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NCBA COMMITTEE MEETING CALENDAR
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SAVE THE DATES

LAW DAY
FREE SPEECH, FREE PRESS, FREE SOCIETY
Wednesday, May 1, 2019
5:30 p.m. at Domus
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120TH ANNUAL NCBA DINNER DANCE
Saturday, May 11, 2019
MAKE YOUR RESERVATION TODAY
See Insert and pg. 6

NCBA AND NAL INSTALLATION OF OFFICERS
Tuesday, June 4, 2019
6:00 p.m. at Domus

WHAT'S INSIDE

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OF NOTE

NCBA MEMBER BENEFIT - I.D. CARD PHOTO
Obtain your photo for Secure Pass Court ID cards at NCBA Tech Center
ONLY FOR NEW APPLICANTS
Cost $10 • May 7, 8 and 9, 2019
9 a.m.- 4 p.m.

UPCOMING PUBLICATIONS COMMITTEE MEETINGS

Thursday, May 2, 2019 12:45 p.m.
Thursday, June 6, 2019 12:45 p.m.

COME . . . AND BE A STUDENT AGAIN!

By Daniel W. Russo

When I was fortunate enough to be inducted last June as Dean of the Nassau Academy of Law, one of the goals I hoped to achieve was getting our members to come to Domus and *Be Students Again*. The Nassau Academy of Law, quite simply, is the premiere provider of CLEs for NCBA members and there simply is no better time to come to Domus and take advantage of the wide array of programs and seminars being offered. Come listen, learn, earn those CLE credits and . . . *Be Students Again*.

The biggest event of the membership year officially kicked off this past June and has truly re-energized the Bar Association. In an extraordinary move aimed at providing a true member benefit, CLEs are included with your dues. All members of the Association can take advantage of free unlimited live CLEs, including free Bridge-the-Gap weekend, free committee CLEs, and twelve free credits of CD/DVD rental. It's been a great year at the Academy and the Bar Association, full of new ideas and energy, and we are excited for the months and years to come.

One of the main focuses of the Academy this year is cooperation and conjunction with the 50+ substantive committees. We continue to look to the committees to keep us informed about what's new and what's relevant and we expect our committee leaders to bring these topics to our members via CLEs. A perfect example of this has been the brilliant work of the Diversity and Inclusion Committee in bringing exceptional, cutting edge programs to the Academy this year.

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As all of you know, as of July 1, 2018, the New York State CLE Board requires all experienced attorneys to have one credit in diversity, inclusion and elimination of bias as part of their biennial registration. All diversity and inclusion courses have the shared theme of not only making us better attorneys, but better individuals.

The Diversity and Inclusion Committee, chaired by District Court Judges Linda Mejias and Maxine Broderick, is at the forefront of crafting innovative and timely CLE programs. For example, the Committee's first outing was a trial re-enactment of the landmark civil rights trial, *Meredith v. Fair*, regarding racial integration of higher education in the South. Twenty-five NCBA members read for the parts of attorneys, witnesses and judges and the re-enactment was a fascinating look at a trial held decades ago that addressed social issues that remain at the forefront of our country today.

If you were unfortunate enough, however, to miss the *Meredith* re-enactment, have no fear, the Diversity and Inclusion Committee's next Academy re-enactment will take place on May 7, 2019. This re-enactment of *Korematsu v. United States* depicts the arrest and trial of Fred Korematsu, a Japanese-American who refused to go to a concentration camp after President Roosevelt issued Executive Order 9066, uprooting some 120,000 Japanese-Americans — two-thirds of them

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LAW DAY 2019
Free Speech, Free Press, Free Society

KEYNOTE SPEAKER

Stone Grissom, Esq.
Journalist
News 12 Long Island Anchor

By Ann Burkowsky

Freedom of speech and press are among the most important liberties for a free society within the United States and many countries around the world. *Free Speech, Free Press, Free Society* is this year's focus topic at the Nassau County Bar Association's upcoming Annual Law Day Awards Dinner on Wednesday, May 1, 2019.

