To Whom Should We Point Our Stylus Allocating the Burden of Review in E-Discovery of Social Media Content

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I. INTRODUCTION

Electronic discovery (“e-discovery”) law governs the discovery of electronically stored information (“ESI”).¹ By definition, e-discovery is “the process of identifying, preserving, collecting, preparing, [processing, searching, reviewing], and producing [ESI] in the context of the legal process.”² One way e-discovery differs from traditional discovery is that parties no longer must search through thousands of pages manually to locate discoverable documents.³ The thrust of e-discovery’s differences from traditional discovery, however, is the increased costs associated with its


³ See Jacqueline Hoelting, Note, Skin in the Game: Litigation Incentives Changing as Courts Embrace a “Loser Pays” Rule for E-Discovery Costs, 60 CLEV. ST. L. REV. 1103, 1107 (2013) (“E-discovery is vastly different from the traditional methods of discovery, such as written responses to requests for information or sorting through stacks of boxes filled with paper documents.”).
review and production. These costs are mainly a result of the large volumes of data accessible in e-discovery.

Although e-discovery case law continues to grow, as Congress anticipated, the rapid pace at which ESI evolves has created unique challenges in the discovery stage of litigation that case law has not addressed, especially regarding social media content. Social media content creates—and will constantly create—new challenges for lawyers involved in e-discovery as fresh social media applications with evolving layouts continue to surface.

Social media content, like any other type of material, must be relevant to be discoverable; the requesting party must be reasonably specific as to the requested items. Precisely, the material sought must relate to any

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5 See Hoelting, supra note 3, at 1107 (stating amount of information recoverable in e-discovery is "limitless"). Sometimes, lawyers who fail to take the time to become well versed in e-discovery rules and processing contribute to the high cost of e-discovery. Craig Ball, Are We Paying Five Times Too Much for E-discovery?, EDD UPDATE (May 2, 2010), http://www.eddupdate.com/2010/05/are-we-paying-five-times-too-much-for-ediscovery.html.

6 See Fed. R. Civ. P. 34(a) advisory committee’s notes to 2006 amendment (“[Rule 34(a)] covers—either as documents or as electronically stored information—information stored in any medium, to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments."); see also id. advisory committee’s notes to 2015 amendments (attempting to address evolving issues in e-discovery).

7 See Ilya Pozin, 15 Social Media Companies to Watch in 2015, FORBES, Dec. 17, 2014, 10:09 AM, http://www.forbes.com/sites/ilyapozin/2014/12/17/15-social-media-companies-to-watch-in-2015/ (listing up and coming social media platforms). Although Facebook, Instagram, Snapchat and Twitter are the current popular social networking websites and applications, applications with innovative layouts—like Bubbly, which is a voice-based social media application that allows users to record, edit, add effects to and share voice-clips—are projected to become popular or take the place of current popular applications. Id. This projected cycle is similar to how MySpace and Hi5 are no longer “in.” See Adam Hartung, How Facebook Beat MySpace, FORBES, Jan. 14, 2011, http://www.forbes.com/sites/adamhartung/2011/01/14/why-facebook-beat-myspace/#46e0fd0d97023 (explaining how Facebook became the leader in social media platforms). In addition, social media companies that are already popular are partnering with start-up companies and are predicted to grow. Pozin, supra.

8 Fed. R. Civ. P. 26(b)(1). The Rule provides, in pertinent part:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in
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claims or defenses to meet the threshold showing of relevance under Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 26(b)(1). The review of documents is necessary to satisfy this threshold. "The objective of review in ediscovery is to identify as many relevant documents as possible, while reviewing as few non-relevant documents as possible." In order to determine whether any content on social networking sites ("SNS")—such as Facebook, Instagram, Snapchat, or LinkedIn—is relevant to a particular case, review of the content is necessary. As a result, a party must bear the burden of review. In traditional discovery, this burden is usually borne by the producing party, but some courts have abandoned tradition when dealing with the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Id.; see also FED. R. CIV. P. 34(b)(1)(A) ("The request: . . . must describe with reasonable particularity each item or category of items to be inspected."); Silva v. Dick’s Sporting Goods, Inc., No. 3:14CV580(WWE)(WIG), 2015 WL 1275840, at *1 (D. Conn. Mar. 19, 2015) ("That the instant motion seeks an order to compel social media communications, rather than hard copy materials, does not take it out of the ambit of Rule 26’s relevancy requirements.").

9 See FED. R. CIV. P. 26(b)(1) (setting forth general scope of federal discovery requests).


11 Id. (stating precise objective in reviewing documents with potential discoverability).

12 See id.

A social networking website is an online platform that allows users to create a public profile and interact with other users on the website. Social networking websites usually have a new user input a list of people with whom they share a connection and then allow the people on the list to confirm or deny the connection. After connections are established, the new user can search the networks of his connections to make more connections. A social networking site may also be known as a social website or a social networking website.


13 See infra Part III (highlighting different parties who may bear burden).
with SNS or social media content.\textsuperscript{14} The costs associated with ESI drives the discussion about who should bear the burden of review.\textsuperscript{15}

This note will lay out the different approaches courts take in determining who should bear the burden of review in the e-discovery of social media, while highlighting differences in the policies behind the approaches.\textsuperscript{16} Identifying the party who should bear the burden of review is important due to the increase of costs associated with e-discovery; to that end, this note will point to remedies that could reduce the burden of review.\textsuperscript{17} Thereafter, this note will argue that the best approach is to amend the Fed. R. Civ. P. to include the application of a burden-shifting balancing test.\textsuperscript{18}

Under the test, the review is a two-step process—courts would perform an initial minimal \textit{in camera} review, then place the burden on the producing party—unless: (1) the requesting party can show that the producing party’s


\textsuperscript{16} See infra Part III (noting majority view is that producing party should bear burden).

\textsuperscript{17} See, e.g., James M. Wright, \textit{Estimating the Cost Burden of E-Discovery: A New and Better Method}, FTI CONSULTING (2008), http://pdfserver.amlaw.com/legaltechnology/EDiscBurdenEst. WhitePaper.pdf (acknowledging an industry of technological service providers have arisen to assist with reviewing ESI); JUDGE XAVIER RODRIGUEZ & JULIA WOMMACK MANN, Essentials of E-Discovery, Chapter 12 Cost Shifting 1 (Judge Xavier Rodriguez ed., 2014), available at http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015-sac/written_materials/5_2 CHAPTER 12 COST SHIFTING authcheckdam.pdf (highlighting reducing costs of e-discovery is necessary due to high costs). “E-discovery has evolved into a very expensive endeavor, spawning a cottage industry of products, technology, and vendors to search, collect, and produce . . . (ESI) . . . searching through all the potential forms of ESI for relevant discoverable information is often an expensive task that can be burdensome for both the litigant and the client.” Id.; see also infra Part III (providing one way to reduce burden is by using applicable discovery rules).

\textsuperscript{18} See infra Part V (arguing varying methods should merge into one consistent rule).
credibility is at issue, or (2) the producing party contests that the court-indicated responsive contents are privileged or nonresponsive after its thorough review. If a requesting party is successful at challenging the producing party’s credibility, then the court would decide how to allocate the burden based on four balancing factors.

II. THE EVOLUTION OF ESI

Since 1970, Congress has endeavored to address electronic data in discovery. In that year, Congress amended Fed. R. Civ. P. 34(a) to include electronic documents—making electronic information discoverable—as computers and machines became increasingly popular. Fed. R. Civ. P. 34(a) reads, in pertinent part:

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):
(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party’s possession, custody, or control:
(A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or
(B) any designated tangible things...

Thereafter, in 2006, Congress made substantial efforts to address cost and efficiency—at which time, the term of art, ESI, debuted. For

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19 See infra Part V (stating in camera review can prevent or reduce disputes about what content is relevant).
20 See infra Part V, Section C (noting courts should consider non-exhaustive list of factors when deciding which method to use).
21 See FED. R. CIV. P. 34(a) advisory committee’s note to 1970 amendment (revising description of “documents” to include “electronic data compilations”).
22 Id. (adding ESI to list of items parties may request for production).
23 See FED. R. CIV. P. 34(a)(1) (including electronic information for discovery purposes).
24 See, e.g., FED. R. CIV. P. 34(a) advisory committee’s note to 2006 amendment (amending discovery rules vigorously to accommodate ESI); FED. R. CIV. P. 26(b)(2)(B) advisory committee’s
instance, the 2006-Amended Fed. R. Civ. P. 26(b)(2) “require[ed] that parties need only search and produce from ‘reasonably accessible’ sources of ESI, but the producing party must identify and provide information to opposing counsel about those sources that [he or she] regards as ‘not reasonably accessible.’” In addition, the 2006 Amendments created a right for parties to “test or sample” and “inspect and copy” ESI material in Rule 34(a). Next, Fed. R. Civ. P. 26(b)(2)(b) was amended to allow a producing party to exclude ESI that is “not reasonably accessible due to undue burden or costs” because locating and retrieving the ESI would prove to be difficult. Lastly, Congress amended Rule 26(f)(2) to require counsel to discuss e-discovery plans, such as the form in which the discovery should be produced.

