

## Advocate's View: The fallacy of privacy: discovery of 'private' social media content in the wake of *Forman v. Henkin*

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### Introduction

There is something about social media that causes people to instinctively share, post and tweet whatever is on their mind (ask Donald Trump). As a result, social media accounts are a potential evidentiary goldmine for litigation attorneys (ask Robert Mueller). While the courts' treatment of publicly shared posts, tweets and photographs is a relatively straightforward and uncontroversial analysis, we have seen an uptick in discovery disputes concerning the disclosure of *privately* shared social media content.

On Feb. 16, 2018, in *Forman v. Henkin*, 2018 NY Slip Op 01015, the New York Court of Appeals liberalized the standard for the disclosure of private social media content in civil litigation.

### "Factual Predicate" Before *Forman v. Henkin*

Prior to the decision in *Forman*, several courts required the party seeking disclosure to establish a "factual predicate" for the request. The party seeking disclosure was required to scour the publicly viewable portions of a subscriber's social media profile for postings and photographs related to the lawsuit and present those to the motion court to establish the requisite "factual predicate" for disclosure.

A "factual predicate" was established in *Jennings v. TD Bank*, 2013 NY Slip Op 32783(U) (Sup Ct, Nassau County 2013) where the defendants in a personal injury action located a photograph on a public, unblocked portion of the plaintiff's Facebook page depicting the plaintiff holding scuba gear on a beach in front of a cruise ship. Similarly, in *Melissa "G" v. North Babylon Union Free Sch. Dist.*, 48 Misc. 3d 389 (Sup Ct, Suffolk County 2006), a "factual

predicate” was established where plaintiff’s public Facebook page contained photographs of the plaintiff engaged in a variety of recreational activities. In both cases, the courts held that disclosure of relevant portions of the private accounts was warranted because disclosure was material and necessary based upon the “factual predicate” established by the public photographs.

To the contrary, the court in *Winchell v. Lopiccicolo*, 954 NYS2d 421 (Sup Ct, Orange County 2010) denied the defendant’s motion to compel access to the plaintiff’s Facebook page where the defendant was unable to demonstrate a sufficient factual predicate. However, in denying the defendant’s motion, the court used the same rationale from *Jennings* and *Melissa “G”*—that disclosure was only available in cases where the requesting party was able to show that information found on the account holder’s public page was relevant to the lawsuit.

### **The Court of Appeals speaks: *Forman v. Henkin***

The plaintiff in *Forman v. Henkin* alleged that she sustained injuries when she fell from a horse owned by the defendant. At her deposition, the plaintiff testified that she previously maintained a Facebook account on which she posted photographs showing her pre-accident lifestyle, but that she deactivated the account about six months after the accident and could not recall publishing any post-accident photographs. The plaintiff also stated that she had difficulty using the computer and writing coherent messages.

Based on the deposition testimony, the defendant filed a motion to compel in the lower court seeking a blanket authorization from the plaintiff for access to the entirety of her “private” Facebook account. The plaintiff argued that the defendant failed to establish the required “factual predicate” because the public portion of the plaintiff’s Facebook profile contained only a single photograph that did not contradict the plaintiff’s claims or the deposition testimony. The lower court granted the defendant’s motion requiring disclosure of pre-accident photographs that the plaintiff sought to introduce at trial; all post-accident photographs of the plaintiff that did not contain sexually explicit material; and data reflecting the timing and number of characters in each message posted after the accident.

The plaintiff appealed to the Appellate Division, First Department, which credited the plaintiff’s “factual predicate” argument and severely restricted disclosure *only* to pre- and post-accident photographs that the plaintiff sought to introduce at trial. Two justices dissented, favoring broad disclosure and a reevaluation of the “factual predicate” standard; thus, the defendant was granted leave to appeal to the Court of Appeals.

In a unanimous decision, the Court of Appeals reversed the Appellate Division and reinstated the Supreme Court’s order. Writing for the Court, Judge DiFiore specifically rejected the pre-*Forman* “factual predicate” standard discussed above, stating that “there is no need for a specialized or heightened factual predicate to avoid improper

'fishing expeditions.'" The Court reasoned that the old rule encourages social media users to "unilaterally obstruct disclosure merely by manipulating privacy settings or curating the materials on the public portion of the account."

Moreover, "[u]nder such an approach, disclosure turns on the extent to which some of the information sought is already accessible — and not, as it should, on whether it is 'material and necessary to the prosecution or defense of an action' [pursuant to CPLR 3101(a)]." The Court found that the plaintiff's deposition testimony acknowledging that she posted photographs to Facebook was more than enough to exceed the defendant's threshold burden showing that the private portions of the plaintiff's Facebook account were likely to contain relevant evidence.

### **'Factual predicate' after *Forman v. Henkin***

Prior to the holding in *Forman*, the disclosure of private social media content, in large part, hinged on the public nature of a user's social media profile. After *Forman*, the party seeking disclosure is no longer required to satisfy this heightened burden. Instead, the courts will proceed as they usually do — guided by New York's historically liberal rules of discovery; engaging in a case-by-case analysis weighing the need for disclosure against any special burden to be borne by the opposing party.

As a result, attorneys on both sides of the caption should not overlook the opportunity to conduct a detailed exploration of social media habits at a party's deposition. Likewise, attorneys should advise clients to be extra cautious with respect to social media usage during the pendency of litigation, even if the account is set to "private."

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