



## New York's Top Court Rules 7-0: "Private" Facebook Posts Subject to Disclosure

On February 13, 2018, the New York Court of Appeals ruled unanimously that a user's "private" Facebook messages and photos are subject to disclosure where that information is "reasonably calculated to contain evidence material and necessary to the litigation." The decision reconfirmed that New York remains a liberal discovery state, favoring disclosure regardless of whether the discovery involves information publicly shared on social media.

In *Forman v. Henkin*, the plaintiff sued a horse owner following an equestrian accident she alleged caused cognitive deficits, including difficulties communicating, and social isolation. The plaintiff testified that pre-accident, she often documented her life on Facebook. In seeking disclosure of the plaintiff's "private" content, the defendant argued that based on her pre-accident usage, the plaintiff's post-accident Facebook account could contain evidence relevant to the credibility of her injury claims.

The trial court partly granted the defendant's motion to compel, ordering (with certain limitations) the disclosure of all post-accident "private" photos and the time and word-count information for post-accident "private" messages. The Court of Appeals agreed, taking a proportionality approach to social media discovery under CPLR 3101(a). The court held that this private content discovery was reasonably calculated to yield evidence relevant to the plaintiff's assertion that she no longer engaged in activities she enjoyed before the accident, had become reclusive, and struggled to use a computer and compose coherent messages.

The court offered guidance that may inform a number of discovery requests and disputes: (i) consider the nature of the event causing the litigation and the injuries claimed to assess whether relevant material is likely to be found on the Facebook account; (ii) balance the potential utility of the information sought against any specific "privacy" or other concerns; and (iii) issue a tailored order identifying materials to be disclosed while avoiding disclosure of irrelevant material. This standard resembles the proportionality considerations now used by federal courts and explicitly encouraged by the New York Commercial Division. As the Court of Appeals emphasized, it is the message that matters, not the medium, if the information is discoverable under New York's liberal discovery standard.

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