Although Congress aggressively amended the Fed. R. Civ. P. in 2006, there were still issues with efficiency and cost that Congress needed to address regarding ESI. Most recently, they amended the rules in 2015 to improve efficiency and lessen e-discovery costs.

For instance, prior to the amendments, content had to “appear reasonably calculated to lead to discovery to be relevant, and now, content


26 FED. R. CIV. P. 34(a) advisory committee’s notes to 2006 amendment (explaining Amendment).

27 See FED. R. CIV. P. 26(b)(2) advisory committee’s notes to 2006 amendment (explaining addition of subparagraph (B) regulates “burdens and costs of accessing electronically stored information”).

28 See FED. R. CIV. P. 26(f) advisory committee’s notes to 2006 amendment (“Early discussion of the forms of production may facilitate the application of Rule 34(b) by allowing the parties to determine what forms of production will meet both parties’ needs. Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms.”).


30 See FED. R. CIV. P. 26(b)(1) (reflecting 2015 Amendments); FED. R. CIV. P. 26(c)(1)(b) (describing recent Amendments to statute); FED. R. CIV. P. 16(b)(3) (explaining 2015 statute Amendments); FED. R. CIV. P. 34(b)(2)(A)–(C) (stating changes made to statute in 2015).
must be “relevant to any party’s claim or defense.” Further, Congress expressly granted courts the authority to shift discovery costs. Additionally, Congress encouraged more judicial involvement in the e-discovery process as to key discovery issues, and made clear the standard for sanctions for failure to preserve ESI. Finally, Congress made a few amendments to Fed. R. Civ. P. 34 that were “aimed at reducing the potential to impose unreasonable burdens by objections to requests to produce.”

31 FED. R. CIV. P. 26(b)(1) (reflecting change in prerequisite necessary for material to be discoverable).
32 FED. R. CIV. P. 26(c)(1)(B) (noting courts may issue an order for “the allocation of expenses”).
33 See FED. R. CIV. P. 16(b)(3)(B) (outlining “permitted contents” of scheduling orders); FED. R. CIV. P. 16(b)(4) (permitting modification of scheduling orders “for good cause and with the judge’s consent”); FED. R. CIV. P. 26(f) (delineating discovery-planning rules for parties and granting courts discretion to expedite planning schedule); FED. R. CIV. P. 34(b)(2)(E) (prescribing production of ESI “unless otherwise stipulated or ordered by the court”); FED. R. CIV. P. 37(e) (allowing courts to sanction parties for failing to preserve ESI). Congress previously mentioned greater judicial involvement in the discovery process. FED. R. CIV. P. 26(b) advisory committee’s notes to 1983 amendment (“The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis.”).
34 FED. R. CIV. P. 34 advisory committee’s note to 2015 amendment. The note provides:

Rule 34(b)(2)(A) is amended to fit with new Rule 26(d)(2). The time to respond to a Rule 34 request delivered before the parties’ Rule 26(f) conference is 30 days after the first Rule 26(f) conference.
Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34. The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters “withheld” anything beyond the scope of the search specified in the objection.
Rule 34(b)(2)(B) is further amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. The response to the request must state that copies will be produced. The production must be completed either by the time for inspection specified in the request or by another reasonable time specifically identified in the response. When it is necessary to make the production in stages the response should specify the beginning and end dates of the production.
Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state whether anything is being withheld based on the objection. This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections.
E-discovery case law in the context of social media is expanding. As to general social media discovery principles, courts have made it clear that because social media content is only discoverable if relevant to the claims at issue, a requesting party is not automatically entitled to access a producing party’s entire account. The general threshold is that discoverability does not have to be very narrow, such as only requesting materials directly correlated to the assertions in a complaint, but should not be so overbroad that it may result in a fishing expedition. Further, an overarching reason for issues in e-discovery of social media is that “[r]elevance of the content . . . is . . . in the eye of the beholder.”

For the producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been “withheld.”

Id.


36 See Simply Storage Mgmt., 270 F.R.D. at 436 (holding only relevant parts of employees’ social account was discoverable). About one year after Bass, the defendants in Simply Storage Mgmt. sought access to their employees’ entire social networking accounts. Id. at 434. The court held that social media content is only discoverable if relevant to the claims at issue. Id. at 434-35. The court distinguished Bass by noting that, there, the defendants’ discovery request was narrow, as it did not request the plaintiff’s entire account, and it was on the court’s own motion that the plaintiff provide the defendants with the entire account. Id.

37 See, e.g., Tompkins v. Detroit Metro. Airport, 278 F.R.D. 387, 389 (E.D. Mich. 2012) (holding entire account was overbroad and undiscoverable absent requisite showing of relevance); Mailhoit v. Home Depot U.S.A., 285 F.R.D. 566, 572 (C.D. Cal. 2012) (“[R]equests for ‘any pictures of Plaintiff taken during the relevant time period and posted on Plaintiff’s profile or tagged or otherwise linked to her profile,’ is impermissibly overbroad. Defendant fails to make the threshold showing that every picture of Plaintiff taken over a seven-year period and posted on her profile by her or tagged to her profile by other people would be considered relevant under Rule 26(b)(1) or would lead to admissible evidence.”); In re Asbestos Prods. Liab. Litig., 256 F.R.D. 151, 157 (E.D. Pa. 2009) (“All-encompassing demands that do not allow a reasonable person to ascertain which documents are required do not meet the particularity standard under Rule 34(b)(1)(A).”).

38 Bass v. Miss Porter’s School et al., No. 3:08cv1807(JBA), 2009 WL 3724968, at *1-2 (D. Conn. Oct. 27, 2009) (noting that relevance is often subjective). Bass is a pioneer case that addresses the discoverability of relevant social media content. Id. In Bass, the defendants requested any information on the plaintiff’s former Facebook page relating to the allegations in the complaint. Id. Even though Bass does not address the burden of review, the Bass quote above highlights one of the reasons the burden of review question is important in the context of social media discovery. Id. The plaintiff then subpoenaed Facebook to get her former account’s information. Id. Thereafter, the court ordered the plaintiff to provide all Facebook documents related to the defendant’s request and to provide the court the entire record for in camera review. Id. “[T]he Court’s review of the unproduced portion of the Facebook Production revealed a number
instance, content that may appear discoverable to one litigant may not appear discoverable to another. As for review, sometimes neither the producing party nor the requesting party may be the ideal reviewer because of possible biases that can result in either: (1) the withholding of information on the part of the producing party or (2) a rummaging and fishing expedition on the part of the requesting party.

III. LIKE A MULTI-TASK SPLIT SCREEN, THE COURTS SPLIT ON WHO SHOULD BEAR THE BURDEN OF REVIEW

FED. R. CIV. P. 34(a) reads, in pertinent part:

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) To produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party’s possession, custody, or control . . .

Further, the procedure for production is as follows:

Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in

\[\text{of communications to and from Plaintiff that [were] clearly relevant to [the] action.}^\text{39} \]

\[\text{Id. The court notes, however, ”[t]he selections of documents Plaintiff disclosed to Defendants and those she referred for in camera review reveal no meaningful distinction.” Id.}\]

\[\text{See id. at *1 (noting that plaintiff’s production of ESI was “more in the eye of the beholder than subject to strict legal demarcations.”).}^\text{40} \]

\[\text{See id. (noting that relevance depends on the reviewer of content). Although in Bass the comparison between the documents given to the court and the defendant was insignificant, because relevance is dependent on the party who is reviewing content, there may be instances where the producing party does not produce objectively important documents. Id.}\]

\[\text{FED. R. CIV. P. 34(a).}\]
a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and (iii) A party need not produce the same electronically stored information in more than one form.  

Evidently, neither the production rule in Fed. R. Civ. P. 34(a) nor the procedure rule in Fed. R. Civ. P. 34(b)(2)(E) set forth whether the burden of production encompasses the burden of review for ESI.  

In the social media context, courts have opined varyingly on who should bear the burden of reviewing social media content for responsive material—whether (1) the account holder; (2) the court via in camera review, “an inspection of materials by the court, in chambers, to determine what, if any, materials are discoverable”; (3) the requesting party; or (4) third parties. With any of these methods, except the account holder method, courts are aware of the risk that a producing party’s “embarrassing” content may surface; nonetheless, the courts allow discovery because they reserve the discretion to later exclude embarrassing content from evidence under the Federal Rule of Evidence (“Fed. R. Evid.”) 611(a)(3).

