Ten Steps to Obtain Facebook Discovery In Florida

By Christopher B. Hopkins

The number of appellate decisions setting out standards for litigants pursuing discovery of information posted on social media websites is small, but growing. In this article Christopher Hopkins identifies trends in the decisional law and suggests ten steps that will improve the chances of obtaining social media discovery. The article focuses on Facebook, but the principles described here can be applied to other social and professional networking sites.

In the past year, three Florida appellate courts have articulated standards in civil cases for the discovery of content from a party's Facebook account. Before 2014, Florida's scant precedent for social media discovery was composed of two federal and two state trial court orders. While this budding authority of three opinions and four orders is not fully harmonized, defense practitioners will detect trends and strategies for obtaining Facebook content (*e.g.*, posts, comments, still images, video, or other information) and, potentially, full access to a plaintiff's Facebook account.

Rather than serving a standard set of "social media discovery" requests, the lesson from these Florida cases is that defense counsel should take discrete steps — early in the case, followed by narrow social media discovery in stages— to maximize production of the plaintiff's Facebook content. This article provides an overview of the recent social media discovery rulings in Florida; explains the grounds to overcome frequent plaintiff objections; and describes ten steps to obtain court-approved access to the plaintiff's Facebook content.

A primer on Facebook and other forms of social media is likely not necessary for most Florida lawyers.[1] This article will focus exclusively on Facebook because of that site's popularity, but the principles and steps articulated here likely will apply to other social media. We begin with a chronological discussion of the four trial court orders from 2011 through 2013 and the more recent 2014 through 2015 appellate opinions.

"Facebook Discovery" Trial Court Orders 2011–2013

There are four reported Florida trial court orders regarding Facebook discovery, decided by the Broward and Palm Beach County circuit courts and the Middle District of Florida. The two South Florida trial court orders — *Beswick v. Northwest Medical Center, Inc.* and *Levine v. Culligan* — are the most significant.

Beswick v. Northwest Medical Center, Inc.[2]

The earliest reported authority in Florida articulating standards for the discovery of a plaintiff's Facebook account is the November 2011 Broward County circuit court order in *Beswick v. Northwest Medical Center, Inc. Beswick* is also noteworthy because it was relied upon by two of the six subsequent Florida cases.[3]

The *Beswick* defendant sent discovery requests asking one of the plaintiffs to identify her social media accounts and to divulge a copy of all shared content for the preceding five years.[4] The *Beswick* plaintiff objected on the grounds that these requests were overbroad, burdensome, not reasonably related to the discovery of admissible evidence, and violative of privacy rights.[5] This mantra of objections, as illustrated below, appears to be the prevailing grounds that plaintiffs use to avoid production of Facebook content.

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Because the *Beswick* plaintiffs had raised noneconomic damages claims, Judge Mily Rodriguez-Powell ruled that the Facebook content was "clearly relevant" and "narrow in scope, as they include a time limitation of five years."[6] Forced to rely upon non-Florida precedent, the *Beswick* court noted that the privacy argument "lacked merit" because "information that an individual shares through social networking websites like Facebook may be copied and disseminated by another, rendering any expectation of privacy meaningless."[7] The court granted the defendant's motion and permitted full access to the plaintiff's Facebook account.

Davenport v. State Farm Mutual Automobile Insurance Co.[8]

Three months later, in February 2012, Magistrate Judge Joel Toomey in the Middle District Court of Florida ordered the plaintiff in *Davenport* to produce photographs depicting her that were posted on Facebook after the subject accident.[9] The *Davenport* defendant had served requests for production seeking "all photographs posted, uploaded, or otherwise added" to the plaintiff's Facebook (and other social media accounts) since the accident, including those posted by others in which the plaintiff was "tagged or otherwise identified."[10]

Like *Beswick*, the *Davenport* plaintiff objected, asserting that the request was overly broad, outside of the scope of discovery and an invasion of privacy.[11] Applying federal standards, the *Davenport* court acknowledged the plaintiff's physical condition and "quality of life" were at issue, and therefore the court limited the scope but ordered the plaintiff "to produce any photographs depicting her, taken since the date of the subject accident, and posted to [social media], regardless of who posted them."[12]

Levine v. Culligan of Florida, Inc.[13]

Nearly a year later, in January 2013, Circuit Court Judge Meenu Sasser in Palm Beach County issued an order sustaining the plaintiff's objections to Facebook discovery in *Levine v. Culligan of Florida, Inc.* Recognizing the pervasiveness of Facebook and the absence of Florida appellate decisions, Judge Sasser detailed the facts and her legal ruling in a lengthy 11-page order that reads like an appellate decision.[14]

One reliable method to pursue Facebook content involves defense counsel establishing, early in the case, a threshold reason for the court to order production of non-public Facebook content.

