Gone Fishin': A Road Map in Protecting Plaintiffs from Defense Counsel's ESI Fishing Expeditions in Discovery

by Thomas M. Connelly

Many lawyers are familiar with the comical portrayal of the legal community in the movie *My Cousin Vinny*, where Joe Pesci's character takes up the murder defense of his cousin despite only having tried personal injury cases, and none of them successfully. However, most lawyers likely do not recognize that one of Pesci's subsequent films, *Gone Fishin'*, can be equally relevant to the legal practice today. Admittedly, I am unfamiliar with *Gone Fishin'*, a box-office bomb from 1997, but I am told it portrays two lifelong friends who embark on a fishing trip and encounter disaster at every turn, requiring them to overcome a series of obstacles to ultimately enjoy their trip. This article will help trial lawyers avoid their own disasters by offering a road map to assist in overcoming discovery obstacles and protecting plaintiffs from the defense bar's increased use of the proverbial fishing expedition in discovery.

Increased use of technology

Smartphone ownership and social media use among adults continues to grow on a yearly basis.[1] In fact, roughly half of U.S. adults ages 18 to 29 say they are almost constantly online.[2] Chief Justice John Roberts even described mobile devices as having become "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."[3] Justice Roberts' description is accurate considering that a forensic examination is arguably more invasive than a physical exam because the data contained on mobile devices, social media, and other various apps involves highly personal information and reveals "a digital record of nearly every aspect of [our] lives—from the mundane to the intimate."[4]

With the continued rise in the popularity of cell phones, tablets, social media, and other electronic data, it is of no surprise that electronically stored information, or ESI, has become increasingly more relevant in lawsuits across the country. It has been nearly ten years since the Illinois Supreme Court recognized the importance of ESI in lawsuits when it amended its discovery rules to explicitly apply to ESI in 2014.[5] Although ESI discovery is no longer a novel or unfamiliar issue, many trial lawyers remain unprepared to handle overbroad requests for ESI contained on plaintiffs' devices in personal injury lawsuits.

Fishing requests to look out for

As litigators continue to become more familiar with ESI, defense counsel will continue to become more and more aggressive in the types of ESI they request from plaintiffs in personal injury cases. Most commonly, defendants request the production of social media postings because they contend the postings are relevant to claims of pain and suffering and loss of normal life because they allege a plaintiff's social media profile will depict the injured plaintiff both before and after the injury and provide a view into what the plaintiff's day-to-day life is like. In other words, defendants often believe that social media posts can be used to show that a plaintiff has exaggerated the extent of their injuries. However, increasingly, defendants do not simply propound narrowly tailored requests for photos, videos, or posts concerning the injury or events at issue. Instead, defendants are serving overly broad, intrusive discovery requests for *any and all* electronic information.

My firm recently represented an individual in connection to a severe traumatic brain injury caused by a fall. Early on in discovery, defense counsel requested complete access to the plaintiff's electronic devices. Defendant's requests for production included requests for *all* photographs and videos of the plaintiff that were posted to *any* social media account or exchanged via text message or email by the plaintiff. Defense also requested *any and all* text messages, emails, or other electronic correspondence sent to or received by the plaintiff regarding the events that resulted in the plaintiff's injury. Because defendant's main defense was comparative fault due to alcohol consumption, defense counsel further requested *all* correspondence sent to or received by the plaintiff regarding alcohol, drugs, and social parties.

In response, we objected on several grounds but produced relevant post-injury photos and videos of the plaintiff taken by his family as well as several electronic communications that were directly relevant to the claim. Dissatisfied with the production, defense counsel filed a motion to compel a forensic inspection of the plaintiff's cell phone, laptop, and tablet. Defendant's ridiculously overbroad

gone fishin' continued on page 38

gone fishin' continued from page 36

proposed inspection protocol attempted to grant defendant's forensic expert unfettered access to every piece of information available on the plaintiff's devices, including online access data (i.e., internet search history), saved passwords, calendar/journal entries, backup/archival files, and other highly personal information.

Likewise, defendants across the country are increasingly requesting unfettered access to plaintiffs' devices because the data on a cell phone will not only include call and text data, but will also provide them with Wi-Fi connection information, Bluetooth devices used, data/app usage, third party messages, social media, vehicle-specific apps, and even health data,[6] allowing defense counsel to obtain a complete picture of every aspect of plaintiffs' lives. It is because of requests like these that trial lawyers need to be ready to combat the fishing expeditions of overzealous defense attorneys who cast wide nets with the hope of capturing a morsel of relevant discovery.

