



ALERT

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New York's Appellate Division Continues Trend On Discoverability of Social Media

The NY courts are focusing on the appropriateness of discovery sought regardless of the technology in which it is contained.

As the New York appellate courts continue to consider the discoverability of social media, on January 24, 2019, the New York Appellate Division held in *Vasquez-Santos v. Mathew* that the defendant may utilize the services of a "data mining" company for a widespread search of the plaintiff's devices, email accounts, and social media accounts for certain discoverable information regarding the credibility of his claim.

Vasquez-Santos is an extension of the recent NY Court of Appeals decision, [Forman v. Henkin](#), holding 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."

Plaintiff Vasquez-Santos used to play semi-professional basketball and alleged that his athletic career came to an end following a motor vehicle accident. The plaintiff claimed Facebook photos posted after the accident depicting him continuing to play basketball were taken before his accident. To rebut the plaintiff's claims, the defendant sought production of the metadata associated with the photos, potentially showing the date and time the photos were taken, with the assistance of a data mining company. The trial court denied the defendant's motion for such discovery.

Unanimously reversing, the Appellate Division granted defendant the requested data mining access with certain limitations. *Vasquez-Santos* represents another example of NY courts focusing on the appropriateness of the discovery sought regardless of the new technology in which it is contained. And, like *Forman*, it is consistent with NY's liberal discovery rules, authorizing "full disclosure of all matter material and necessary in the prosecution or defense of an action[.]" Although both *Forman* and *Vasquez-Santos* arose in the context of personal injury claims, their analysis and approach regarding social media discovery will be instructive for such discovery in many civil cases. The decision also underscores the need for counsel to stay abreast of changing technology and information sources, such as metadata, and how they may be leveraged to assist clients in the pursuit or defense of claims.

For a discussion of the *Forman v. Henkin* decision see Jones Day's Alert titled [New York's Top Court Rules 7-0: "Private" Facebook Posts Subject to Disclosure.](#)



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