In *Levine*, the defendant served a request for production seeking access to the personal injury plaintiff's Facebook account. The defendant claimed that evidence contradicting the plaintiff's deposition testimony "may" exist on her social media accounts.[15] Not surprisingly, the *Levine* plaintiff raised the familiar objections that the request was vague, overbroad and otherwise outside the scope of discovery.[16] While privacy was not directly raised, Judge Sasser agreed with *Davenport* and authorities cited in *Beswick* that "social networking content is neither privileged nor protected by any right of privacy."[17]

The *Levine* court concluded, however, that the "defendant has not alleged any factual basis indicating that plaintiff's profiles contain information relevant to the pending matter."[18] Specifically, Judge Sasser noted that the defendant had not come forward with evidence from the plaintiff's publicly-available Facebook profile, or some other source, to show "the defendant [has] *some* reason to believe that the private portion of a profile contains information relevant to the case."[19] Lacking that threshold predicate or a time limitation, the court denied access to the plaintiff's Facebook content.

Estate of Salvato v. Miley [20]

In June 2013, the tables were turned in *Estate of Salvato v. Miley*, where it was the plaintiffs who sought the defendant's Facebook and other social media content.[20] The *Salvato* defendant raised the "same basic objections" of irrelevance, immateriality and privacy.[21] Without ruling on the privacy objection, Magistrate Judge Philip Lammens of the Middle District Court of Florida concluded that the cell phone and social media interrogatories and requests were outside the scope of discovery absent a "threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence."[22]

At first glance, these four trial orders seem to reach an irreconcilable Goldilocks-like impasse, because *Beswick* allowed complete Facebook access, *Davenport* permitted limited access and *Levine* and *Salvato* denied all access. However, the requesting parties did not necessarily assert the same legal arguments and, of course, the facts were case-specific. Although a complete Facebook discovery strategy may not manifest itself in these trial orders, it becomes clear that one reliable method to pursue Facebook content involves defense counsel establishing, early in the case, a threshold reason for the court to order production of non-public Facebook content.

"Facebook Discovery" Appellate Opinions 2014–2015

Between February 2014 and January 2015, the First, Second and Fourth District Courts of Appeal ruled on Facebook discovery issues in civil cases. These opinions differ in how much access to Facebook content was permitted, *e.g.*, all content posted on a single day; only photos posted during a certain period; or the entire account. In the immediate section, we will discuss the courts' rulings and, later in the article, we will seek to harmonize the judicial analysis to develop steps to maximize Facebook discovery.

Root v. Balfour Beatty Construction LLC[23]

In February 2014, the Second District Court of Appeal was the first Florida appellate court to render an opinion regarding Facebook discovery. In *Root v. Balfour Beatty Construction LLC*, the court denied access to the Facebook content of the mother and "next friend" of the minor plaintiff who was injured. The defendants had served requests for production seeking all Facebook content regarding a spectrum of topics including the mother/next friend's relationships, mental health, alcohol use and other lawsuits.[24] Similar to the trial court orders above, the Second District concluded that, in this case, the discovery was not related to the claims, affirmative defenses or the accident itself.[25] Specifically, the panel noted the minor plaintiff was merely three years old and that the plaintiff-mother, to whom the broad requests were directed, was not making an individual claim, nor had the defendants "pointed to anything claimed by her in support of their contention that the requested information is relevant and discoverable."[26]

In short, *Root* is factually distinguishable from most Facebook discovery cases because the mother/"next friend" was the subject of the requests, but she was not a witness to the accident or a party to the actions, and the scope of content requested did not relate to the counts or defenses in the case. In future hearings regarding Facebook discovery, plaintiffs' lawyers will unquestionably rely upon select sentences and the holding of *Root*. Defense counsel should emphasize the outlying nature of the facts in *Root* and re-direct the court to more factually relevant precedent.

Estate of Antico v. Sindt Trucking, Inc.[27]

Florida's second Facebook discovery appellate opinion was *Estate of Antico v. Sindt Trucking, Inc.*, decided in October 2014 by the First District Court of Appeal. There, defendants argued entitlement to the decedent's iPhone, and secondarily to her Facebook content, premised upon evidence that the decedent may have been comparatively or solely liable for the subject motor vehicle accident by way of her iPhone distracting her before impact.