A. The Traditional Approach: Burden on the Producing Party

The majority view is that the account holder/producing party should bear the burden of reviewing social media accounts. With this approach,

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Pennsylvania courts place the burden on the requesting party when the information is public. See Brogan, 2013 WL 1742689, at *5. In Brogan, the requesting party’s request was outside of the public information realm, and therefore, the court denied the requesting party’s motion for production of the entire account and relied on the producing party. Id. at *8. The court stated, “[T]he demand for . . . [a] username and password is overly intrusive and would cause unreasonable embarrassment and burden . . . .” Id. at *1.
46 See Melissa G., 6 N.Y.S. 3d at 447-49 (requiring plaintiff’s counsel or producing party to bear burden of review); Giachetto v. Patchogue-Medford Union Free Sch. Dist., 293 F.R.D. 112,
courts rely on attorneys’ professional obligations by holding them to their duties as officers of the court; in other words, the courts depend on account holders’ attorneys to review content honestly and accurately. Case in point, the rationale for the approach is that the American adversarial system obliges the producing party, in good faith, to disclose all relevant, responsive information in response to an opposing party’s request. Where a producing party fails to exercise good faith, the injured party can seek relief upon a showing of bad faith. Account holders’ attorneys should “keep in mind the broad scope of discovery” when reviewing for relevance in order to prevent being accused of bad faith production by the requesting party, and to mitigate the effect of relevance being in “the eyes of the beholder.”

B. Burden Allocated to the Requesting Party

In some state courts, the requesting party may obtain a party’s login information to access the party’s social media content after a requisite showing of relevance; as such, the requesting party in effect bears the burden of review, because they have to determine what content within the entire account is relevant. Courts that allow full access to social media accounts after a threshold showing of relevance opine that if a producing party’s public information is relevant, then “there is a reasonable likelihood of


47 See Melissa G., 6 N.Y.S.3d at 449 (ordering counsel to review Facebook account because no basis that counsel could not perform review).


49 See Rozell, 2006 WL 163143, at *4 (“Discovery . . . is based on a good faith response to demands for production by an attorney constrained by the Federal Rules and by ethical obligations . . . When a party can demonstrate that an adversary may be wrongfully withholding relevant information, it can seek relief.”).

50 See id. (explaining it is usually best to interpret relevance broadly when reviewing documents for relevance).

51 See Zoe Rosenthal, “Sharing with the Court: The Discoverability of Private Social Media Accounts in Civil Litigation,” 25 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 227, 252 (2014) (“A number of common pleas courts have, upon the requisite showing of relevance, required a party to provide its adversary with the usernames and passwords for any private social media accounts held by the complaining individual as a means of producing requested social media material.”).
additional relevant and material information on the non-public portions of
[the party’s account]."52

To date, federal courts disagree with this approach, but may allow a
requesting party access to an entire account where a producing party’s
credibility is questionable.53 In Crowe v. Marquette Transp. Co. Gulf-
Inland54—the case-in-point for the credibility exception to the general rule—
the defendant-employer requested the plaintiff-employee’s Facebook
account because the employee alleged that he injured his knee at work, but
the employer had information that the employee told a friend that the injury
took place on a personal fishing trip.55 At first, the judge required in camera
review of the account in lieu of the defendant receiving full access.56
However, the employee responded that he no longer had a Facebook account,
which implied deletion, but he actually deactivated, not deleted, the
account.57 When the employee reactivated the account, he provided the court
with 4,000 pages of data.58 Displeased with the plaintiff-employee’s
conduct, the court required him to, not only send all 4,000 pages to the
employer, but also allow the employer to log-in to his Facebook account
because his credibility became questionable.59

Com. Pl. May 19, 2011) (articulating holding for authorizing full access); see also Largent v. Reed,
account because doing so is not very burdensome when conducting discovery.); see generally,
Rosenthal, supra note 51, at 252 (explaining advantages in providing narrowly tailored discovery
requests).

2986892, at *3-4 (D. Kan. July 2, 2014) (denying full access, but allowing “defendant to discover
information relevant to plaintiff’s emotional state”); Smith v. Hillshire Brands, No. 13-2605-CM,
2014 WL 2804188, at *3-6 (D. Kan. June 20, 2014) (ordering same); Palm v. Metro PCS Wireless,
Inc., 18 F. Supp. 3d 1346, 1347 (M.D. Fla. 2014) (denying request for social media posts from
account due to conduct).


55 See id. at *1-2 (reciting facts of case).

56 See id. at *2.

57 See id. (“It is readily apparent to any user who navigates to the page instructing how to
deactivate an account that the two actions, [deactivating or deleting,] are different.”).

58 See id. (stating that Crowe submitted 4,000 pages of data for in camera review).

59 See Crowe, 2015 WL 254633, at *2 (“While the Court has made a preliminary review of
certain of these materials, it is not about to waste its time reviewing 4,000 pages of documents . . .
when it is patently clear from even a cursory review that this information should have been
produced as part of Crowe’s original response.”). The court noted that it was “troubled by Crowe’s
refusal to produce any responsive documents on the basis of the statement that he did not ‘presently
have a Facebook account.’” Id. at *6.
The rationale for federal courts’ disagreement with providing the requesting party with the producing party’s login information—where credibility is not at issue—is that, despite the requirement for a showing of relevance before the requesting party receives login information, there is, nonetheless, the risk of fishing expeditions and rummaging of the producing party’s account.⁶⁰ Moreover, the courts are concerned with allowing a requesting party access to private areas of the producing party’s account.⁶¹ Albeit federal courts’ position that social media content shared with others are not privileged, even when a producing party’s profile is set to “private,” federal courts have not gone so far as to say if there is relevant information on the shared or public parts of the sites, then the private areas, such as private messaging, are accessible.⁶²

C. In Camera Review

Some courts sua sponte conduct an in camera review to determine the relevance of the social media content the requesting party demands, which eliminates the necessity for a court to rely on account holders’ attorneys’ professional duties under the majority account holder approach.⁶³


⁶¹ See Howell, 2012 WL 5265170, at *1 (“Here defendants’ discovery request is overbroad. Howell’s username and password would gain defendants access to all the information in the private sections of her social media accounts—relevant and irrelevant alike.”); see also Rick E. Kubler & Holly A. Miller, Recent Developments in Discovery of Social Media Content, AMERICAN BAR ASS’N (Mar. 4, 2015), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015_inspect_materials/24_recent_developments_in_discovery_of_social_media_content.authcheckdam.pdf (“One of the most intrusive methods of discovery is to permit the requesting party access to a user’s entire social media account. This would be analogous to allowing access to someone’s entire office when one file might be relevant . . . this has been the least popular method with parties and the courts.”).

⁶² See Tompkins, 278 F.R.D. at 388 (agreeing with threshold showing of relevance approach); Keller, 2013 WL 27731, at *4 (agreeing with relevance threshold); Howell, 2012 WL 5265170, at *1 (same).

Courts may find it practical to order *in camera* review, for instance, where a requesting party argues that a plaintiff-account holder’s single-handed redaction of portions of social media content, which she believes to be irrelevant or privileged, is inappropriate because some of the redactions are likely relevant and “suspect.”

Similar to the other approaches, the requesting party must make some showing of relevance before a court would conduct *in camera* review. If a court decides to use the *in camera* approach, it has broad discretion to determine the extent to which it will inspect the response when a thorough review would be unduly burdensome. This discretion includes, for instance, “the right to direct plaintiff to conduct an initial review of her own Facebook account, and limit the *in camera* inspection to items whose discoverability is contested by plaintiff.” With this broad discretion, the *in camera* review approach furthers Congress’ goal in having the judiciary more involved in the e-discovery process.

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64 *See* Milo’s Kitchen, 307 F.R.D. at 180, 183 (ordering *in camera* review to inspect allegedly irrelevant portions of social media account).

65 Compare Nieves, 966 N.Y.S.2d at 808-09 (holding defendant met requisite showing that plaintiff’s profile contained relevant photographs); Richards v. Hertz Corp., 953 N.Y.S.2d 654, 656 (2012) (ordering full *in camera* review after showing alleged injury was refuted by Facebook picture), *with* Gonzalez, 2015 WL 2191363, at *1 (quoting Patterson v. Turner Constr. Co., 88 A.D.3d 617, 620 (N.Y. App. Div. 2011)) (stating, “plaintiff’s mere possession and utilization of a Facebook account is an ‘insufficient basis’ to compel access to the account.”).

66 *See* Nieves, 966 N.Y.S.2d at 809 (reminding trial court of its discretion to inspect *in camera* when remanding for such use). A trial court can “set reasonable terms and conditions thereon,” Id.

67 See also Offenback v. L.M. Bowman, Inc., No. 1:10-CV-1789, 2011 WL 2491371, at *3 (M.D. Pa. June 22, 2011) (“Plaintiff shall produce the information identified [by the court] ... to Defendants in a format mutually agreeable to the parties. To the extent that the parties have continued disagreements regarding the scope or manner of this discovery, they are directed to contact the Court’s deputy clerk...”).