The evening will commence with a cocktail reception beginning at 5:30 PM, succeeded by a dinner and awards presentation at 6:30 PM. Following the cocktail reception, the NCBA will be honoring four individuals for their dedication and commitment to the legal community. There will be three award categories this year that include the Liberty Bell Award, Peter T. Affatato Court Employee of the Year Award and Thomas Maligno Pro Bono Attorney of the Year Award.

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For NCBA Members
Notice of
Nassau County Bar Association
Annual Meeting

May 14, 2019 • 7:00 p.m.

Domus
15th & West Streets
Mineola, NY 11501

Proxy statement can be found on the insert in this issue of the *Nassau Lawyer*. The Annual meeting will confirm the election of NCBA officers, directors, Nominating Committee members, and Nassau Academy of Law officers.

A complete set of the By-Laws, including the proposed amendments, can be found on the Nassau County Bar Association website at www.nassaubar.org. Copies are available at the reception desk at Domus, or by mail upon request.

Rosalia Baiamonte
Secretary

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Social Media and Discovery: One Year after *Forman*

A little more than a year ago, the Court of Appeals issued its decision in *Forman v. Henkin*.[1] This case removed the heightened standard applicable to social media discovery in New York. Since the decision, and unsurprisingly, access to social media accounts in discovery has greatly increased. However, courts have been mindful of balancing the privacy interests in social media posts with the potential utility of the information sought, which was a concern of many legal commenters when *Forman* was first issued. This still holds true even after the First Department's recent decision in *Vasquez-Santos v. Mathew*.[2]

Christopher F. Mestecky   Anthony J. Fasano

Forman v. Henkin

In *Forman*, the plaintiff was injured after she fell from a horse owned by the defendant. The plaintiff argued that the fall resulted in "cognitive deficits, memory loss, difficulties with written and oral communication, and social isolation." At her deposition, the plaintiff stated that she was a frequent Facebook user prior to the fall, which included posting "a lot" of pictures, but she deactivated her Facebook account about six months after the fall "and could not recall whether any post-accident photographs were posted." The plaintiff further stated that "she had become reclusive as a result of her injuries and also had difficulty using a computer and composing coherent messages."[3]

Given this testimony, the defendant moved to discover the entire private section of plaintiff's Facebook account. While the supreme court held that posts prior to her fall were of little probative value, it did order the disclosure of the pre-fall pictures because plaintiff would be relying on them at trial. For the post-fall pictures, the court noted that these were of probative value and ordered them disclosed with the exception of those showing "nudity or romantic encounters."[4] The court further ordered the disclosure of private Facebook messages, but limited the disclosure to "showing each time plaintiff posted a private message and the number of characters or words in the text of each private message, from the date of her injury until she deactivated her Facebook account."[5]

On appeal, the First Department, consistent with its prior rulings and those of the other departments at that time, vacated the lower court's holding requiring production with the exception of those photographs being introduced at trial. The majority stated that its precedent did not create a heightened standard for social media discovery and pointed to its other holdings requiring a "factual predicate" outside of the social media realm. Without the factual predicate, the majority stated, there would be "unbridled disclosure" of social media.[6]

The Court of Appeals reversed, holding that the First Department did apply a heightened standard and that it was improper and inconsistent with New York's longstanding history of liberal discovery. The court then went through New York's general rule as it pertained to discovery and noted: "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."

The court did reject the notion that a party's entire social media account is automatically discoverable simply because litigation has been commenced. Instead, a case-by-case analysis must be utilized. In its analysis, the court listed several factors to 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;
- 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;
- 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;
- to the extent the account may contain sensitive or embarrassing materials of marginal relevance, the account holder can seek protection from the court.[7]

Application of *Forman* by Lower Courts

Contrary to the majority's opinion from the First Department's decision in *Forman*, the concerns of "unbridled disclosure" pertaining to social media has not occurred. Two recent New York County Supreme Court cases illustrate this point.