The defendants sought an order permitting an expert to inspect the decedent's iPhone data from the day of the accident to ascertain "whether [the decedent] was texting, Facebooking, Tweeting, or nothing at the time of the accident."[28] Not addressed in the First District opinion, but evident from the motions and hearing transcript below, Facebook content was implicated because the decedent's mother allegedly learned of the accident via Facebook, and the decedent's relatives allegedly posted "don't text and drive" messages after the accident. Plaintiff opposed the inspection on that the request was an invasion of privacy and exceeded the scope of discovery.[29]

The *Antico* panel ruled the defendants had supported their motion to inspect specific evidence, including cell phone records, that could show whether the decedent was texting just before the accident. The defendants had proffered testimony suggesting the decedent may have been using her iPhone before the crash.[30] The court based its ruling on the facts that (a) there was no dispute that the iPhone may contain "very relevant information"; (b) the court order "adequately safeguards privacy interests" and plaintiff had "advanced no alternative plan"; and (c) the requested scope of nine hours surrounding the time of the accident appeared to be "the only way to discover whether the decedent used her cellphone" and, again, the plaintiff had not proposed a less intrusive method.[31]

Nucci v. Target Corp.[32]

The third Florida appellate decision regarding social media was *Nucci v. Target Corp.*, rendered by the Fourth District Court of Appeal in January 2015. The defense lawyers in *Nucci* likely knew that Facebook discovery could be critical to their slip-and-fall case when they discovered, pre-deposition, that the plaintiff's public Facebook profile contained 1,285 photographs.[33] The photographs were the subject of some discussion at the deposition, and afterwards, defense counsel revisited the plaintiff's Facebook page to learn some photos now were missing.[34] The discovery battle in *Nucci* was limited to still images and not other Facebook content.

The *Nucci* defendant moved for an inspection and then served a more narrowly-tailored set of "electronic media" interrogatories and requests for production. As we have seen routinely with other plaintiffs, the *Nucci* plaintiff claimed privacy, non-accessibility, burden, overbreadth and lack of relevance as grounds to prevent Facebook discovery.[35]

The *Nucci* case stands out among Facebook discovery cases because the defendant sought only photographs and not a wider list of content ("our ruling in this case covers [no] communications other than photographs…").[36] In the face of claims that the defendant was seeking "unfettered access," the *Nucci* defendants wisely pointed out that they were not seeking to "compel the production of passwords to [plaintiff's] social networking accounts" but, instead, were focused on images of the plaintiff.[37] The court distinguished these requests from those in *Root*, where the defendant had asked for a "much broader swath of Facebook material without any temporal limitation."[38]

As for discoverability, the court noted that, in claims where a plaintiff alleges non-economic damages, "there is no better portrayal of what an individual's life was like than those photographs the individual has chosen to share through social media…"[39] Finally, the *Nucci* panel appeared critical that the plaintiff sought to use a conclusory, blanket objection rather than seek to identify how production of each individual image was damaging or embarrassing.[40]

The *Nucci* court also dispensed with the claim that there was a legitimate expectation of privacy: "we agree with those courts concluding that, generally, the photographs posted on a social networking site are neither privileged nor protected

by any right of privacy, regardless of any privacy setting" because "by creating a Facebook account, a user acknowledges that her personal information would be shared with others."[41] For that reason, citing *Beswick* and other authorities, the *Nucci* court found no grounds for privacy, especially because "even had plaintiff used privacy settings that allowed only her 'friends' on Facebook to see postings, she had no justifiable expectation that her friends would keep her profile private."[42]

Finally, the court disagreed with the argument that the federal Stored Communications Act applied: "the act does not apply to individuals who use the communications services provided."[43] While not cited in *Nucci*, both the *Beswick* and *Levine* courts likewise concluded that they had the authority to order the plaintiff to execute waivers that would avoid application of the Act, to the extent it applied.[44]

It may be tempting to summarize the foregoing orders and opinions based upon their outcomes (five permitted discovery and two did not). But the results are not necessarily the focal point. The lesson for practitioners is that the most effective Facebook discovery practice begins early and involves an ongoing process, seeking greater access based upon narrow requests until defense counsel has sufficient, if not complete, access to the plaintiff's Facebook content. Before we reach the recommended Facebook discovery steps, the next section discusses how to overcome plaintiff's frequent objections.

Overcoming Plaintiff's Objections to Facebook Discovery

As illustrated in these Florida cases, plaintiffs often rely on a common set of objections to resist Facebook discovery. Below are some of those arguments against Facebook production as well as the case law to overcome them.