68 *See* FED. R. CIV. P. 16(b)(3) (illustrating one grant for court involvement). *See also,* e.g., FED. R. CIV. P. 16(b)(3)(B) (outlining “permitted contents” of scheduling orders and allowing courts to modify discovery); FED. R. CIV. P. 34(b)(2)(E) (prescribing production rules with condition “unless otherwise stipulated or ordered by the court”); FED. R. CIV. P. 26(f) (outlining discovery-planning rules for parties and giving courts discretion to modify areas of planning); FED. R. CIV. P. 37(e) (allowing courts to sanction parties for lack of preservation under certain conditions). Congress has also previously mentioned greater judicial involvement in the discovery process. *See* FED. R. CIV. P. 26(b) advisory committee’s notes to 1983 amendment (“[R]ule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis.”).
D. Review Burden on a Third Party

Third parties that may bear the burden of review are either social media hosts or court appointed neutral parties. Social media hosts are “public content sharing websites that allow individual users to upload, view, and share content such as video clips, press releases, opinions, and other information[,]” and perform “private” actions, such as direct messaging. In contrast, court-appointed neutral parties have no connection to the litigation because they do not provide the social platform, like social hosts, and because they are not parties in the case.

i. Social Media Hosts

It is unlikely that a court would require a social media host to bear the burden of review. Courts are reluctant to require social networking hosts to provide content to requesting parties on the premise that there is no need for a third party to become involved, especially if a party to the litigation has access to the account.

In addition, privacy issues with the Stored Communications Act (“SCA”), which protects production of social users’ private information, may arise if courts require social media hosts to review and produce social

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69 See infra notes 73 and 79 and accompanying text (expounding on said parties bearing burden).

70 UNITED STATES DEPARTMENT OF HOMELAND SECURITY, DHS 4300A SENSITIVE SYSTEMS HANDBOOK, 73 (Version 11.0 2015), available at https://www.dhs.gov/sites/default/files/publications/DHS-4300A-Sensitive-Systems-Handbook-0.pdf (defining “social media hosts”); see also Marsha Collier, How to Send Private Messages to Facebook Friends, DUMIES, http://www.dummies.com/social-media/facebook/how-to-send-private-messages-to-facebook-friends.html (last visited Dec. 30, 2016) (“Facebook has a feature that enables you to send private messages to your friends. Think of it like Facebook e-mail, only your personal e-mail address is not revealed. Even better, you can e-mail those whose e-mail addresses you don’t know.”).

71 See infra Part III, Section 2 (discussing “Appointed Neutral Third Parties”).

72 See infra note 73 (explaining why court would not mandate social host to bear burden of review).

73 Compare Giachetto v. Patchogue-Medford Union Free Sch. Dist., 293 F.R.D. 112, 117 (E.D.N.Y. 2013) (holding accessing plaintiff’s social postings through third-party was unnecessary because plaintiff had direct access), with Bass v. Miss Porter’s School, No. 3:08cv1807(JBA), 2009 WL 3724968, at *1 (D. Conn. Oct. 27, 2009) (noting court did not object to plaintiff subpoena of Facebook over deleted account); see also Timothy J. Chorvat & Laura E. Pelanek, Electronically Stored Information in Litigation, 68 BUS. LAW. 245, 249 (2012) (“In contrast to courts’ receptiveness to social media discovery directed to parties, litigants have been largely unsuccessful in seeking to compel entities that host social media sites to produce information data.”).
Whether the SCA protects the content depends on a variety of factors, including whether it is a criminal or civil case. For instance, in *People v. Harris*, the New York Supreme Court found that a criminal defendant has no proprietary interests and, therefore, has no protection under the SCA to quash a subpoena for his or her Twitter or other SNS account. As such, the Government was able to compel Twitter to produce the content from the defendant’s account absent a showing of undue burden.

ii. Appointed Neutral Third Parties

Some courts have appointed neutral parties of the court, sometimes called special masters, to review content for relevance; in doing so, a court is essentially outsourcing *in camera* review for efficiency. Akin to *in camera* review, this approach protects privacy concerns, but unlike *in camera* review, a court’s burden is either substantially reduced or is completely delegated to a special master. One benefit of such a delegation...
is that the special master usually performs in camera review in a timelier fashion.\textsuperscript{81} In federal courts, all parties to the litigation usually share the costs for use of a special master.\textsuperscript{82} In state courts, however, there may be some degree of variation; for instance, in New York, “the fees to be paid those special masters should be paid by the party seeking such discovery in a tort case, but which may be shared by the parties in a commercial or matrimonial matter.”\textsuperscript{83}

The appointment of a special master not only addresses privacy concerns, but also prevents and investigates credibility issues.\textsuperscript{84} For instance, in \textit{E.E.O.C. v. Original Honeybaked Ham Co.},\textsuperscript{85} the Court—though acknowledging that plaintiff-employees’ Facebook accounts may contain relevant information to the sexual harassment claims—was unconvinced that “all of [defendant’s] alleged areas of relevant information” were actually relevant.\textsuperscript{86} As such, the court appointed a forensic expert as a special master.\textsuperscript{87}

\textsuperscript{81} Fulcrum Inquiry, Special Masters and Court-Appointed Experts Save Electronic Discovery Costs, HG.ORG LEGAL RESOURCES, http://www.hg.org/article.aspid-5233 (last visited Sept. 16, 2016) [hereinafter Fulcrum Inquiry].

A special master can perform more timely in camera review of documents, since the trial judge likely has a heavy case load that makes such timely consideration difficult. Similarly, some cases require a comparison of data contained in plaintiff and defendant records (for example, customer lists). Typically, neither party wishes the other to see what is contained in their records. A neutral party can perform the comparison of electronic records quickly and inexpensively, and produce more narrow but still acceptable discovery based on the limited group of matched records.

\textsuperscript{82} See Honeybaked Ham Co., 2012 WL 5430974, at *2-3 (ordering parties to share costs associated with appointing special master). The court considered letting the requesting party, the defendant in this case, bear the burden, but concluded that doing so might be inconsistent with the Federal Rules of Civil Procedure. \textit{Id.}

\textsuperscript{83} See Fawcett, 960 N.Y.S.2d at 598 (explaining standards for production of electronic discovery and in camera review).

\textsuperscript{84} See Honeybaked Ham Co., 2012 WL 5430974, at *3 (expressing concern that defendants’ requests were not within scope of relevancy requisites).

\textsuperscript{85} \textit{Id.} at *2 (establishing need for special process to collect “discoverable information”).

\textsuperscript{86} \textit{Id.} at *2-3.

\textsuperscript{87} \textit{Id.} at *2 (appointing a special master). The Court also acknowledged having privacy concerns. \textit{Id.}
Finally, when a court appoints a special master, it may require a collaborative effort between the court, the litigants, and the special master.\textsuperscript{88} In \textit{Honeybaked Ham Co.}, although the court appointed a third party, the review efforts were collaborative.\textsuperscript{89} The court required the plaintiff to provide the special master with the login information for the Facebook accounts and required all parties in the litigation to assist with the special master’s review.\textsuperscript{90} The court then set out to review the information the special master deemed to be relevant via \textit{in camera} inspection to ensure legal relevance prior to production to the defendant.\textsuperscript{91}

IV. METHODS OF REDUCING THE BURDEN OF REVIEW


A party can reduce the burden of review by using the Fed. R. Civ. P. applicable to discovery or even the Fed. R. Evid., where applicable.\textsuperscript{92} This section will examine the use of different rules.\textsuperscript{93}

i. Fed. R. Civ. P. 26(b)(2)(C)

First, a party can use Fed. R. Civ. P. 26(b)(2)(C), which provides that “the court must limit the frequency or extent of discovery” when the discovery is “unreasonably cumulative or duplicative,” or can be retrieved...
in a “more convenient, less burdensome, or less expensive” manner. As such, a party can move a court to limit discovery by pointing to a less expensive alternative. One way courts address the issue of unreasonably cumulative discovery of social media content is by preventing a requesting party from making overly broad requests.