Be proactive and prepared to respond

The first step in preventing a fishing expedition by defense counsel is through proactively preparing clients pre-suit by warning them of the dangers of social media and other ESI. All trial lawyers should provide clients with social media and internet warnings during the intake process. Such warnings should inform clients that they must assume the defendant in any potential lawsuit will search the internet for any and all references of them, and that although they may believe social networking sites like Facebook, Twitter, and LinkedIn may be shielded from public view, the possibility exists that the court will require them to divulge information from their social media profiles. Simply put, clients need to be told they should be generally cautious when posting anything that could cause embarrassment in front of a jury and specifically cautious concerning the posting of anything at all related to the facts giving rise to their claim. It is even appropriate to advise a client to refrain from engaging in any social media activity while their claim is pending. But to avoid running afoul of any ethical rules and being sanctioned, be wary of instructing clients to delete any potentially relevant past social media posts without first preserving a copy for your own file.[7]

Once the defendant issues overbroad discovery requests, be prepared to respond with objections to any requests that are not narrowly tailored to the issues in the case. Objections should state that the requests are overly broad and unduly burdensome, not likely to lead to the discovery of admissible evidence regarding the plaintiff's injuries, and not proportional to the needs of the case. Indeed, requests for *all* social media posts requires the plaintiff to go through their entire social media profiles to search for any post or photo

that could possibly be responsive to the request, and such broad requests are not likely to lead to the discovery of admissible evidence regarding the plaintiff's injuries or damages but will almost certainly return large swaths of information concerning events that have absolutely no connection to the lawsuit. Objections should also point out that the discovery rules address the production of materials when benefits do not outweigh the burden of producing them, especially in the area of ESI.[8] The proportionality objection is especially helpful because the discovery rules require a proportionality analysis regarding requests for ESI.[9] The committee comments even list certain categories of ESI that should not be discoverable as well as requiring a case-by-case analysis of whether the ESI requests are appropriate under the discovery rules.[10]

If defense counsel continues to push forward in their fishing expedition following your objections, you can expect a motion to compel production of documents and possibly even a motion to compel forensic inspection of the devices that contain the ESI. Unfortunately, despite the increased popularity in ESI discovery, there remains to be a lack of case law in Illinois dealing with the appropriateness of ESI discovery requests. However, there is just enough Illinois law to create a roadmap on how to respond to such motions, and there continues to be growing case law from around the country.

Principles set forth in Illinois case law

Although there is a shortage of case law in Illinois, the Second District Appellate Court has identified a roadmap combining three main principles that can be used to combat ESI fishing expeditions: (1) traditional civil discovery principles and privacy rights, (2) relevance, and (3) proportionality.[11]

ESI discovery is no different than traditional discovery dealing with paper documents or other tangible items and is still governed by the general principles set out by Illinois Supreme Court Rules 201 through 224.[12] These general principles provide that discovery requests that are disproportionate in terms of burden or expense should be avoided.[13] Most relevant to ESI discovery, "the discovery rules envision that the responding party will search for, identify, and produce the information specifically requested by the other party. They do not permit the requesting party to rummage through the responding party's files for helpful information."[14] Additionally, the discovery rules govern the specific discovery methods allowed in order to provide judicial oversight to protect litigants from harassment.[15] Importantly, the traditional principles of discovery in Illinois are not blind to the privacy interests of the parties.[16] In fact, "[a]lthough the scope of permissible discovery can be quite broad, 'parties engaged in litigation do

gone fishin' continued on page 40

gone fishin' continued from page 39

not sacrifice all aspects of privacy or their proprietary information simply because of a lawsuit.'"[17] So, Illinois' civil discovery rules adopt two safeguards—relevance and proportionality—to ensure that the discovery of ESI will be reasonable, so as not to offend the basic constitutional rights embodied in the privacy clause of the Illinois Constitution.[18]

The relevance requirement in discovery prevents the disclosure of highly personal information that has no bearing on the issues in the lawsuit.[19] Broad discovery requests for *any and all* social media posts, or other similar requests, are not only overly intrusive, but they will likely "sweep in substantial amounts of irrelevant information."[20] Such requests will yield an enormous amount of data that goes far beyond the issues that are relevant to a personal injury lawsuit, potentially including personal photographs, declarations of love, confidential information about family and friends, and private online activities utterly unconnected to the lawsuit.[21] A party may not "dredge an ocean" of irrelevant information by requesting all ESI "in an effort to capture a few elusive, perhaps non-existent fish."[22] Simply put, overbroad requests that are not narrowly tailored offer no indication that the requests will return information relevant to the issues in the case, so they should be prohibited.