Objections Based on Privacy Rights and Privacy Settings

The front page of Facebook announces, "Facebook helps you *connect and share* with people in your life."[45] "Generally, [social media] content is neither privileged nor protected by any right of privacy."[46] Courts around the country have determined that social media evidence is discoverable.[47]

The lesson for practitioners is that the most effective Facebook discovery practice begins early and involves an ongoing process, seeking greater access based upon narrow requests.

"There is no reasonable expectation of privacy in material posted on Facebook. Almost all information on Facebook is shared with third parties and there is no reasonable expectation in such information. [...] [A]s explained above, even 'private' Facebook posts are shared with others."[48] As the *Nucci* court held, "generally photographs posted on a social networking site are neither privileged nor protected by any right of privacy, regardless of any privacy setting that the user may have established."[49] Among the Florida cases above, *Beswick*, *Davenport*, *Levine* and *Nucci* considered the privacy argument and unanimously disagreed with this objection.[50]

According to Facebook, "no security measures are perfect or impenetrable. We cannot control the actions of other users with whom you share your information. We cannot guarantee that only authorized persons will view your information. We cannot ensure that information you share on Facebook will not become publicly available."[51]

"As such, information that an individual shares through social networking websites like Facebook may be copied and disseminated by another, rendering any expectation of privacy meaningless."[52] In one case, a criminal defendant posted information on Facebook, and his "friend" shared the information with the government. According to the New York court, "[w]hen Colon posted to his Facebook profile, and then shared those posts with his friends, he did so at his peril."[53] As another court concluded, anyone who believes Facebook posts are private is engaging in "wishful thinking."[54]

Objections That the Stored Communications Act Prevents Disclosure

Despite the failure of this argument in Florida and elsewhere, it continues to be made. *Beswick*, *Levine* and *Nucci* all rejected this argument, noting a Florida Supreme Court opinion that permitted trial courts to require litigants to sign releases.[55] Indeed, at least two non-Florida courts have circumvented application of the Stored Communications Act to Facebook discovery requests.[56]

Objections to Producing "Tagged" Photos

Some plaintiffs may seize upon an errant sentence in *EEOC v. Simply Storage*, a frequently-cited Pennsylvania case, which states, "a picture posted on a third party's profile in which a claimant is merely 'tagged' is less likely to be relevant."[57] That quote should not be read in isolation to suggest that photos in which plaintiffs are "tagged" should be excluded. Such an argument can be quickly dispelled by considering the entire *Simply Storage* order and by following the Florida precedent in *Davenport* and *Nucci*.

EEOC v. Simply Storage involved sexual harassment claims where defendants made broad social media requests that the court narrowed but permitted. In doing so, the court fashioned tests that it applied to the social media content to determine whether the content was discoverable.[58] The plaintiff, of course, argued extremely narrow grounds (such as "only communications that directly reference the allegations in the complaint"). The court disagreed, noting "[t]his standard would not encompass clearly relevant com-

munications and, in fact, would tend only to yield production of communications supportive of the claimant's allegations."[59]

In fashioning a test to determine the discoverability of Facebook images, the *Simply Storage* court ordered that "pictures of the claimant taken during the relevant time period and posted on a claimant's profile will be generally discoverable…"[60] The court noted, however, that photos in which the plaintiff was merely "tagged" were "less likely" to be relevant but it appears that this was simply one consideration that was based on the fact that a "tagged" photo could have been taken long ago; the image may not reflect the plaintiff's mindset at the time it was posted; and the third party may have just simply "tagged" the plaintiff but not used an image that actually depicts the plaintiff.[61]

Neither defense counsel nor Florida courts need to divine the meaning behind that reference in *Simply Storage*. In *Reid v. Ingerman Smith LLP*,[62] a New York court relied upon *Simply Storage* but nonetheless ordered production of "photographs uploaded by third parties depicting plaintiff…" In Florida, the *Davenport* court likewise entertained a *Simply Storage* objection to "tagged" photos but held that "the Court will order plaintiff to produce any photographs depicting her, taken since the date of the subject accident, regardless of who posted them."[63] Finally, in *Nucci*, the court acknowledged the value of pictures, even over the descriptive words of "a great novelist," and ordered production of all photos depicting the plaintiff, not just those posted by the plaintiff, noting that the plaintiff "may not be an accurate reporter."[64] That is consistent with *Simply Storage* because, earlier in that order, the court rejected a standard that would reveal only content the plaintiff had cherry-picked.[65]