In courts that place the burden on the producing party/account holder, such party can reduce or eliminate costs through cost-shifting under Fed. R. Civ. P. 26(b)(2)(B) and Fed. R. Civ. P. 26(e), read cohesively. Under the rules, if a party shows undue burden in producing ESI, the requesting party may show “good cause,” and after a showing of good cause, a court, in its discretion, may allocate the expenses to the requesting party. A producing party can only use this method if he or she meets the threshold showing of “undue burden.” Though courts make clear that undue burden does not require inaccessibility of the ESI, circumstances that courts constitute as “undue burden” may vary; in addition, the Fed. R. Civ. P. do

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95 See id. (limiting electronic discovery where moving party establishes it “can be obtained from some other source that is more convenient, less burdensome, or less expensive”).
96 See cases cited supra note 37 and accompanying text (explaining threshold for relevance and courts’ disapproval of overbroad requests).
97 See FED. R. CIV. P. 26(b)(2)(B) (“A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.”); see also FED. R. CIV. P. 26(c) (granting courts discretion to allocate discovery costs).
98 See, e.g., FED. R. CIV. P. 26(b)(2)(B) (explaining parties may compel protective order for limiting discovery or allocation of costs); FED. R. CIV. P. 26(c) (granting courts discretion to “allocate expenses”); Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 674 F.3d 158, 170-71 (3rd Cir. 2012) (citing Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978)) (“[T]here is a ‘presumption . . . that the responding party must bear the expense of complying with discovery requests.’ A responding party, however, ‘may invoke the district court’s discretion under Rule 26(c) to grant orders protecting him from ‘undue burden or expense’ in [complying with discovery requests], including orders conditioning discovery on the requesting party’s payment of the costs of discovery.’”).
99 FED. R. CIV. P. 26(b)(2)(B) (“On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.”).
not define “good cause.” As a result, it is difficult for a producing party to obtain relief because: (1) meeting the “undue burden” threshold is generally unpredictable, and (2) it is not clear when production of ESI based on “good cause” is appropriate.101

iii. Fed. R. Civ. P. 54(d)

Parties may also utilize Fed. R. Civ. P. 54(d).102 For example, “[p]ursuant to [Fed. R. Civ. P.] 54(d), costs (other than attorney’s fees) should be awarded to a prevailing party unless a statute, rule, or court order provides otherwise.”103 The rule “creates a presumption in favor of awarding costs to prevailing parties, and it is incumbent upon the losing party to demonstrate why the costs should not be awarded.”104 By that token, a winning party can assert that a court should include costs associated with e-discovery of social media content in the award.105

iv. Fed. R. Evid. 502(d) Orders and The Bucketing Approach

Finally, where the goal of social media content review by the producing party is to identify privileged information in order to avoid its production (“privilege review”), the party can use Fed. R. Evid. 502(d)

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100 See, e.g., Adair v. EQT Prod. Co., No. 1:10cv00037, 2012 U.S. Dist. LEXIS 75132, at *12 (W.D. Va. May 31, 2012) (“Rule 26(b)(2)(C) gives the court the ability to ‘limit the frequency or extent of discovery’ - regardless of accessibility - whenever ‘the burden or expense of the proposed discovery outweighs its likely benefit.’”; Adkins v. EQT Prod. Co., No. 1:10cv00041, 2012 U.S. Dist. LEXIS 75133, at *11 (W.D. Va. May 31, 2012) (same); Hoelting, supra note 3, at 1117-18 (“The failure of the Federal Rules to define ‘good cause’ makes it difficult for courts to determine when production of ESI is inappropriate . . . . Courts have not employed a consistent approach of determining when cost-shifting is appropriate. Thus, even though controlling e-discovery is largely dependent on the judge’s discretion, very few courts actually set production limits or shift costs.”).

101 See Hoelting, supra note 3, at 1117 (“The rules’ purposes have not been fulfilled and producing parties have not received adequate financial relief for several reasons.”).

102 Fed. R. Civ. P. 54(d)(2)(D) (“By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney’s fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.”).


104 Id. (discussing presumptive loser bears cost rule).

105 See id. at *1-2 (explaining once cost is not attorney’s fees, it is covered by 54(d)).
orders and “the bucketing approach” to help reduce the burden.\textsuperscript{106} Fed. R. Evid. 502(d) orders can prevent waiving privileges in any circumstance, even if a litigant purposefully produces the privileged documents.\textsuperscript{107} In addition, “the bucketing approach allows parties to group together similar kinds of potentially privileged documents, describe them to opposing parties, and remove them from review, without having to log each item separately on a privilege log, which can be a costly process.”\textsuperscript{108} In addition to these tools, litigants should keep abreast the costs the burden-shifting method, previously mentioned, uses in conjunction with these Fed. R. Evid. tools.\textsuperscript{109}

B. Predictive Coding: Using Technology to Reduce the Burden of Review

Predictive coding, a computer-assisted review method, is an inventive tool that the party bearing the burden of review may use to reduce costs associated with document-by-document review.\textsuperscript{110} Courts and litigants commonly refer to predictive coding as computer-assisted review or technology assisted review; the latter is “the preferred term of art.”\textsuperscript{111} “Broadly speaking, predictive coding refers to the use of a software program to identify documents that are relevant to a particular case or issue. [It] involves a machine learning process and a combination of different algorithmic tools.”\textsuperscript{112} In predictive coding, attorneys use a small set of documents, called a “seed set,” to “train” the machine to recognize what


\textsuperscript{107} See id. (explaining that a Fed. R. Evid. 502(d) order “protects parties from the waiver of privilege[s]” because it can “remove the ‘reasonableness’ determination that is required”).

\textsuperscript{108} Id. (analyzing \textit{Adair} and \textit{Adkins} cases where bucketing approach allowed parties to keep potentially privileged emails).


\textsuperscript{111} See id. (noting e-discovery community still uses terms predictive coding and computer assisted review, but not often).

documents are relevant or privileged in a particular case. An attorney thereafter reviews the program’s coding decisions for accuracy while rejecting or accepting each decision—an iterative round process. Based on the feedback, the software then recodes to improve its accuracy. The software is trained until it agrees with an experienced attorney’s decisions, and then the software applies its coding to all documents in the selected ESI pool. But, there does not have to be 100% agreement.

Although predictive coding or technology assisted review is a sophisticated review method, courts hold it to the same standard as other search methodologies, such as keyword searches and manual reviews. Magistrate Judge Andrew Peck of the Southern District of New York, in Da Silva Moore v. Publicis Groupe was the first judge to “recognize that computer-assisted review is an acceptable way to search for relevant ESI in appropriate cases.” In that case, the document set that the litigants agreed to review with predictive coding was mainly a set of e-mails. Nonetheless, the use of predictive coding can assist in discovery of other ESI, including social media content.

Since Judge Peck’s decision in Da Silva Moore, courts have been accepting of the use of predictive coding, and the case law is expanding.

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113 See Da Silva Moore v. Publicis Groupe, 287 F.R.D. 182, 189 (S.D.N.Y. 2012), adopted sub nom. Moore v. Publicis Groupe SA, No. 11 CIV. 1279(ALC)(JPH), 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012) (rejecting litigant’s proposition that predictive coding is “unreliable.”); see also, Chorvat & Pelanek, supra note 73, at 253 (“Unlike traditional document review, predictive coding involves attorneys coding a small set of documents, which the computer uses to code other documents, until the system’s predictions and reviewers’ coding are sufficiently aligned.”); Hampton, supra note 112, at 30-31 (describing when predictive coding is useful in litigation).

114 See Hampton, supra note 112, at 29.

115 See id. (explaining purpose of iterative process).

116 See id. (expounding on “training” process through iteration).

117 See Da Silva Moore, 287 F.R.D. at 186 (exhibiting parties agreed to “95% confidence level”).

118 See Rio Tinto PLC v. Vale S.A., 306 F.R.D. 125, 129 (S.D.N.Y. 2015) (“[I]t is inappropriate to hold TAR to a higher standard than keywords or manual review. Doing so discourages parties from using TAR for fear of spending more in motion practice than the savings from using TAR for review.”).


120 Id. at 183 (mentioning use of predictive coding may not be appropriate sometimes because of this review objective).

121 See id. at 187 (“The parties agreed on certain ESI sources . . .”).

122 See id. at 194 (speaking of ESI in general rather than singling out e-mails or other ESI sources).

123 Rio Tinto, 306 F.R.D. at 127 (“In the three years since Da Silva Moore, the case law has developed to the point that it is now black letter law that where the producing party wants to utilize TAR for document review, courts will permit it.”). See, e.g., Fed. Hous. Fin. Agency v. HSBC N. Am. Holdings Inc., No. 11 CIV. 6189 DLC, 2014 WL 584300, at *3 (S.D.N.Y. Feb. 14, 2014)
One issue that has surfaced with its use is whether transparency and cooperation, such as “giving . . . full access to the seed set’s responsive and non-responsive documents (except privileged)” is required where parties do not agree to transparency. Because whether the rules of discovery require transparency of seed sets is unclear, some courts may require transparency and cooperation. The In re Biomet court, however, the Court opined that allowing such transparency is beyond the scope of discoverable material in Fed. R. Civ. P. 26(2)(C), and a court has no authority to expand that scope and compel full access to an opposing litigant’s entire seed set. Mirroring In re Biomet, Judge Peck, while revisiting the Da Silva Moore opinion in Rio Tinto, held that although cooperation and transparency is preferred, it is up to the responding party to decide.


Compare, e.g., Bridgestone Americas, 2014 WL 4923014, at *1 (requiring “[full openness and transparency” because it approved predictive coding after discovery commenced), and In re Actos (Pioglitazone) Products Liab. Litig., No. 6:11-MD-2299, 2012 WL 7861249, at *5 (W.D. La. July 27, 2012) (stating litigants “may meet and confer” to discuss seed set if seeding takes place), with In re Biomet, 2013 WL 6405156, at *2 (requiring litigants to share set if beyond scope of Fed. Civ. P.). See Rio Tinto, 306 F.R.D. at 128 (“Where the parties do not agree to transparency, the decisions are split and the debate in the discovery literature is robust.”).

See id. at 127 (revisiting predictive coding to set standards).

