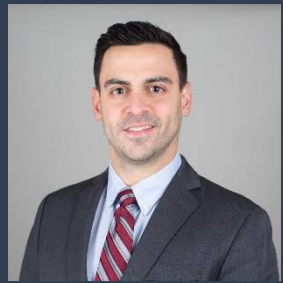


Unanimous New York Court Of Appeals Decision Clarifies New York Disclosure Rules for “Private” Social Media Accounts



Kevin E. Wolff
Shareholder
P: (973) 957-2554
kevin.wolff@klrw.law



Nicholas J. Guarino
Associate
P: (973) 957-2565
nicholas.guarino@klrw.law

On February 13, 2018, in a unanimous decision, the New York Court of Appeals held, in Forman v. Henkin, 2018 NY Slip Op. 01015 (“Forman”), that disclosure demands for a party’s “private” social media account should not be reviewed under a heightened standard but, instead, are subject to the “material and necessary” standards set forth in CPLR § 3101(a).

In Forman, plaintiff claimed to have suffered traumatic spinal and brain injuries after falling from a horse. During her deposition, plaintiff stated that she was very active on Facebook but, after her accident, had made her account “private” and eventually deactivated the account entirely. Defendant moved to compel disclosure of plaintiff’s “private” account under CPLR § 3101(a), because plaintiff alleged that the accident impaired her ability to read, write, and reason. The Supreme Court granted the motion, limiting discovery of the “private” Facebook account to photographs plaintiff intended to introduce at trial; all photographs posted privately after the accident, except those depicting nudity or romantic relationships; and plaintiff’s Facebook posts authored either before or after the accident.

On appeal, the Appellate Division, First Department, limited the “private” Facebook disclosure, limiting to only those photographs that plaintiff intended to introduce at trial. Citing Tapp v. New York State Urban Dev. Corp., 102 A.D.3d 620 (1st Dept 2013), the Appellate Division appeared to apply a heightened standard for disclosure of private Facebook accounts, under which a party must “establish a factual predicate” for the request by “identifying relevant information” from the plaintiff’s *public* Facebook account that conflict with the opposing party’s “disabilities, losses or claims.” Id. at 620.

The Court of Appeals reversed the judgment of the Appellate Division and reinstated the Supreme Court’s ruling. Chief Judge DiFiore, writing for the Court, held that the Appellate Division improperly employed “a heightened threshold for production of social media records” in conflict with New York’s long-standing liberal discovery standard under CPLR § 3101(a), which turns on whether the information sought is “‘material and necessary’ to the prosecution or defense.” The Court held that “the request need only to be appropriately tailored and reasonably calculated to yield relevant information.” In reinstating the Supreme Court’s ruling, the Court laid out a two-part test for courts addressing social media disclosure: a court should “assess whether relevant information is likely to be found,” and then balance “the potential utility of the information sought against any specific ‘privacy’ concerns” so as to issue a tailored disclosure order “that identifies types of materials that must be disclosed while avoiding disclosure of nonrelevant materials.” The Court also dismissed arguments that “private” social media disclosure constitutes an unjustified invasion of privacy, holding that “even private materials,” such as medical records, “may be subject to discovery if they are relevant.”

The Court of Appeals clarified disclosure rules for social media accounts to apply a two-part balancing test, permitting disclosure of private social media accounts to the extent that the disclosure is “reasonably calculated to contain relevant information.” If you have any questions about the Court of Appeals’ decision in Forman, please contact Kevin E. Wolff or Nicholas J. Guarino.

KINNEY LISOVICZ REILLY & WOLFF PC

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New Jersey Office:
299 Cherry Hill Road, Suite 300
PO Box 912
Parsippany, New Jersey 07054
Phone: 973-957-2550
Fax: 973-710-1054

New York Office:
11 Broadway, Suite 615
New York, New York
Phone: 646-741-7332
Fax: 646-690-8772