Other Objections

- *Embarrassing or Humiliating*: as one Pennsylvania court noted, "[a]lmost all discovery causes some annoyance, embarrassment, oppression, burden, or expense."[66]
- *Injury or Harm by Producing Photos*: in both *Davenport* and *Nucci*, the courts were critical of plaintiffs who opposed production of photos but failed to articulate, for each photograph, what injury or harm would result from production.
- *Plaintiff Disagrees with Production Methods*: again, the courts in *Nucci* and *Antico* were critical of plaintiffs who failed to propose alternative, less intrusive methods.[67]
- *Plaintiff Does Not Know How to Access*: Facebook has a "help" section explaining how to download user content.[68]
- *References to the* Holland *and* Menke *Cases*: in these two Florida cases, defendants sought broad access to vast hard drives and SIM cards of information.[69] This discovery is distinctly different and broader than Facebook discovery (the content of one's computer implicates privacy concerns, whereas Facebook content should not). Consider the discussion of these two cases in *Antico* to dispel their application to Facebook discovery.[70]

Ten Steps to Obtain Facebook Content

Based upon this Florida precedent and the non-Florida authorities upon which those cases relied, the following steps should result in discovery of the plaintiff's Facebook content.

1. Preserve Plaintiff's Public Profile

At the earliest opportunity, defense counsel should locate and print or save the public portion of the plaintiff's Facebook account, including number of friends, photographs, and other openly-available information (ideally, this should be done at the claim stage). Depending upon the plaintiff's Facebook settings, this may reveal information that defense counsel, at the inception of the claim or case, may not even know is relevant. Moreover, preserving an early "snapshot" of the plaintiff's profile may reveal whether the plaintiff subsequently alters, removes or deletes content, which in turn may suggest that the content is relevant and/or was spoliated.

2. Serve a Single Interrogatory

Once discovery has begun, defense counsel should serve a single interrogatory seeking identification of the plaintiff's social media accounts.[71] This interrogatory should simply request identification of the existence of any social media accounts and the username, nothing more (to avoid delay associated with an objection over the definition of social media, assess whether to limit the interrogatory to Facebook, Twitter, Instagram, LinkedIn and (maybe) Pinterest accounts). Defense counsel should not rely on a Facebook or Google search to determine whether the plaintiff has social media accounts; based upon privacy settings, users can prevent such a search from locating their account.[72] Likewise, a person may have a common, married or pseudonymous username (or multiple Facebook accounts) that inhibits defense counsel from finding all accounts without that single interrogatory. Consider using the interrogatory quoted in either *Beswick* or *Nucci*, because that form was approved by the courts.[73] Likewise, defense counsel should be prepared to distinguish this single interrogatory from the broad discovery in *Davenport* and *Root*.

3. Re-Check Public Profile

Before the plaintiff's deposition, re-examine the plaintiff's public profile to determine whether privacy settings, number of photos or other content appears to have been altered, removed or deleted. Under a proposed advisory opinion, the Professional Ethics Committee of the Florida Bar has suggested that "a lawyer may advise the client prelitigation to remove information from a social media page…"[74] In the event that any Facebook content appears to have been altered, removed or deleted, defense counsel may develop an argument that greater discovery is warranted.

4. Develop Case-Specific Reasons for Facebook Disclosure

During the course of discovery, defense counsel should develop strategies regarding (a) what type of Facebook content is the most relevant and valuable in defense of this particular case and (b) what is the narrowest scope of an initial discovery request that should yield viable results (*e.g.,* narrow timeframe or limiting content to "only photos of the plaintiff"). Photographs depicting the plaintiff during a limited, relevant period was broadly supported by the Fourth District Court of Appeal in *Nucci*. As explained below, if those results yield valuable information, defense counsel then can serve supplemental discovery, using this first round of discovery as a "threshold basis" for further inquiry.

5. Consider Facebook Questions in Deposition

For the plaintiff's deposition, consider the following Facebook-related lines of inquiry. Even if defense counsel chooses not to ask these questions directly, the following should be considered as part of the overall defense discovery strategy.

a. Confirm the plaintiff's social media accounts listed in the answer to interrogatory.
b. What is the plaintiff's frequency of use? What does the plaintiff typically do on Facebook?
c. Number of friends? Privacy settings?
d. Does plaintiff acknowledge that Facebook itself can see his/her content? And that friends might share what the plaintiff has posted?
e On Facebook, does plaintiff discuss his or her activities, physical condition, or emotional/mental condition?
f. On Facebook, has the plaintiff or anyone else discussed or made statements about this case?
g Does plaintiff post pictures/video? Do "friends" typically tag the plaintiff in posted images?
h. Are there pictures/video on Facebook of the plaintiff that relate to any claim or defense in this case?
i. Are there "before and after" photos/video on Facebook? Are there captions or comments to those images?
j. Does the plaintiff typically insert comments or captions along with images uploaded to Facebook? Do plaintiff's friends typically comment/reply to plaintiff's posts?
k. Has the plaintiff altered, removed or deleted any content since the incident that is the subject of this lawsuit? What, when and why?

