



ARE RELEVANT SOCIAL MEDIA POSTS DISCOVERABLE?

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Of course. Social media deserves no special evidential treatment: the scope of discovery into social media websites requires the application of basic discovery principles in a novel context. Indeed, discovery demands for social media must be (1) reasonably calculated to lead to the discovery of admissible evidence, (2) limited in time and scope, according to the needs of the case, and (3) described with sufficient particularity for the responding party to understand what is called for in response.

While many states—like New York, Maryland, Nevada, and Florida, to name a few—have well-developed jurisprudence on social media discovery, New Jersey's case law is more limited. However, under New Jersey law, social media content is discoverable. What remains unclear in New Jersey is whether the proponent is required to show a "factual predicate" (*i.e.*, a threshold evidentiary showing that the requested social media content contains information that will reasonably lead

to the discovery of admissible evidence) in making her demand.

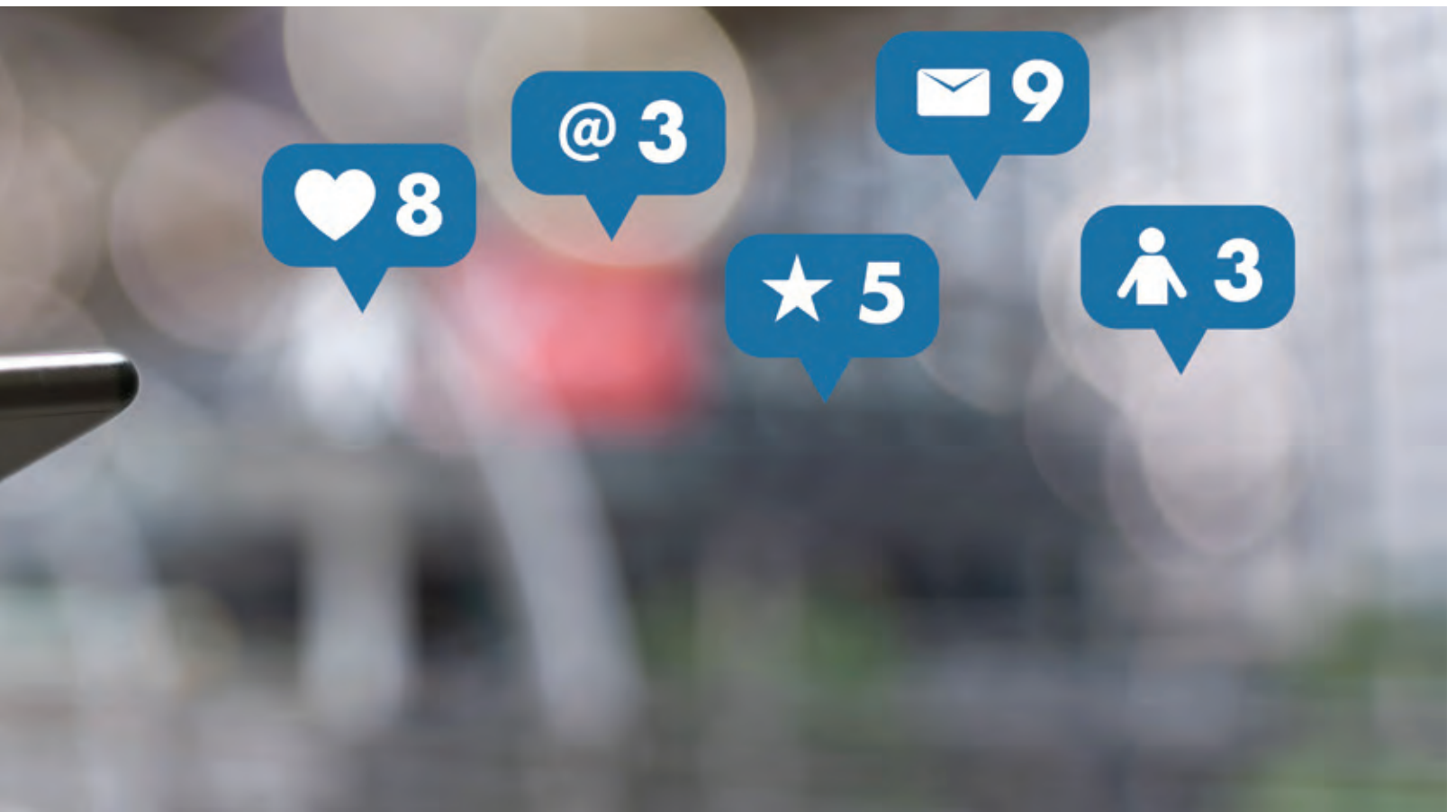
New Jersey's early decisions on social media discoverability, *T.V. v. Union Twp. Bd. of Educ.*, No. UNN-L-4479-04, 2007 N.J. Super. Unpub. LEXIS 3005 (N.J. Super. Ct. June 8, 2007) and *Beye v. Horizon Blue Cross Blue Shield of New Jersey*, No. CIV.A. 06-5337-FSH, 2007 WL 7393489 (D.N.J. Dec. 14, 2007), stand for the proposition that discoverable social media content must have been shared with some other third-party, must be related to the litigation claims and defenses, and may require a factual predicate.

