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Editor's Note: The material contained in this publication is provided as information only, and is not intended to be construed or relied upon as legal advice in any manner. Always consult an attorney with the particular facts of a case before taking any action. The material contained in this publication was not necessarily prepared by an attorney admitted to practice in the jurisdiction of the material contained in the publication.

URB FORMS NEWS

SF forms series:
URB has all but completed filing the SF forms series. There is only one form, left to file which is the Golf Pak and its Supplemental Declarations. All submitted SF forms have been approved except for the Craft Pak.

Forms recently approved and released:
- UMB-65 Ed. 12/17 Cross Liability Exclusion and Bulletin UM-2
- CL-100S Ed. 1/18 Supplemental Declarations Cyber Insurance Endorsement
- SF-345A Ed. 12/17 Equipment Breakdown Enhancement Endorsement
- SF-345 Ed. 12/ 17 Equipment Breakdown Enhancement Endorsement
- ML-345 Ed. 12/17 Equipment Breakdown Enhancement Endorsement
- FL-345 Ed. 12/17 Equipment Breakdown Enhancement Endorsement

Submitted forms pending approval:
- Updated IMP-S Ed. 11/17 Inland Marine Policy Supplement
- New form MR-10 Ed. 11/17 Supplemental Declarations for use with IMP-S

Current major forms project:
- Update LS Forms Series

Form projects planned for filing in Spring, 2018 include:
- ML home business extender endorsement;
- Unmanned Aircraft endorsements for ML and LS.

URB will keep you posted on the status of forms submissions to the DFS and on the status of up and coming projects.◆

Court Examines Standard For Discovery Of Non-Public Social Media Content

In the case of *Forman v Henkin*, 2018 NY Slip Op 01015 decided recently by the Court of Appeals, the Court examined the standard for discovery of non-public social media content, particularly on Facebook.

Plaintiff was injured when she fell from a horse owned by defendant. At her deposition, plaintiff stated that she had a Facebook account and she posted "a lot" of photographs showing her pre-accident active lifestyle but that she deactivated the account about six months after the accident. She maintained that she had become reclusive as a result of her injuries and also had difficulty using a computer and composing coherent messages.

Defendant sought an unlimited authorization to obtain plaintiff's entire "private" Facebook account, contending the photographs and written postings would be material and necessary to his defense of the action under CPLR 3101(a). When plaintiff failed to provide the authorization (among other outstanding discovery), defendant moved to compel.

Plaintiff opposed the motion arguing that defendant failed to establish a basis for access to the "private" portion of her Facebook account because, among other things, the "public" portion contained only a single photograph that did not contradict plaintiff's claims or deposition testimony. At oral argument on the motion, defendant reiterated that the Facebook material was reasonably likely to provide evidence relevant to plaintiff's credibility.

Supreme Court granted the motion to compel to the limited extent of directing plaintiff to produce all photographs of herself privately posted on Facebook prior to the accident that she intends to introduce at trial, all photographs of herself privately posted on Facebook after the accident that do not depict nudity or romantic encounters, and an authorization for Facebook records showing each time plaintiff posted a private message after the accident and the number of characters or words in the messages. Supreme Court did not order disclosure of the content of any posts. Only plaintiff appealed.

On that appeal, the court modified by limiting disclosure to photographs posted on Facebook that plaintiff intended to introduce at trial (whether pre- or post-accident) and eliminating the authorization permitting defendant to obtain data relating to post-accident messages, and otherwise affirmed. Two Justices dissented, concluding defendant was entitled to broader access to plaintiff's Facebook account and calling for reconsideration of that court's recent precedent addressing disclosure of social media information as unduly restrictive and inconsistent with New York's policy of open discovery.

On appeal, the Court of Appeals reinstated Supreme Court's order, holding as follows:

Disclosure in civil actions is generally governed by CPLR 3101(a), which directs: "[t]here shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof." We have emphasized that "[t]he words material and necessary,' . . are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *see also Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 746 [2000]). A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is "material and necessary" — i.e., relevant — regardless of whether discovery is sought from another party (*see* CPLR 3101[a][1]) or a nonparty (CPLR 3101[a][4]; *see e.g. Matter of Kapon v Koch*, 23 NY3d 32 [2014]). The "statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise" (*Spectrum Systems Intern. Corp. v Chemical Bank*, 78 NY2d 371, 376 [1991]).