6. Conduct Post-Deposition Review

As you can see from the Florida cases above, courts generally agree that social media content is discoverable. However, many courts have insisted on some threshold basis before allowing discovery into the plaintiff's Facebook account. Are there photos or content in the publicly-available portion that are inconsistent with the plaintiff's claims and suggest there is more such (relevant) content? Has there been a change in the amount of content? Did the plaintiff reveal something about his/her Facebook content in deposition providing grounds to believe there is relevant evidence on the account? Has surveillance, witness testimony or other investigation revealed grounds to suggest there is discoverable content on Facebook? To develop a focused strategy, review the court's analysis in the Florida cases, particularly *Levine* and *Root*.[75] Similarly, consider the discovery test(s) articulated in *Simply Storage*. Finally, post-deposition, re-check the plaintiff's public Facebook profile (for the third time) to see whether there has been evidence of alteration, removal or deletion.[76]

7. Serve a Narrow Request for Production

Assuming the previous steps yielded useful information, defense counsel should serve a single, narrow request for production that seeks, for example, photographs depicting the plaintiff (posted or tagged) on Facebook from two years before the incident to the present (see *Davenport* and *Nucci* as examples; note that the *Beswick* court ordered production of five years' of content; and avoid the discovery practices attempted in *Levine* and *Root*).[77] To establish relevancy, defense counsel needs to be able to relate any Facebook discovery request to a claim or defense raised in the case. To the extent possible, limit this first request to just still and video images depicting the plaintiff rather than requesting "all content." In short, this single, *Nucci*-like request is aimed at providing the "threshold" basis to permit further Facebook discovery in later supplemental requests.

If it appears content was altered, removed or deleted after the deposition, defense counsel may consider an interrogatory inquiring whether the plaintiff spoke with anyone regarding doing so. If the plaintiff's response raises the attorney-client privilege, the assertion of that privilege may be evidence the revision was made upon advice of counsel. This implication increases the importance of the altered contbeing discoverable. Similarly, consider an interrogatory for a description of the content that was changed. Avoid a request for production for the altered content because, at this stage, the content that was changed may not (yet) be relevant under *Levine* and *Root* standards. Serving an interrogatory seeking a *description* should be recognized as a reasonable request. If granted, defense counsel then can develop a request for the relevant portions of the altered content.

8. Set a Hearing If Plaintiff Objects

If the plaintiff objects to social media discovery, compare the objections to those raised in the Florida cases above. Recall the broad standard of discovery set forth in Rule of Civil Procedure 1.280(b)(1): the discovery request must be is *reasonably calculated* to lead to admissible evidence. That broad standard is amplified by Rule 1.350(a), which specifically contemplates this type of e-discovery.[78] In addition to the

foregoing Florida cases, consider the defense-favorable authorities cited in this footnote.[79]

9. Check Public Profile Post-Deposition and Pre-Hearing

For the fourth time, check the plaintiff's public Facebook profile immediately before the hearing. Again, if the plaintiff's profile has been changed, defense counsel should argue that the fact of alternation, and its timing, creates grounds for identification (if not production) of what was changed.

10. Consider Supplemental Facebook Discovery

Assuming the court permits the defendant's initial round of (narrowly-tailored) social media discovery, defense counsel should analyze the plaintiff's Facebook content that was produced with an eye towards supplemental requests:

(a) If some of the photos or video are relevant and helpful, serve a supplemental request for the plaintiff's caption and friends' comments associated with those specific images.

(b) If photos or video were removed and they appear discoverable based upon the plaintiff's answer to defendant's supplemental interrogatory seeking a description, request the images and possibly the associated captioning and comments.

(c) Consider supplemental requests based upon the *Simply Storage* standards and the scope of discovery set out in *Reid*: "plaintiff must disclose social media communications and photographs that reveal, refer, or relate to any emotion, feeling, or mental state… and that reveal, refer, or relate to events that could reasonably [be] expected to produce a significant emotion, feeling, or mental state."[80]

If defense counsel believes further requests will survive *Levine* and *Root*-level scrutiny, further Facebook discovery requests consistent with steps 7 and 8 above should be pursued.