Similarly, the next social media decision, the 2010 Monmouth County Superior Court decision in *Krawchuk v. Bachman*, No. MON-L-902-08, 2010 WL 9044940 (N.J. Super. Ct. Law Div. May 10, 2010), also required the defendant to "provide justification," *i.e.*, a factual predicate, for seeking social media

content. And, the *Krawchuk* Court reasoned that "unfettered" access to social media content was overly broad and would not be allowed.

In 2011, New Jersey's federal court addressed a social media spoliation issue in the context of a trademark infringement lawsuit, in *Katiroll Company, Inc. v. Kati Roll and Platters, Inc.*, No. 10-cv-3620, 2011 WL 3583408, at *4, *7 (D.N.J. Aug. 3, 2011). There, Chief Judge Garrett Brown, Jr. opined that even an "unintentional" failure to preserve social media, which was "somewhat prejudicial," constituted spoliation. Thus, based on the court's holding in *Katiroll*, social media content must be preserved because it may be relevant and discoverable, depending on the nature of the claims involved in a lawsuit.

In 2013, in *Gatto v. United Air Lines, Inc.*, the defendants sought discovery related to the plaintiff's physical limitations and social



activities, including a request for documents and information related to the plaintiff's social media accounts. No. 10-CV-1090- ES-SCM, 2013 WL 1285285, at *1 (D.N.J. Mar. 25, 2013). After the parties reached an agreement to allow the defendants to access the Facebook account, but before its contents were retrieved, the plaintiff deactivated and deleted his Facebook account. As a result, the Gatto court held that the plaintiff failed to preserve relevant evidence (which related to the plaintiff's damages and credibility) and that therefore a spoliation inference was appropriate.

In State v. Hannah, 448 N.J. Super. 78 (App. Div. 2016)—notably, a published decision—the court addressed an issue of authentication, involving certain social media content. Relevant to the discoverability of social media is the court's treatment of Twitter content, which the Appellate Division reasoned still constitutes a "writing" under N.J.R.E. 801(e), "[d]espite the seeming novelty of social network-generated documents." In essence, the Court explained that existing concepts of evidence and traditional rules apply to social media—no new tests are necessary for social media postings.

In another somewhat instructive decision, Archer v. Cape Regional Medical Center, et al., CPM-L-565-15 (N.J. Sup. Ct. Law Div. Feb. 6, 2018), the defendants sought all of the plaintiff's Facebook content. The only basis in asking for all of the plaintiff's Facebook content was that she had Facebook and likely shared content that may be admissible, bearing on her claims of physical injury. After considering the parties' positions, the court denied the defendants' motion for failing to "articulate[] any justification," *i.e.*, a factual predicate, for the broad discovery into the plaintiff's Facebook content.

More recently, Presiding Judge Clarkson S. Fisher, Jr., considered social media evidence relevant and helpful in establishing evidence of cohabitation, in a Family Court dispute. Temple v. Temple, 468 N.J. Super. 364, 371-76 (App. Div. 2021).

In Matter of Robertelli, 248 N.J. 293 (Sept. 21, 2021), the Supreme Court weighed in on a social media issue—albeit in the context of an ethics complaint—explaining that it is "fair game for the adversary lawyer to gather information from the public realm, such as information that a party exposes to the public online, [but] it is not ethical for the lawyer—

through a communication—to coax, cajole, or charm an adverse represented party into revealing what the person has chosen to keep private." But, because Facebook posts were disclosed after the close of discovery, the Court did not consider what was and what was not discoverable. Instead, the Court explained that it was permissible to monitor an individual's public Facebook for discovery purposes, but "friending" the individual to gain access to "private" content crossed the line.

In sum, New Jersey's body of case law provides that the same rules that govern the discovery of information in hard copy documents apply to electronic files. Indeed, what an individual or business shares on its social media platforms, though electronic, must still be viewed through a traditional lens. Requests for social media content must be limited in time and scope, seek information or content relevant to a claim or defense, and cannot create a proverbial "fishing expedition." But, there is no consensus in New Jersey on the need for a factual predicate. This is very much still a developing area of law that does not have as much published case law as neighboring states.