

## E-Discovery For Defendants Cheat Sheet

Tuesday, November 22, 2011

After getting the latest favorable Facebook discovery decision in [Largent v. Reed](#), and seeing that [Largent](#) cited to a recent New York case that we didn't know about, we've come to the (probably belated) conclusion that the fast-developing area of e-discovery for defendants with respect to social media maintained by plaintiffs is worthy of a cheat sheet to keep up with the cases as they've come down. So here it is – a compilation of all the favorable opinions we're aware of concerning the right of defendants to take the offensive on e-discovery in personal injury cases, rather than merely having to grin and bear it on the receiving end. As with our other posts of this nature, it's in purely chronological order, and we'll update it whenever we learn of additional case law, so if you on the right side of the “v.” win something, feel free to pass it along to us.

By the way, we've cited some Canadian cases as well, because, particularly early on, they've been cited several times on this side of the border. The citation forms may look unusual to American lawyers, but we've tried them out. This is how they appear on WL.

1. [Mackelprang v. Fidelity National Title Agency, Inc.](#), 2007 WL 119149 (D. Nev. Jan. 9, 2007). Discovery of social media is allowable, to the extent relevant to the case, but discovery should come from the plaintiff, rather than directly from My Space.
2. [Dexter v. Dexter](#), 2007 WL 1532084 (Ohio App. May 25, 2007). Not a discovery case, but frequently cited. Publicly available posts on MySpace were not entitled to any reasonable expectation of privacy.
3. [Murphy v. Perger](#), 2007 CarswellOnt 9439 (Ont. Super. Oct. 3, 2007) (Canada). Discovery of plaintiff's Facebook account authorized. Social media to which many people have access has no reasonable expectation of privacy.
4. [Beye v. Horizon Blue Cross Blue Shield](#), 2007 WL 7393489 (D.N.J. Dec. 14, 2007). Discovery of plaintiff's Facebook and MySpace accounts authorized. There is no reasonable expectation of privacy in information shared with others.

5. Leduc v. Roman, 2009 CarswellOnt 843 (Ont. App. Feb. 20, 2009) (Canada). Refusal to allow discovery of plaintiff's Facebook account was an abuse of discretion. Social media are not privileged, even if restricted as "private." A plaintiff must identify any relevant materials posted on Facebook, public or private.
6. Moreno v. Hanford Sentinel, Inc., 91 Cal. Rptr.3d 858 (Cal. App. April 2, 2009). Not a discovery case, but frequently cited. A plaintiff cannot bring an invasion of privacy action concerning republication of information that he voluntarily posted on MySpace. There can be no expectation of privacy in publicly posted information.
7. Bishop v. Minichiello, 2009 CarswellBC 871 (B.C. April 7, 2009) (Canada). Discovery of plaintiff's hard drive was proper to determine how much time plaintiff spent on Facebook.
8. Kent v. Laverdiere, 2009 CarswellOnt 1986 (Ont. Super. April 14, 2009) (Canada). Discovery of plaintiff's Facebook and MySpace accounts was proper.
9. Ledbetter v. Wal-Mart Stores, Inc., 2009 WL 1067018 (D. Colo. April 21, 2009). Subpoenas directly to Facebook, My Space, Inc., and Meetup.com were proper discovery of plaintiff's accounts.
10. Bass v. Miss Porter's School, 2009 WL 3724968 (D. Conn. Oct. 27, 2009). Discovery of plaintiff's Facebook account was proper. Plaintiff's withholding of relevant information justified sanction of production of entire Facebook page.
11. Romano v. Steelcase Inc., 907 N.Y.S.2d 650 (N.Y. Sup. Sept. 21, 2010). Discovery of plaintiff's Facebook and MySpace accounts authorized. Social media are not privileged, even if restricted as "private." Social media are discoverable, and have no reasonable expectation of privacy.
12. McCann v. Harleysville Insurance Co., 910 N.Y.S.2d 614 (N.Y.A.D. Nov. 12, 2010). While the defendant had yet to establish entitlement to discovery of any particular item, prospective refusal to allow any discovery of plaintiff's Facebook account was an abuse of discretion.
13. EEOC v. Simply Storage Management, LLC, 270 F.R.D. 430 (S.D. Ind. May 11, 2010). Discovery of plaintiffs' Facebook and MySpace accounts authorized.

Social media have no reasonable expectation of privacy. Targeted social media discovery is not burdensome or oppressive.

14. Barnes v. CUS Nashville, LLC, 2010 WL 2265668 (M.D. Tenn. June 3, 2010).  
Discovery of plaintiff's Facebook account authorized. Due to plaintiff's intransigence, the magistrate will "friend" plaintiff and review the account for discoverable information.
15. McMillen v. Hummingbird Speedway, Inc., 2010 WL 4403285 (Pa. C.P. Jefferson Co. Sept. 9, 2010). Discovery of plaintiff's Facebook account authorized. There is no "social network privilege." Social media are discoverable, and access "should be freely granted."
16. Sparks v. Dubé, 2011 CarswellNB 80 ¶¶52-58 (N.B.Q.B. Feb. 4, 2011) (Canada).  
Imposing litigation hold on plaintiff to prevent deletion of Facebook information.
17. Zimmerman v. Weis Markets, Inc., 2011 WL 2065410 (Pa. C.P. Northumberland Co. May 19, 2011). Discovery of plaintiff's Facebook and MySpace accounts authorized. No privilege exists for information posted in the non-public sections of social websites. Social media have no reasonable expectation of privacy.
18. Offenback v. LM Bowman, Inc., 2011 WL 2491371 (M.D. Pa. June 22, 2011).  
Discovery of plaintiff's Facebook account authorized. Social media are discoverable. There is no need for judicial in camera review of social media before it is produced.
19. Katiroll Co. v. Kati Roll and Platters, Inc., 2011 WL 3583408 (D.N.J. Aug. 3, 2011). A party's intentional destruction of Facebook evidence could constitute spoliation, but unintentional alterations do not. Parties "control" their Facebook pages for purposes of discovery.
20. Held v. Ferrellgas, Inc., 2011 WL 3896513 (D. Kan. Aug. 31, 2011). Discovery of plaintiff's Facebook and job search accounts authorized. Targeted social media discovery is not burdensome or oppressive.
21. Patterson v. Turner Construction Co., 931 N.Y.S.2d 311, 312 (N.Y. App. Div. 2011). Affirming grant of Facebook discovery. Social media are not privileged, even if restricted as "private."

22. Largent v. Reed, 2011 WL 5632688, [slip op.](#) (Pa. C.P. Franklin Co. Nov. 8, 2011).

Discovery of plaintiff's Facebook account authorized. Social media are discoverable, and have no reasonable expectation of privacy. Social media are not privileged, even if access is restricted. The Stored Communications Act does not apply to discovery from plaintiffs. Targeted social media discovery is not burdensome or oppressive.