[W]hile [the court] generally believe[s] in cooperation, requesting parties can insure that training and review was done appropriately by other means, such as statistical estimation of recall at the conclusion of the review as well as by whether there are gaps in the production, and quality control review of samples from the documents categorized as non-responsive.

Id. The court also reiterates that in In re Biomet, Judge Miller ruled that he could not require parties to share seed sets because there was no authority allowing him to do so. Id. at 128; see also cases cited supra notes 124-127 and accompanying text (articulating Judge Miller’s In re Biomet opinion).
Finally, with predictive coding, litigants should bear in mind that this cost reduction approach is usually best suited for instances where data is overwhelming to review. As Judge Peck concludes in *Da Silva Moore*, “[c]omputer-assisted review is an available tool and should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review.” Litigants should also note, however, that appropriate cases for predictive coding are not restricted to “large-data-volume cases.” The operative word is “appropriate.” Therefore, litigants and judges should make determinations as to its use under the circumstances.

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130 *See Chorvat & Pelanek, supra note 73, at 254 (noting Judge Peck’s reasoning that predictive coding is neither mandated nor appropriate in all cases).*


132 *See id. (“[The Opinion] does not mean computer-assisted review must be used in all cases, or that the exact ESI protocol approved here will be appropriate in all future cases that utilize computer-assisted review.”).*


> There simply is no review tool that guarantees perfection . . . [T]here are risks inherent in any method of reviewing electronic documents. Manual review with keyword searches is costly, though appropriate in certain situations . . . Such review is prone to human error and marred with inconsistencies from the various attorneys’ determination of whether a document is responsive. Judge Peck concluded that under the circumstances of this particular case, the use of the predictive coding software as specified in the ESI protocol is more appropriate than keyword searching. The Court does not find a basis to hold that his conclusion is clearly erroneous or contrary to law. Thus, Judge Peck’s orders are adopted and Plaintiffs’ objections are denied.*

*Id.*


> Parties in litigation are required to be diligent and to act in good faith in producing documents in discovery. The production of documents in litigation such as this is a herculean undertaking, requiring an army of personnel and the production of an extraordinary volume of documents. Clients pay counsel vast sums of money in the course of this undertaking, both to produce documents and to review documents received from others. Despite the commitment of these resources, no one could or should expect perfection from this process. All that can be legitimately expected is a good faith, diligent commitment to produce all responsive documents uncovered when following the protocols to which the parties have agreed, or which a court has ordered.*
V. NOT “SIMPLY OLD WINE IN A NEW BOTTLE”

Courts should merge the varying burden of review methods into one consistent rule that recognizes the underlying rationales behind all the approaches, while observing the policy rationale behind the Fed. R. Civ. P., such as the efficiency and low cost policies.\textsuperscript{135} To best achieve that goal, courts should use a burden-shifting framework that encompasses a balancing test (“burden-shifting balancing test”).\textsuperscript{136} Initially, courts should conduct minimal \textit{in camera} review to screen a requesting party’s discovery request for relevance.\textsuperscript{137} Then, if relevance appears satisfied, the producing party should bear the burden of reviewing the content thoroughly unless: (1) the requesting party can show that the producing party’s credibility is questionable or (2) the producing party contests responsiveness/discoverability or claims privilege as to certain items after reviewing the content thoroughly.\textsuperscript{138} If the requesting party successfully puts credibility at issue, then the court should either: (1) conduct a thorough \textit{in camera} review, (2) allow the requesting party full access to the account, (3) appoint a neutral party, also known as a “special master,” or (4) a combination of two or more of these options, based on the circumstances.\textsuperscript{139} A non-exhaustive list of factors to consider in deciding which of these methods to use include: (1) the requesting party’s conduct and character, (2) the producing party’s conduct and character, (3) the content requested and

\textsuperscript{135} See supra Part III (outlining varying approaches and explaining their rationales); see also supra Part II (noting Fed. R. Civ. P. policies).

\textsuperscript{136} See supra Part II (showing burden of review question needs consistent rule).


\textsuperscript{138} See sources cited supra note 61 (stating \textit{in camera} review may be modified to be necessary where plaintiff contests discoverability); see also Bass v. Miss Porter’s School, No. 3:08cv1807(JBA), 2009 WL 3724968, at *1 (D. Conn. Oct. 27, 2009) (noting policy for account holders bearing burden of review). Note also that where counsel fails to review in good faith, there should be a remedy. See \textit{In re Milo’s Kitchen Dog Treats Consol. Cases}, 307 F.R.D 177, 178 (W.D. Pa. 2015).

the relative risks of rummaging, and (4) stipulations between the parties.\textsuperscript{140} Moreover, if a producing party contests discoverability or asserts privilege, then the court should conduct thorough \textit{in camera} review.\textsuperscript{141} Finally, if an account is unavailable or inaccessible to a producing party, then the third party social media host can be subpoenaed, and thereafter, the same test for review put forth should be followed.\textsuperscript{142} The rationales for the proposed rule follows.\textsuperscript{143}

\textbf{A. Tier 1(a): Minimal In Camera Review}

Many courts and scholars believe social media data should be treated the same way as other types of data, which means they believe that the burden of review should be on the producing party.\textsuperscript{144} Treating social media content just like other content and applying the traditional approach, however, does not consider the uniqueness of social media content; this uniqueness is the reason some courts used alternate approaches when dealing with social media content.\textsuperscript{145}

Although benefits, such as impartiality in reviewing documents for discoverability come with the \textit{in camera} review approach, it is not in the interest of the courts to conduct a full or thorough \textit{in camera} review at all

\textsuperscript{140} See cases cited supra notes 53-59 (producing party’s conduct tainted his credibility and court allowed requesting party to review account); see also cases cited supra notes 52-53 (stating one relevant entry on producing party’s account does not justify requesting party gaining access); cases cited supra notes 72-73 and accompanying text (explaining social host may intervene if producing party has no access to account, but need for social host unlikely.).

\textsuperscript{141} See Milo’s Kitchen, 307 F.R.D at 183.

\textsuperscript{142} See supra note 73 (explaining that courts are only comfortable with bringing third party social media hosts into the picture where a social media account is unavailable.).

\textsuperscript{143} See infra Part V, Sections A-F (expounding upon reasoning for proposed rules).

\textsuperscript{144} See Brogan v. Rosen, Jenkins & Greenwalk, LLP, 27 Pa. D. & C. 5th 533 (2013) (“[T]he resolution of social media discovery disputes pursuant to existing Rules of Procedure is simply new wine in an old bottle.”); see also McPeak, supra note 14, at 945 (“The better solution is to treat social media data the same as other forms of evidence.”).

\textsuperscript{145} See infra Part V, Section A (explaining why starting with minimal in camera review is ideal); see also supra Part III (outlining different methods of review).
times. Such an across-the-board rule would require courts to invest a considerable amount of time and money into social media discovery, which is not in the interest of judicial efficiency. To balance the goals of impartial review and efficiency, a limited minimal in camera review would be best after the requisite showing of relevance by the requesting party.

Minimal in camera review is allowed because courts have broad discretion in deciding how to administer an in camera review. As such, courts have the authority to conduct a minimal review as a pre-screening tactic to ensure relevance, reduce the effect of potentially biased review, and help to prevent blatant dishonest review.

When a non-neutral party conducts review, biased review is likely because “relevance of the content . . . is . . . in the eye of the beholder.” For example, if the initial reviewer is the producing party, he or she may view certain data as undiscoverable even though a neutral party may believe otherwise. In the alternative, if a requesting party is the reviewer, he or she may see certain data as discoverable while a neutral party may have the opposite opinion. These variations in review cause disputes over content’s relevancy. If courts perform an initial minimal in camera review, courts can prevent or reduce disputes over what content is relevant between the parties. The court is a neutral party that should have no motive for attempting to deem content responsive without a basis. Therefore, a court would not need to step in to settle a dispute on the discoverability of a particular piece of content. Moreover, this approach has the potential to

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146 See Fawcett v. Altieri, 960 N.Y.S.2d 592, 597-98 (Sup. Ct. 2013) (“[A]sking courts to review hundreds of transmissions ‘in camera’ should not be the all purpose solution to protect the rights of litigants.”); see also Fulcrum Inquiry, supra note 81 (“A special master can perform more timely in camera review of documents, since the trial judge likely has a heavy case load that makes such timely consideration difficult.”).

147 See Fawcett, 960 N.Y.S.2d at 597-98 (mentioning in camera review should not be an “all purpose solution”).

148 See id. (warning of dangers of overusing in camera review). A minimal review would be less burdensome than the burden Fawcett highlights. See id.


150 See id. The broad discretion courts have would encompass this type of minimal review. Id.

151 See Bass v. Miss Porter’s School, No. 3:08cv1807 (JBA), 2009 WL 3724968, at *1-*2 (D. Conn. Oct. 27, 2009) (highlighting perception of relevance may be influenced by reviewing party).

152 Id. (discussing sometimes these discrepancies are simply honest, different perceptions.).

153 Id. (varying perceptions result in disagreement).

154 See id. (varying perceptions are due to bias, whether conscious or unconscious). Hence, a neutral party, such as the court, is the most reliable perception. See id.