The right to disclosure, although broad, is not unlimited. CPLR 3101 itself "establishes three categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101[b]); attorney's work product, also absolutely immune (CPLR 3101 [c]); and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship" (*Spectrum*, *supra*, at 377). The burden of establishing a right to protection under these provisions is with the party

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asserting it — "the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity" (*id.*).

In addition to these restrictions, this Court has recognized that "litigants are not without protection against unnecessarily onerous application of the disclosure statutes. Under our discovery statutes and case law competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party" (*Kavanaugh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954 [1998] [citations and internal quotation marks omitted]; *see* CPLR 3103[a]). Thus, when courts are called upon to resolve a dispute, discovery requests "must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure . . . Absent an [error of law or an] abuse of discretion, this Court will not disturb such a determination (*Andon*, *supra*, 94 NY2d at 747; *see Kavanaugh*, *supra*, 92 NY2d at 954).

Here, we apply these general principles in the context of a dispute over disclosure of social media materials. Facebook is a social networking website "where people can share information about their personal lives, including posting photographs and sharing information about what they are doing or thinking" (*Romano v Steelcase, Inc.*, 30 Misc 3d 426 [Sup Ct Suffolk County 2010]). Users create unique personal profiles, make connections with new and old "friends" and may "set privacy levels to control with whom they share their information" (*id.*). Portions of an account that are "public" can be accessed by anyone, regardless of whether the viewer has been accepted as a "friend" by the account holder — in fact, the viewer need not even be a fellow Facebook account holder. However, if portions of an account are "private," this typically means that items are shared only with "friends" or a subset of "friends" identified by the account holder (*id.*). While Facebook — and sites like it — offer relatively new means of sharing information with others, there is nothing so novel about Facebook materials that precludes application of New York's long-standing disclosure rules to resolve this dispute.

On appeal in this Court, invoking New York's history of liberal discovery, defendant argues that the Appellate Division erred in employing a heightened threshold for production of social media records that depends on what the account holder has chosen to share on the public portion of the account. We agree. Although it is unclear precisely what standard the Appellate Division applied, it cited its prior decision in *Tapp v New York State Urban Dev. Corp.* (102 AD3d 620 [1st Dept 2013]), which stated: "To warrant discovery, defendants must establish a factual predicate for their request *by identifying relevant information in plaintiff's Facebook account* — that is, information that contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims'" (*id.* at 620 [emphasis added]). Several courts applying this rule appear to have conditioned discovery of material on the "private" portion of a Facebook account on whether the party seeking disclosure demonstrated there was material in the "public" portion that tended to contradict the injured party's allegations in some respect (*see e.g. Spearin v Linmar*, 129 AD3d 528 [1st Dept 2015]; *Nieves v 30 Ellwood Realty LLC*, 39 Misc 3d 63 [App Term 2013]; *Pereira v City of New York*, 40 Misc 3d 1210[A] [Sup Ct Queens County 2013]; *Romano*, *supra*, 30 Misc 3d 426). Plaintiff invoked this precedent when arguing, in opposition to the motion to compel, that defendant failed to meet the minimum threshold permitting discovery of any Facebook materials.

Before discovery has occurred — and unless the parties are already Facebook "friends" — the party seeking disclosure may view only the materials the account holder happens to have posted on the public portion of the account. Thus, a threshold rule requiring that party to "identify relevant information in [the] Facebook account" effectively permits disclosure only in limited circumstances, allowing the account holder to unilaterally obstruct disclosure merely by manipulating “privacy” settings or curating the materials on the

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public portion of the account. Under 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" (*see* CPLR 3101[a]).

New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information. Indeed, as the name suggests, the purpose of discovery is to determine if material relevant to a claim or defense exists. In many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence. Thus, we reject the notion that the account holder's so-called "privacy" settings govern the scope of disclosure of social media materials.

That being said, we agree with other courts that have rejected the notion that commencement of a personal injury action renders a party's entire Facebook account automatically discoverable (*see e.g. Kregg v Maldonado*, 98 AD3d 1289, 1290 [4th Dept 2012] [rejecting motion to compel disclosure of all social media accounts involving injured party without prejudice to narrowly-tailored request seeking only relevant information]; *Giacchetto*, *supra*, 293 FRD 112, 115; *Kennedy v Contract Pharmacal Corp*., 2013 WL 1966219, [ED NY 2013]). Directing disclosure of a party's entire Facebook account is comparable to ordering discovery of every photograph or communication that party shared with any person on any topic prior to or since the incident giving rise to litigation — such an order would be likely to yield far more nonrelevant than relevant information. Even under our broad disclosure paradigm, litigants are protected from "unnecessarily onerous application of the discovery statutes" (*Kavanaugh*, *supra*, 92 NY2d at 954).