In sum, defendant's formal Facebook discovery effort will begin with a single identification interrogatory, followed by a limited, *Nucci*-like request for images of the plaintiff during a narrow time period, and then (a series of) supplemental requests seeking increasingly more detail such as captions, comments, and narrative communications regarding topics relevant to the case. Because the case law emphasizes "narrowly-tailored" requests premised upon some "threshold" basis, defense counsel should consider social media discovery as best accomplished through small, cumulative steps rather than the traditional discovery practice of serving an initial round of intentionally-broad requests.

[1] According to a recent Florida Bar study, 50% of Florida lawyers surveyed reported personal use of Facebook, and 42% use LinkedIn for professional purposes. *See Results of the 2014 Economics and Law Office Management Survey*, January 2015, available at http://bit.ly/1K4S072 (last visited Feb. 7, 2015).

[2] No. 07-020592 CACE (03), 2011 WL 70005038 (Fla. 17th Cir. Ct. Nov. 3, 2011). The author was defense counsel in *Beswick*.

[3] *See Nucci v. Target Corp.*, ---So. 3d---, 2015 WL 71726, at *6 (Fla. 4th DCA Jan. 7, 2015); *Levine v. Culligan of Florida, Inc.*, No. 50-2011-CA-010339-XXXXMB, 2013 WL 1100404, at *8 (Fla. 15th Cir. Ct. Jan 29, 2013).

[4] *Beswick*, 2011 WL 7005038, at *1.

[5] *Id*.

[6] *Id.* at *2.

[7] *Id*.

[8] No. 3:11-cv-632-J-JBT, 2012 WL 555759 (M.D. Fla. Feb. 21, 2012).

[9] *Id.* at *1.

[10] *Id.*

[11] *Id*.

[12] *Id*. at *2.

[13] No. 50-2011-CA-010339-XXXXMB, 2013 WL 1100404 (Fla. 15th Cir. Ct. Jan. 29, 2013).

[14] The *Levine* order and all three appellate opinions below cite to this author's article, *Discovery of Facebook Content in Florida Cases*, 31 No. 2 Trial Advoc. Q. 14 (2012) (co-written with Tracy Segal).

[15] *Levine*, 2013 WL 1100404, at *2.

[16] *Id.*

[17] *Id.* at *3 (citations and internal quotes omitted).

[18] *Id*. at *5.

[19] *Id.* (ital. original).

[20] No. 5:12-CV-635-Oc-10PRL 2013 WL 2712206 (Fla.M.D. June 11, 2013).

[21] *Id.* at *2.

[22] *Id.*

[23] 132 So. 2d 867 (Fla. 2d DCA 2014).

[24] *Id*. at 869.

[25] *Id.* at 870.

[26] *Id.*

[27] 148 So. 3d 163 (Fla. 1st DCA 2014).

[28] *Id*. at 167.

[29] *Id.*

[30] *Id*. at 166.

[31] *Id.* at 167.

[32] No. 4D14-138, 2015 WL 71726, ---So. 3d--- (Fla. 4th DCA 2015).

[33] *Id.* at *1.

[34] *Id*.

[35] *Id*.

[36] *Id*. at *3.

[37] *Id*.

[38] *Id.* at *7.

[39] *Id*. at *4.

[40] *Id*. at *2.

[41] *Id.* at *6.

[42] *Id.* (citations and internal quotes removed).

[43] *Id*. at *7.

[44] *Beswick*, 2011 WL 7005038, at *2; *Levine*, 2013 WL 1100404, at *3.

[45] https://en-gb.facebook.com/ (last visited Feb. 7, 2015) (emphasis added).

[46] *Davenport*, 2012 WL 555759, at *1 (citations omitted); *Levine*, 2013 WL 1100404, at *3. *See also Beswick*, 2011 WL 7005038, at *2.

[47] *Root*, 132 So. 2d at 869.

[48] *Largent v. Reed*, 2011 WL 5632688, at *5 (Pa.Com.Pl. Nov. 8, 2011) (citations omitted).

[49] *Nucci*, 2015 WL 71726 , at *6.

[50] *Beswick*, 2011 WL 7005038, at *2; *Davenport*, 2012 WL 555759, at *1; *Levine*, 2013 WL 1100404, at *3; *Nucci*, 2015 WL 71726, at *5. *See also Patterson v. Turner Constr. Co.*, 931 N.Y.S.2d 311, 312 (NY 1st Dept. 2011) ("not shielded from discovery merely because plaintiff used the service's privacy settings to restrict access"); *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650, 655 (NY Sup. Ct. 2010) ("To permit a party claiming very substantial damages… to hide behind self-set privacy controls on a website… risks depriving the opposite party of access to material…").

[51] https://www.facebook.com/notes/facebook-site-governance/facebooks-privacy-policy-7-how-we-protect-information/322341825300 (last visited Feb 7, 2015).