155 See In re Milo’s Kitchen Dog Treats Consol. Cases, 307 F.R.D. 177, 183 (W.D. Pa. 2015) (realizing courts do not have to rely on judgment of others with in camera review).

156 See id.
reduce dishonest review and spoliation because, unlike the traditional approach, the producing party would be on notice that the court has prior knowledge of the account.\footnote{See sources cited supra note 35 (noting obligation called “duty to preserve”). Lack of following preservation duties is called spoliation. Id.}

Lastly, starting with minimal review would achieve greater judicial involvement that the Fed. R. Civ. P. aim for, while keeping the burden on the court low.\footnote{See source cited supra note 35 (noting Congress’s consistent push for greater judicial involvement in discovery process).} “Minimal” is the keyword because in camera review in the first instance would not place an overly heavy burden on courts.\footnote{See generally Nieves v. 30 Ellwood Realty LLC, 966 N.Y.S.2d 808, 809 (App. Div. Apr. 11, 2013) (noting court’s broad discretion in limiting in camera review).} The courts will not be reviewing contents entirely; rather, courts will review contents sufficiently enough to see whether portions of requests are relevant.\footnote{See id. at 808-09 (limiting in camera review to contested discoverable items).} As such, most situations, like “status updates on Facebook within the past month” or “pictures on Instagram over the past two months,” would not warrant minimal review of an entire account, such as where a requesting party makes a targeted request.\footnote{See FED. R. CIV. P. 26(b)(1) (prescribing requests must be relevant and targeted); see also FED. R. CIV. P. 34(b)(1)(A) (noting discovery requests must be made with particularity). Because of the statutory law in place, a requesting party’s broad request, which disregards the particularity relevance rule, would peeve a court. See Mailhoit v. Home Depot U.S.A., Inc., 285 F.R.D. 566, 572 (C.D. Cal. 2012).} In addition, because requesting parties know that the court will perform an initial check, they are more likely to craft their requests in a targeted manner so as not to upset the court by wasting time and resources.\footnote{See McPeak, supra note 14, at 945 (stating review of entire accounts may “be embarrassing or unfair for the account holder”). Other scholars may also believe that minimal in camera review

Some scholars may argue that minimal in camera review increases the potential for courts to come across “embarrassing” content from the producing party, but this is a trivial risk at the discovery stage.\footnote{See McPeak, supra note 14, at 945 (stating review of entire accounts may “be embarrassing or unfair for the account holder”). Other scholars may also believe that minimal in camera review

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\end{itemize}
court is more likely to direct the producing party to give the court notice or attempt to exclude the content at trial under Fed. R. Evid. 611, if anything particularly embarrassing may surface in a minimal review.\textsuperscript{164}

B. Tier 1(b): Producing Party Bears Burden to Review Courts’ Selections Thoroughly

Allocating the burden of review to the producing party only after a requisite minimal review is logical.\(^{165}\) One benefit of adding a requisite minimal review for a producing party, is that he or she would not have to thoroughly search through every single item of entire accounts—saving associated costs.\(^{166}\) The rationales for a producing party to bear the burden are that: (1) the producing party is most knowledgeable of the account and can therefore be very effective at thorough review of the portions the court has selected; and (2) allocating the burden to the producing party maintains privacy.\(^{167}\)

Review of the court’s selection by the producing party is a good safety net in case a court overlooks any relevant areas during minimal in camera review, because the producing party would still be under the obligation to review the selected content in good faith.\(^{168}\) Therefore, a remedy is still available to a requesting party if a producing party attempts to withhold responsive information by, for example, using the excuse that the court did not say that a certain part is responsive.\(^{169}\) To illustrate, if the court says a picture album titled “Vacation in the Virgin Islands” is responsive and directs the producing party to review it thoroughly, and there happens to be a subfolder or multiple subfolders within that album, then the producing party should thoroughly review all subfolders.

This prong would complete the reviewing process unless the requesting party puts credibility at issue, or the producing party contests responsiveness or claims privilege.\(^{170}\) If the court disagrees that credibility is at issue, the burden would stay on the producing party, and the requesting party can get relief if the producing party does not review and produce in good faith.\(^{171}\)

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\(^{165}\) See supra Part V, Section A.

\(^{166}\) See Hoelting, supra note 3, at 1112 and accompanying text (highlighting that thousands of pages involved in social media content makes discovery very costly).

\(^{167}\) See supra Part III, Section A (discussing traditional approach to burden of review).

\(^{168}\) See cases cited supra note 48 and accompanying text (producing party should conduct broad discovery to honor obligation of producing in good faith).


\(^{170}\) See infra Parts C and D.

\(^{171}\) See case cited supra note 169 (explaining requesting party has available remedies if producing party does not produce in good faith).
C. Tier 2 (a): Credibility Successfully at Issue

Disqualifying a producing party from reviewing social media content when his or her credibility is questionable maintains the integrity of the discovery process and is in accordance with the policies of the Fed. R. Civ. P.172 Where a requesting party successfully calls into question the trustworthiness of a producing party, a court should use the balancing factors previously stated and outlined below to decide which alternative method of review is best because this prong is fact-sensitive.173 The factors, discussed in detail below, are a compilation of common considerations courts use in cases when varying fact patterns surface in judging credibility.174

i. The Requesting Party’s Conduct and Character

This factor should focus on whether the requesting party’s conduct shows an attempt to engage in fishing expeditions; the factor should go hand in hand with the third factor—“the content requested and relative risks of rummaging.”175 As stated, courts are wary of fishing expeditions and, in addition, the Fed. R. Civ. P. do not allow such expeditions.176 Therefore, examining the requesting party’s conduct and character factor calls for a court to evaluate whether the requesting party made reasonable production requests.177 In other words, a court should ask whether all of the “alleged areas of relevant information” appear to have some relation to the claims at issue.178 A court should further inquire into whether a requesting party’s goal is to gain access to the full account in an attempt to go fishing; an unreasonable discovery requests that clearly have no relevance to claims at

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172 See Fed. R. Civ. P. 37(c) (outlining sanctions for dishonesty); see also Rozell, 2006 WL 163143, at *4 (mentioning that broad scope of discovery can help prevent sanction for dishonest practice).
173 See cases cited supra notes 52-53 (summarizing when requesting parties may and may not gain access to producing parties’ accounts); see also sources cited supra note 72 and accompanying text (discussing social host may intervene if producing parties have no access to requested account).
174 See cases cited supra notes 52-53 (considering access to private portions of social media allows requesting party access to irrelevant information).
175 See infra Part V, Section C(3) (detailing consent requested); see also cases cited supra notes 52-53 (noting one relevant piece of information means access is given).
176 See supra notes 39, 60 and accompanying text (explaining that courts do not permit parties to engage in overbroad requests or fishing expeditions).
178 See Honeybaked Ham Co., 2012 WL 5430974, at *3 (preventing fishing expedition by appointing special master to examine “[d]efendant’s alleged areas of relevant information”).
issue is one indication of such a goal.\textsuperscript{179} Any conduct of this sort would weigh in favor of either a thorough \textit{in camera} review or the appointment of a special master, because an attempt to fish shows that a requesting party would abuse full access to a producing party’s account.\textsuperscript{180} Whether a court chooses between the thorough \textit{in camera} review or a special master would depend on factors, such as the court’s docket, the amount of content, and any stipulations between the parties.\textsuperscript{181}

\hspace{1cm} ii. The Producing Party’s Conduct and Character

In evaluating the requesting party’s conduct and character, a court should look to see whether the level of dishonesty was so blatant and intentional, such as the plaintiff lying about account accessibility or overproducing documents on purpose, that the court could disregard any privacy issues.\textsuperscript{182} The conduct in \textit{Crowe v. Marquette Transp. Co. Gulf-Inland}\textsuperscript{183} is significant because federal courts generally do not give requesting party’s full access to an account because of privacy and

\begin{footnotesize}
\begin{enumerate}
\item See cases cited \textit{supra} notes 63-65 and accompanying text (explaining \textit{in camera} review maintains privacy and would prevent fishing); \textit{see also} cases cited \textit{supra} notes 84-86 and accompanying text (demonstrating special master—like a court—is a mutual party, and rationales for having special master are essentially the same as \textit{in camera} review).
\item See \textit{FED. R. CIV. P. 26(f)(2)} (showing Congress encourages agreements by parties in discovery conferences). \textit{See also} Fawcett v. Altieri, 960 N.Y.S.2d 592, 597-98 (Sup. Ct. 2013).
\end{enumerate}

[A]sking courts to review hundreds of transmissions “in camera” should not be the all-purpose solution to protect the rights of litigants. Courts do not have the time or resources to be the researchers for advocates seeking some tidbit of information that \textit{may} be relevant in a tort claim. While several courts have frequently assigned the “in camera” review to “special masters,” the fees to be paid those special masters should be paid by the party seeking such discovery in a tort case, but which may be shared by the parties in a commercial or matrimonial matter.