In *Mylon v. Liebowitz*, defendants moved to compel the production of, among other things, "all photos and videos of plaintiff from the date of loss until the present from her smart phone, social media accounts, and computers." The court, in denying the request, held that the defendants failed to meet the initial burden required for such discovery and failed "to even attempt to narrow or limit the requested discovery to eliminate material that would be irrelevant to the instant action." The court took specific aim at the defendants' "blanket demands" for social media, "which would yield every photograph or communication plaintiff has on any topic prior to and since the motor vehicle accident." [8]

In *Paul v. The Witkoff Group*, the court ordered the disclosure of data associated with and authorizations for several social media sites for three years prior to the date of the incident at issue. The court, in its decision, noted that the plaintiff had posted suicidal thoughts on his Facebook page, which was directly relevant to the case at hand. However, the court did not order the disclosure of authorizations for "full access" for these social media accounts for the same time period because they were "not sufficiently tailored with scopes and temporal limitations."[9]

A primary difference between these two cases rests on whether there is sufficient information to assess whether relevant material is likely to be found on social media. In *Mylon,* the defendant sought access to the plaintiff's Facebook account simply because the plaintiff alleged injuries in the bill of particulars. The defendant, other than noting that plaintiff had a Facebook account, was unable to point to any reason why such access would yield any information that was material and necessary.[10] In *Paul,* the defendant specifically noted that the plaintiff was posting relevant material to his Facebook account. The court further noted that there was an issue with the plaintiff not being truthful with his access to his Facebook account.[11] These cases are similar, however, in that they support the proposition that "blanket demands" for social media remain improper after *Forman*, as both courts denied access to such overbroad demands.

The First Department Post-*Forman*

Interestingly, the First Department, which denied the production of Facebook information in *Forman*, took *Forman* one step further in *Vasquez-Santos v. Mathew*. The plaintiff in this case, a former semi-professional basketball player, alleged that he became disabled after an automobile accident. At a deposition, however, defense counsel confronted the plaintiff with photographs of him playing basketball that were posted to social media after the accident. The defendant then moved to compel plaintiff to produce and give "access to defendant's expert to data mine all laptops, smart phones, cameras, Facebook accounts, email accounts, . . . social media accounts, used by plaintiff to obtain photographs, data, . . . of plaintiff engaging in physical activities . . . subsequent to the date of the accident until present."

The First Department, in a short but significant decision, held that "access to plaintiff's accounts and devices . . . is appropriately limited in time, i.e., only those items posted or sent after the accident, and in subject matter, i.e., those items discussing or showing defendant engaging in basketball or other similar physical activities." It is important to note that the defense's expert did not get carte blanche access to all of the plaintiff's devices and social media accounts as a result of this decision. Rather, the decision limits production to those devices and accounts that the plaintiff used to receive information pertaining to him performing physical activities. Further, the metadata of the photographs at issue was relevant because of an ongoing dispute as to when the photographs were taken.

At first blush, this case would seem to be a significant expansion of *Forman*. As a review of the underlying record reveals, however, the First Department's decision was well in line with *Forman*. There was a contentious relationship regarding the production of Facebook information which is not illustrated in the decision. In an initial motion paper in the lower court for Facebook information, defense counsel attached several noteworthy photos to the motion, with some showing the plaintiff engaging in a basketball game "six days following the motor vehicle accident, and game photos posted August 25, 2013, show[ing] plaintiff actively taking part in the game" and other highly relevant pictures.[12] The decision on this motion only provided defendant with an authorization for Facebook for pictures and raw data, and was not as intrusive as the decision that was ultimately appealed.[13]

Thereafter, a further motion was made to provide defendant's expert with "access to plaintiff's Facebook account and e-mail accounts for the limited purpose of identifying information relating to the items marked as Exhibits at the deposition and the other discovery served to date."[14] Even on this motion, the lower court only ordered the production of an authorization for defendant "to obtain all raw data for all photos posted on his Facebook account from date of accident . . . to present."[15] On yet another motion on the same issue, the lower court ordered plaintiff's counsel to "obtain and produce to [defendant's] counsel . . . from [plaintiff's] Facebook account (using the download your information tool on Facebook) the metadata" for certain photographs marked as deposition exhibits.[16]