Rather than applying a one-size-fits-all rule at either of these extremes, courts addressing disputes over the scope of social media discovery should employ our well-established rules — there is no need for a specialized or heightened factual predicate to avoid improper "fishing expeditions." In the event that judicial intervention becomes necessary, courts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account. Second, balancing the potential utility of the information sought against any specific "privacy" or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials. In a personal injury case such as this it is appropriate to consider the nature of the underlying incident and the injuries claimed and to craft a rule for discovering information specific to each. Temporal limitations may also be appropriate — for example, the court should consider whether photographs or messages posted years before an accident are likely to be germane to the litigation. Moreover, to the extent the account may contain sensitive or embarrassing materials of marginal relevance, the account holder can seek protection from the court (*see* CPLR 3103[a]). Here, for example, Supreme Court exempted from disclosure any photographs of plaintiff depicting nudity or romantic encounters.

Plaintiff suggests that disclosure of social media materials necessarily constitutes an unjustified invasion of privacy. We assume for purposes of resolving the narrow issue before us that some materials on a Facebook account may fairly be characterized as private. But even private materials may be subject to discovery if they are relevant. For example, medical records enjoy protection in many contexts under the physician-patient privilege (*see* CPLR 4504). But when a party commences an action, affirmatively placing a mental or physical condition in issue, certain privacy interests relating to relevant medical records — including the physician-patient privilege — are waived (*see Arons v Jutkowitz*, 9 NY3d 393, 409 [2007]; *Dillenbeck v Hess*, 73 NY2d 278, 287 [1989]). For purposes of disclosure, the threshold inquiry is not whether the materials sought are private but whether they are reasonably calculated to contain relevant information.

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Applying these principles here, the Appellate Division erred in modifying Supreme Court's order to further restrict disclosure of plaintiff's Facebook account, limiting discovery to only those photographs plaintiff intended to introduce at trial. With respect to the items Supreme Court ordered to be disclosed (the only portion of the discovery request we may consider), defendant more than met his threshold burden of showing that plaintiff's Facebook account was reasonably likely to yield relevant evidence. At her deposition, plaintiff indicated that, during the period prior to the accident, she posted "a lot" of photographs showing her active lifestyle. Likewise, given plaintiff's acknowledged tendency to post photographs representative of her activities on Facebook, there was a basis to infer that photographs she posted after the accident might be reflective of her post-accident activities and/or limitations. The request for these photographs was reasonably calculated to yield evidence relevant to plaintiff's assertion that she could no longer engage in the activities she enjoyed before the accident and that she had become reclusive. It happens in this case that the order was naturally limited in temporal scope because plaintiff deactivated her Facebook account six months after the accident and Supreme Court further exercised its discretion to exclude photographs showing nudity or romantic encounters, if any, presumably to avoid undue embarrassment or invasion of privacy.

In addition, it was reasonably likely that the data revealing the timing and number of characters in posted messages would be relevant to plaintiffs' claim that she suffered cognitive injuries that caused her to have difficulty writing and using the computer, particularly her claim that she is painstakingly slow in crafting messages. Because Supreme Court provided defendant no access to the content of any messages on the Facebook account (an aspect of the order we cannot review given defendant's failure to appeal to the Appellate Division), we have no occasion to further address whether defendant made a showing sufficient to obtain disclosure of such content and, if so, how the order could have been tailored, in light of the facts and circumstances of this case, to avoid discovery of nonrelevant materials.

In sum, the Appellate Division erred in concluding that defendant had not met his threshold burden of showing that the materials from plaintiff's Facebook account that were ordered to be disclosed pursuant to Supreme Court's order were reasonably calculated to contain evidence "material and necessary" to the litigation. A remittal is not necessary here because, in opposition to the motion, plaintiff neither made a claim of statutory privilege, nor offered any other specific reason — beyond the general assertion that defendant did not meet his threshold burden — why any of those materials should be shielded from disclosure.

Click here to read this case in its entirety. ◆

Editor's Note: Footnotes omitted, see case in its entirety for references.

URB Pays Tribute To Retiring Company Executive

John N. Masselli, Jr. CPCU, CIC, AAI, AIS, AU who is General Manager at New York Mutual Underwriters (NYMU) will be retiring on March 31, 2018 after a long and varied career.