Additionally, proportionality provides another safeguard on limiting what is discoverable. In other words, even if the information is relevant, it need not be produced if the benefits do not outweigh the burdens, and the legitimate privacy concerns of the responding party is one of the most important burdens to consider when dealing with requests for ESI.[23] Courts have the power and responsibility to deny discovery if it will result in unreasonable embarrassment and oppression, so courts must consider whether the discovery requests represent a substantial invasion of the privacy interests of the responding party.[24] Requests for personal ESI data do result in a substantial invasion of privacy interests because people put their whole lives on cell phones, computers, and social media, and it is not acceptable for the defense to be able to search through a plaintiff's entire life.[25] Monetary factors also play a role in the proportionality analysis. The expense of the proposed discovery, the amount in controversy, and the resources of the parties are especially relevant in dealing with requests for ESI.[26] Unlike many defendants, plaintiffs are not sophisticated corporations that have document retention policies and other resources to easily retrieve and produce ESI. When properly considered, the monetary factors combined with the privacy interests and other nonmonetary factors[27] will often indicate that a plaintiff's personal ESI should not be discoverable.

Other developing case law around the country

Illinois law certainly has its shortcomings in directly addressing requests for ESI in personal injury lawsuits, so it is helpful to rely on other jurisdictions for guidance. Throughout the country, courts have held that overbroad requests for a plaintiff's ESI is not allowed. For example, there is no general right to have access to an entire Facebook account and such a request is no different than requesting the right to search through a party's entire house or office, making the request a "fishing expedition."[28] Moreover, defendants do not have a generalized right to rummage at will through information that a plaintiff has limited from public view and engage in the proverbial fishing expedition, in the hope of finding something on a social media account.[29] Although information on social networking sites is not entitled to special protection, a discovery request seeking it nevertheless must meet the requirements of the discovery rules and be tailored "so that it 'appears reasonably calculated to lead to the discovery of admissible evidence.'"[30] In essence, courts have recognized that a discovery request for unfettered access to social networking accounts—even when temporarily limited—would permit the defendant to cast too wide a net for relevant information.[31] Courts across the country have consistently applied basic discovery principles to ESI discovery, resulting in overly broad social media discovery requests being quashed as fishing expeditions where defense counsel is attempting to "look under the hood" to figure out whether there is even anything worth exploring.[32]

Final considerations

It is important to be ready to combat discovery requests like the ones mentioned throughout this article. None of this, however, is to say that plaintiffs should withhold any readily available photos, social media postings, communications, or other ESI that are clearly relevant to the claim. Producing clearly relevant ESI will even prevent some defendants from going any further in their fishing expedition and it will almost certainly show that you've made reasonable attempts to provide relevant information if the issue ever leads to a discovery dispute in front of the judge. In fact, courts across the country have ruled that there is no absolute right to privacy in social media, and that relevant photos and/or postings on social media sites must be produced.[33] It is also important to be mindful of how you tailor your own ESI discovery requests, so as not to start a battle of competing overbroad and inappropriate requests. If you are required to produce ESI from your clients' devices or accounts, make sure to prepare protective orders, ESI protocols, and if necessary, search terms, in order to protect the information searched and produced. It is also advisable to retain a forensic

gone fishin' continued on page 42

gone fishin' continued from page 40

expert to assist in the retrieval of any ESI on your client's devices.

Conclusion

ESI discovery is an extremely powerful tool in litigation. The purpose of this article is not to criticize the use of ESI in discovery practices. In fact, trial attorneys regularly request ESI productions from defendants in injury cases and benefit from the production of incriminating and damaging evidence that can be used against the defendant at trial. With that said, there is a disturbing new trend of overly broad and intrusive requests for the personal and private information of plaintiffs in personal injury lawsuits, and trial lawyers must make an effort to protect their clients from the defense bar's increased use of ESI as a way to conduct a proverbial fishing expedition in discovery.

