of private social media accounts.

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some new mode of communication that I cannot now fathom and will likely never learn to use.”).

<sup>189</sup> See *supra* note 55.