

Another NY court on discovery of social media evidence

By [Nicole L. Black](#), Published on February 23, 2013

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The majority of adults in the United States have social media accounts. For years now, celebrities have interacted with their fans using social media sites. Even the pope now has a Twitter account. Social media is everywhere and pretty much everyone is using it.

So it's not surprising that social media sites have become a prime source for lawyers to mine for evidence to support their clients' cases. In fact, this has become a fairly common occurrence and, as a result, an increasing number of appellate cases are cropping up which address the circumstances under which lawyers may obtain access to the data contained in social media accounts. I've discussed a number of these cases in prior articles.

First, there was *Abrams v. Pecile*, 83 A.D.3d 527 (1st Dept. 2011), where the First Department refused to allow access to the plaintiff's social networking accounts since the defendant failed to show that doing so would lead to the discovery of evidence relevant to the defense of the lawsuit.

Likewise, in *Patterson v. Turner Construction Company*, 2011 WL 5083155 (1st Dept. 2011), the court likened the plaintiff's private messages on Facebook to a diary and concluded that, if relevant, they were discoverable, but limited access to the Facebook data and required that the trial court first conduct an in camera review to determine if there was evidence relevant to the lawsuit.

Similarly, in a 2012 Order issued in *Davids v. Novartis*, CV06-0431 (<http://tinyurl.com/davids-novartis>), U.S. Magistrate Judge William D. Wall concluded that although the plaintiff's publicly available social media information was subject to discovery, the defendant failed to show that the private data was relevant to matters at issue in the lawsuit: "(T)here must be some factual predicate, like an individual's public postings, from which the court could infer that relevant information exists on the individual's private page. Because it lacks any such evidence, defendant's motion amounts to a suggestion that a plaintiff should have to grant free access to all of her social media accounts for no other reason than she filed a claim against defendant."

Most recently, this issue was presented in *Kregg v. Muldonado*, 98 A.D.3d 1289 (4th Dept. 2012), a case brought to my attention by the always helpful Rochester criminal defense attorney and prolific author, Gary Muldoon.

In *Kregg*, the defendants sought access to the social media accounts of the plaintiffs' son, who was injured while operating a vehicle manufactured by the defendants. The plaintiffs objected to the discovery demand, asserting that the defendants' request was a "fishing expedition," with no factual predicate.

The Fourth Department agreed: "(T)here is no contention that the information in the social media accounts contradicts plaintiff's claims for the diminution of the injured party's enjoyment of life ... (T)he proper means by which to obtain disclosure of any relevant information contained in the social media accounts is a narrowly-tailored discovery request seeking only that social-media-based information that relates to the claimed injuries arising from the accident."

Thus, once again, unfettered and baseless access to a party's social media accounts was denied, and rightfully so. Social media, while a fairly new medium of communication, should be treated no differently than any other form of communication. Granting unlimited access to all social media data is unwise and short sighted, so it is heartening to see New York judges crafting decisions in which they exhibit an understanding of the medium and issue rulings that are narrowly tailored to the specific requests at hand, allowing access only when relevancy has been established.