Endnotes

[1] Michelle Faverio, *Share of those 65 and older who are tech users has grown in the past decade*, Pew Research Center, Jan. 13, 2022, https://www.pewresearch.org/fact-tank/2022/01/13/share-of-those-65-and-older-who-are-tech-users-has-grown-in-the-past-decade/.

[2] *Id.*

[3] *Riley v. California*, 573 U.S. 373, 385 (2014)

[4] *Id.* at 395.

[5] *See Carlson v. Jerousek*, 2016 IL App (2d) 151248, *P43.

[6] Ryan Ferreira, *How to Use Mobile Phone Data in Car Accident Cases*, 4Discovery Webinar (June 8, 2022), https://4discovery.com/webinars/how-to-use-mobile-phone-data-in-car-accident-cases/.

[7] *Allied Concrete Co. v. Lester*, 736 S.E.2d 699, 701 (Va. 2013). Plaintiff attorney got off on the wrong foot by issuing the vague directive to "clean up" the Facebook page, resulting in client deleting certain past posts. Attorney could have avoided later problems by giving the client specific written advice on (1) what he needed to do to comply with the duty to preserve relevant evidence and (2) what to avoid posting. *See also*, Zach Wolfe, *How to Get Sanctioned for Deleting Facebook Posts*, Five Minute Law April 20, 2022, https://fiveminutelaw.com/2020/04/20/how-to-get-sanctioned-for-deleting-facebook-posts/.

[8] Ill. Sup. Ct. R. 201, revised May 29, 2014, committee comments (c).

[9] *Id.*

[10] *Id.*

[11] *See generally Carlson v. Jerousek*, 2016 IL App (2d) 151248.

[12] *Id.* at *P27.

[13] *Id.* (citing Ill. S. Ct. R. 201(a)).

[14] *Id.* at *P29.

[15] See *id.* at *P30 (quoting *Kunkel v. Walton*, 179 Ill. 2d 519, 531 (1997)).

[16] *Id.* at *P31.

[17] *Id.* (quoting *In re Mirapex Products*

Liability Litigation, 246 F.R.D. 668, 673 (D. Minn. 2007)).

[18] See *id.* at *P34-35.

[19] *Id.* at *P37 (quoting *Kunkel*, 179 Ill. 2d at 539).

[20] *Id.* at *P65.

[21] *Id.*

[22] *Id.* (quoting *Tucker v. Am. Int'l Grp., Inc.*, 281 F.R.D. 85, 95 (D. Conn 2012) (internal quotations omitted)).

[23] *See id.* at *P39-41

[24] *Id.*

[25] *See id.* at *P14

[26] *Id.*

[27] Other non-monetary factors include the importance of the issues in the litigation (i.e., the societal importance of the issues at stake) and the importance of the requested discovery in resolving the issues. *Id.* at *P40.

[28] *McCann v. Harleysville Ins. Co. of New York*, A.d.2d 1524 (N.Y. A.D. 2010) (Defendant "failed to establish a factual predicate and essentially sought permission to conduct a fishing expedition into plaintiff's Facebook account based on the mere hope of finding relevant evidence which is not allowed.").

[29] *Tompkins v. Detroit Metro. Airport*, No. 10-10413 (E.D. Mich. Jan. 8, 2012).

[30] *Davenport v. State Farm Mut. Auto. Ins. Co.*, No 3:11-cv-632-J-JBT, 2012 WL 555759, at *1 (M.D. Fla. Feb. 21, 2012 (quoting Fed. R. Civ. P. 26(b)(1)).

[31] *Mackelprang v. Fid. Nat'l Title Agency of Nev., Inc.*, No 2:06-cv-00788-JCM, 2007 WL 119149, at *7 (D. Nev. Jan 9, 2007)).

[32] *See e.g., Root v. Balfour Beatty Const. LLC*, 2014 WL 444005 (Dist. Ct. of App. Of FL, 2nd Dist. Feb. 5, 2014) (citing *EEOC v. Simply Storage Mgmt, LLC*, 270 F.R.D. 430 (S.D. Ind. 2010)).

[33] *See, e.g., Nucci v. Target Corp., et al.*, No. 4D14-138 (FL 4th D.C.A., Jan 7, 2015) (holding that "generally, the photographs posted on a social networking site are neither privileged nor protected by any right to privacy" and must be produced if available and relevant).

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