John began his insurance career in 1979 as a debit agent for The Prudential, in Catskill, NY. He was promoted to a Sales Manager's position in 1982, having direct oversight of eleven agents, and instructing the district's new agents' training program until 1984. At that time he became an independent agent, first with The Grapeville Agency, then with The Grossmann Agency, both in Catskill, NY. He worked in this capacity until September, 1989 when he left the insurance field entirely and joined family members in the pizza and restaurant business. In July, 1990 he returned to insurance and became an underwriter (personal and commercial lines) for The Commercial Mutual Insurance Company, being elected to Vice President of Underwriting in 1992. In 1995 he assumed the position of Claims Manager for that company, being elected to its Board of Directors and to the position of Vice President of Underwriting and Claims in 1996.

In April, 2000 he left Commercial Mutual and joined The Colonial Cooperative Insurance Company as Assistant VP – Insurance Operations. He was elected as company VP in February, 2001, as well as to the company's Board of Directors, and assumed direct oversight of Claims and Insurance Operations, the position he held until leaving there in July, 2005.

For the period of July, '05 to '06, he worked as a management consultant to York Claims Services, Inc., a national t/p/a, as well as independent agency consulting in the Hudson Valley and New York City areas. John joined NYMU in July, 2006, as Assistant Manager and in July, 2008 he was elected as its GM and CEO, the position he held until his upcoming retirement

John received his Certified Insurance Counselor (CIC) Professional Designation in October of 2001, and maintains his designation in the National Society of CIC with regular continuing education. He became qualified to be a member of that Society's National Faculty, in which capacity he teaches at National Alliance Institutes, around the country. He obtained his CPCU designation, as well as his AAI and AIS professional designations, during 2009, and then his AU professional designation in 2010.

John was Greene County's STOP-DWI Coordinator from July of 1990 through December of 2010. John regularly speaks at various trade and professional associations, having been a lecturer for part of the NY Bar Association's CLE program. He is a member and Past President of the Northeastern NY Chapter, Society of CPCU.

He attended the University of Rochester and has completed distance learning studies in management and strategic planning with Kennedy-Western University.

In the past, John worked as a radio announcer for more than ten years and also as a part-time police officer in the late 1970's. John worked for Conrail (now CSX Freight Railway) as a diesel locomotive mechanic and drove tractor-trailer for two and a half years.

For recreation, John enjoys target shooting, hunting and fishing and being a lighthouse hobbyist. He is a member of the Free & Accepted Masons and of the Shriners, being the leader of their "Hillbilly Band" that performs to raise funds for the Children's Hospital in Springfield, MA. For more than a year now, John has volunteered with the "RISE" Program, an informational service for the visually impaired, provided by WMHT -FM public radio in The Albany, NY area. In this service, John records books and magazine articles for broadcast to those with visual impairments.

He and Dana, his wife of 40 years, have resided in Cairo, NY for 32 years and have three grown, married children with several grandchildren. John and Dana plan to move to South Carolina to enjoy retirement and to spend more time with their children and grandchildren.

We at Underwriters Rating Board wish John all the best for happiness in his retirement and always. ◆

URB Welcomes New Company Executive

URB would like to take this opportunity to welcome Tim O'Brien, who will take over the helm of New York Mutual Underwriters (NYMU) when its current General Manager, John Masselli, retires on March 31, 2018.

Tim brings a great deal of experience to NYMU, with 17 years in various positions. Tim most recently worked at Energy Insurance Brokers, Inc./Integro USA as a Senior Vice President in charge of insurance placement for energy (petroleum), transportation and related clients. Prior to that time he worked as a Director of Underwriting Services at Farm Family Insurance Companies, where he managed a $150 million commercial lines book of business with operations in 40 states. He was, at one time, President of Absolute Risk Placement LLC, a wholesale brokerage, and worked at First Cardinal LLC of Latham, New York where he completed his tenure as President and CEO of CardinalComp LLC and where he previously held positions of Vice President and Broker Sales Manager.

Tim is a graduate of the State University of New York at Albany and holds a Bachelor of Arts Degree in Geography with a minor in Biology. He is a Capital Leadership Fellow, Class of 2000 through the Albany Colonie Chamber of Commerce and holds a New York State Insurance Brokers License.

Everyone at URB wishes Tim much success in his new position at NYMU.◆

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