[52] *Beswick*, 2011 WL 7005038, at *2 (citation omitted); *see also Largent v Reed*, 2011 WL 5632688, at *5 ("There is no reasonable expectation of privacy posted on Facebook [...] even 'private' Facebook posts are shared with others.").

[53] *U.S. v. Meregildo*, 883 F. Supp. 2d 523, 526 (S.D.N.Y. 2012).

[54] *Romano*, 907 N.Y.S.2d at 657 (citation omitted).

[55] *Beswick*, 2011 WL 7005038, at *2; *Levine*, 2013 WL 1100404, at *4; *Nucci*, 2015 WL 71726, at *7.

[56] *See generally Juror Number One v. Superior Court*, 206 Cal. App. 4th 854 (CA. 3d Dist. 2012); *Largent*, 2011 WL 5632688, at *5. (citations omitted).

[57] 270 F.R.D. 430, 436 (S.D. Ind. 2010).

[58] *Id.* at 435-36.

[59] *Id.* at 435.
[60] *Id.* at 436.
[61] *Id.*
[62] 2012 WL 6720752, at *2 (E.D.N.Y. Dec. 27, 2012).
[63] *Davenport*, 2012 WL 555759, at *2.
[64] *Nucci*, 2015 WL 71726, at *4.
[65] *Simply Storage*, 270 F.R.D. at 436.
[66] *Trail v. Lesko*, 2012 WL 2864004, at *11 (Pa.Com.Pl. July 5, 2012).
[67] *Nucci*, 2015 WL 71726, at *2; *see also Antico*, 148 So. 3d at 167.
[68] https://www.facebook.com/help/131112897028467/ (last visited Feb. 7, 2015).
[69] *Holland v. Barfield*, 35 So.3d 953 (Fla. 5th DCA 2010); *Menke v. Broward Cnty. Sch. Bd.*, 916 So.2d 8 (Fla. 4th DCA 2005).
[70] *Antico*, 148 So. 3d at 167.
[71] As an exception, if the the plaintiff's Facebook (or other social media) account is public and the plaintiff is actively updating, defense counsel may choose to serve no social media discovery and quietly continue to monitor (and preserve) the plaintiff's social media activity.
[72] On Facebook.com, under the Privacy Tab, a user can configure "Do you want other search engines to link to your timeline?" If unchecked, a search on Google or even on Facebook should not reveal the user's account. *See* "How do I change my settings so that people can't search me on Facebook?" at https://www.facebook.com/help/community/question/?id=1410390959205480 (last visited Feb. 7, 2015).
[73] *Beswick*, 2011 WL 7005038, at *2; *Nucci*, 2015 WL 71726, at *2.
[74] At the time of this writing, the Professional Ethics Committee of the Florida Bar had issued Proposed Advisory Opinion ("AO") 14-1 (January 23, 2015), http://bit.ly/1KyqRYo (last visited Feb. 7, 2015). This Proposed AO is subject to change; however, as written, it should be clear that this is an *ethics* opinion and not a statement regarding rules of discovery, evidence or spoliation.
[75] *Levine*, 2013 WL 1100404, at *4-5; *Root*, 132 So. 2d at 869-870.
[76] Recall, after the plaintiff's deposition, defense counsel in *Nucci* discovered that 36 photos had been removed. *Nucci*, 2015 WL 71726, at *1.
[77] *Beswick*, 2011 WL 7005038, at *2; *Davenport*, 2012 WL 555759, at *1; *Nucci*, 2015 WL 71726, at *2; *Levine*, 2013 WL 1100404, at *3; *Root*, 132 So. 2d at 869.
[78] *Root*, 132 So. 2d at 869; *see also* Hopkins, *Defendants Want Social Media, Plaintiffs Want E-Discovery* (Palm Beach Bar Bulletin April 2013), http://bit.ly/1rOrEAS.
[79] *See generally Largent v. Reed*, 2011 WL 5632688; *Patterson v. Turner Construction Co.*, 931 N.Y.S.2d 311; *Reid*, 2012 WL 6720752; *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d at 657; *Trail v. Lesko*, 2012 WL 2864004; *Zimmerman v. Weis Markets, Inc.*, 2011 WL 2065410 (Pa. Com. Pl. 2011) and Christopher Hopkins, *Discovery of Facebook Content in Florida Cases*, 31 No. 2 Trial Advoc. Q. 14 (2012) (co-written with Tracy Segal).
[80] *See Simply Storage*, 270 F.R.D. at 436; *Reid*, 2012 WL 6720752, at *2.