As a review of the underlying history in *Vasquez-Santos* illustrates, the defendant did not simply seek to obtain such a broad level of Facebook and social media discovery at the outset, nor was the court willing to allow the defendant's expert to data mine plaintiff's accounts in the early stages of litigation. The defendant's requests steadily became broader as plaintiff was apparently not complying with repeated requests for the same materials, which the First Department did note, and as discrepancies continued to arise with social media postings.[17]

Before *Vasquez-Santos*, the First Department applied *Forman* in another case and held that the demands for social media information "were overbroad and not reasonably tailored to obtain discovery relevant to the issues in the case."[18] When read together, especially considering the lengthy record in *Vasquez-Santos*, the First Department remains consistent with the *Forman* decision. A data mining expert remains the exception and not the general rule for social media discovery. In fact, demanding access by a data mining expert will usually be inconsistent with *Forman*, which held: "Attorneys, while functioning as advocates for their clients' interests, are also officers of the court who are expected to make a bona fide effort to properly meet their obligations in the disclosure process."[19]

Since *Forman*, it is clear that courts have expanded access to social media discovery and removed the old heightened standard which once applied. It cannot be said, however, that clients' privacy interests are being overtaken by discovery. The post-*Forman* courts have shown their ability to balance the privacy of clients with the information being sought. Where demands for discovery of social media are likely to lead to relevant materials and are sufficiently tailored, courts should grant the demands. Clients and attorneys on both sides need to be mindful of the types of content being posted on social media. When attorneys initially meet with clients, the impact and reach of *Forman* should be discussed. This will hopefully avoid the unpleasant conversation with a client that a data mining expert needs the client's username and password for multiple social media accounts.

Christopher F. Mestecky is a member of the firm Guercio & Guercio, LLP, and chairs the firm's personal injury litigation group.

Anthony J. Fasano is an attorney with the firm Guercio & Guercio, LLP, and is a co-chair of the Publications Committee.

1. 30 N.Y.3d 656 (2018).
2. 168 A.D.3d 587 (1st Dept. 2019).
3. *Forman*, 30 N.Y.3d at 659.
4. *Forman v. Henkin*, Index No. 113059/2011, 2014 WL 1162201 (Sup. Ct. N.Y. Co. 2011), *aff'd* 30 N.Y.3d 656 (2018).
5. *Id.*
6. *Forman v. Henkin*, 134 A.D.3d 529 (1st Dept. 2015), *rev'd* 30 N.Y.3d 656 (2018).
7. *Forman*, 30 N.Y.3d at 665.
8. *Mylon v. Leibowitz*, Index No. 151849/2017, 2019 WL 429462 (Sup. Ct., N.Y. Co. Feb. 4, 2019). Because the motion was denied for defendants' failure to submit an affirmation of good faith, this portion of the court's discussion is dicta.
9. *Paul v. The Witkoff Group*, Index No. 151322/2014, 2018 WL 1697285 (Sup. Ct., N.Y. Co. Apr. 3, 2018).
10. *Mylon*, 2019 WL 429462 at *1.
11. *Paul*, 2018 WL 1697285 at *2.
12. *Forman v. Henkin*, Index No. 113059/2011, Affirmation in Support, ¶ 16 (Doc. #71).
13. Decision + Order on Motion (May 20, 2016) (Doc. #91).
14. Affirmation in Support, ¶ 27 (Doc. # 103).
15. Decision + Order on Motion (May 19, 2017) (Doc. #130).
16. Decision + Order on Motion (Dec. 4, 2017) (Doc. #172).
17. *See Vasquez-Santos*, 168 A.D.3d at 244 (discussing "Plaintiff's response to prior court orders").
18. *Doe v. Bronx Prep. Charter Sch.*, 160 A.D.3d 591, 591 (1st Dept. 2018).
19. *Forman*, 30 N.Y.3d at 662 n.2.