\textit{Id.}; \textit{see also} Fulcrum Inquiry, \textit{supra} note 81 (“A special master can perform more timely in camera review of documents, since the trial judge likely has a heavy case load that makes such timely consideration difficult.”).

\item \textit{id.}
\end{footnotesize}
rummaging reasons. When the requesting party successfully puts the producing party’s credibility at issue, Crowe is a good measure for the type of conduct that would warrant giving a requesting party full access to an account because such types of cases are rare.

If a court finds the level of dishonesty to be, in fact, intentional and blatant, then this factor would weigh in favor of ordering the producing party to provide the requesting party with the login information for the account. The stance that courts should take such an approach in such types of cases is based on the policy that courts and legislatures expect attorneys to act honestly in order for the discovery process to be fair and honest. Therefore, it would be fair for a court to deem a blatantly dishonest plaintiff who lies intentionally, or does something equally gross, to have practically forfeited his or her right of privacy, similar to how a criminal defendant has no expectation of privacy under the SCA. A court should not have to use its resources and time to thoroughly conduct in camera review to protect an intentionally dishonest producing party’s privacy. Any privileged information that may be revealed by allowing full access to a requesting party can be remedied by Fed. R. Evid. 502(d) to prevent waiver of any privileges. Furthermore, as a measure to prevent fishing expeditions, a court can warn a requesting party that the purpose of gaining access to the account is to aid discovery for the claims at issue, and that the duties to refrain from fishing expeditions still apply.

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184 See cases cited supra note 60 and accompanying text (noting federal courts’ disagreement with allowing requesting party’s full access to producing party’s account).
185 See Crowe, 2015 WL 254633, at *3 (expressing disappointment in producing party’s behavior).
186 Id. at *8 (ordering plaintiff-producing party to give full access to account).
188 See Harris II, 949 N.Y.S.2d 590, 596 (Crim. Ct. 2012) (articulating criminal defendant has no protection of privacy under SCA); see also supra note 71 and accompanying text (explaining case).
189 See Fawcett v. Altieri, 960 N.Y.S.2d 592, 597-98 (Sup. Ct. 2013) (elucidating court must use considerable time and resources to conduct thorough in camera review). Because of the time and resources a court must use in conducting a complete, thorough in camera review, Fawcett states that in camera should not be the go-to safety net to resolve all disputes. Id.
190 Borden, supra note 106 (explaining use of Fed. R. Evid. 502(d) to protect revealed privileges).
191 See Rosenthal, supra note 51, at 252 (requesting party must meet requisite showing of relevance before receiving username and password).
iii. The Content Requested and Relative Risks of Rummaging

In looking at the content and relative risk of rummaging factor, a court should focus on the amount of content requested, such as whether it is an entire account, and look closely at the first factor: “the requesting party’s conduct and character.” To recap, there is a high risk of fishing expeditions and rummaging by the requesting party if the court decides to allocate the burden to the requesting party. Hence, if a requesting party requests an entire account, unless the court finds that the producing party’s conduct was intentional and blatant under the “producing party’s conduct and character factor” above, the content requested factor should weigh against allowing a requesting party full access to the producing party’s account, and therefore, in favor of in camera review or the appointment of a special master.

A court should also be especially careful when the requesting party requests a private portion of an account, such as “direct messages” on Instagram or instant messages on Facebook. Although private areas may have relevant content, federal courts are reluctant to allow a requesting party access here because private areas will also contain irrelevant information, or even privileged information that may be contained in personal instant messages. As such, the risk of rummaging, yet again, surfaces. Therefore, if the content requested is located in such an area, this factor

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192 See supra Part V, Section C(1) (describing the “conduct and character” factor); see sources cited supra notes 60-62 (stating federal courts are reluctant to giving requesting party’s full access to accounts).


195 Howell, 2012 WL 5265170, at *1 (revealing privacy is still concern despite social media data is generally public).

196 See id. at *1 (“Here defendants’ discovery request is overbroad. Howell’s username and password would gain defendants access to all the information in the private sections of her social media accounts-relevant and irrelevant alike.”).

197 See Palma v. Metro PCS Wireless, Inc., 18 F. Supp. 3d 1346, 1347 (M.D. Fla. 2014) (holding request for all social media posts was overbroad and would result in rummaging); Howell, 2012 WL 5265170, at *1 (“The fact that the information defendants seek is in an electronic file as opposed to a file cabinet does not give them the right to rummage through the entire file. The same rules that govern the discovery of information in hard copy documents apply to electronic files.”).
should weigh in favor of in camera review or the appointment of a special master.\textsuperscript{198}

Another option that courts have is to conduct in camera review for private portions and allow the requesting party to review non-private portions to reduce the courts’ burden.\textsuperscript{199} However, rummaging is still likely to occur on public parts of the account, so this is a less reliable option.\textsuperscript{200} Though in camera review or a special master would be best to prevent fishing expeditions and privacy issues where a producing party’s credibility is at issue, admittedly, allocating the burden of review to the requesting party in such situations would likely force a requesting party to be mindful of the costs and time associated with their requests.\textsuperscript{201} As such, allocating the burden to a requesting party who makes overbroad requests, such as the password for an entire account, may help to prevent overbroad requests in the first place.\textsuperscript{202} Nonetheless, such an approach would be less effective than the in camera review or special master approach when considering the goals of preventing fishing expeditions and maintaining privacy.\textsuperscript{203}

\textsuperscript{198} See Palma, 18 F. Supp. 3d at 1347; Howell, 2012 WL 5265170, at *1


\textsuperscript{200} See Palma, 18 F. Supp. 3d at 1347 (explaining request for all social media posts was overbroad and would lead to rummaging).

\textsuperscript{201} See Hoelting, supra note 3, at 1119 (noting burden of review fight is driven by the high costs of reviewing social media).

\textsuperscript{202} See generally Fed. R. Civ. P. 26(b)(1) (explaining goal of Fed. R. Civ. P. is to have requesting parties make relevant requests). Rule 26(b)(1) provides, in pertinent part:

\textquote{Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.}

\textquote{Id.; see also Fed. R. Civ. P. 34(b)(1)(A) (“The request: . . . must describe with reasonable particularity each item or category of items to be inspected.”); Silva v. Dick’s Sporting Goods, Inc., No. 3:14cv580 (WWE)(WIG), 2015 WL 1275840, at *1 (D. Conn. Mar. 19, 2015) (“That the instant motion seeks an order to compel social media communications, rather than hard copy materials, does not take it out of the ambit of Rule 26’s relevancy requirements.”).}

\textsuperscript{203} See Howell, 2012 WL 5265170, at *1 (mentioning reluctance to allow parties to review private areas of social media accounts); supra Part V, Section C(1) (explaining goals to prevent fishing and protect privacy in relation to “content requested”).
iv. Stipulations between the Parties

The stipulation between the parties factor is simply to recognize the general principle that courts usually honor agreements between parties about discovery that are agreed upon at the discovery conference. In examining the stipulation between the parties factor, the courts should check to see if the parties have agreed on allocating the burden to a special master, and if so, how they have proposed to split the costs.

D. Tier 2(b): Contested Responsiveness or Privilege

As previously mentioned, courts are in the best position to review disputes because of their neutrality and expertise. Under this note’s proposed approach, a requesting party is likely to argue that because the court pre-screened the content in a minimal review, then a producing party’s claim of privilege becomes especially “suspect.” As such, if the minimal in camera review fails at mitigating potential disputes as to discoverability and a producing party contests to responsiveness or privilege, then a court should either deny the producing party’s claim or conduct a full, thorough in camera review of the contested area.

Note that a court should not allocate

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204 FED. R. CIV. P. 26(f)(2). The rule provides, in full:

(2) Conference Content; Parties’ Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

205 See id. (noting parties’ responsibilities in discussing agreements at discovery conference).

206 See cases cited supra notes 151-156 (explaining relevance is “in the eyes of the beholder” and court’s neutrality in settling discovery); see also In re Milo’s Kitchen Dog Treats Consol. Cases, 307 F.R.D. 177, 183 (W.D. Pa. 2015) (illustrating court acting as neutral party).

207 Milo’s Kitchen, 307 F.R.D at 183. In Milo’s Kitchen, the Court conducted in camera review when a requesting party contested a producing party’s redaction of alleged privileged information because it was “suspect.” Id.

208 See supra Part V, Section A (stating initial in camera review should prevent discoverability and privilege disputes); see also supra note 151 and accompanying text (explaining courts are neutral parties that can settle discovery issues).
the burden to a special master in these cases because special masters usually
do not have the skill or authority to resolve the issue.209

E. The Case of an Unavailable Account

In agreement with courts, a third party social media host should
never have to review content for a case to which it is not a litigant.210
Therefore, where a producing party does not have access to an account, a
party to the litigation should subpoena the host for the account’s content, and
then, the content would go through the same burden shifting balancing test
outlined above.211

F. Illustrating the Proposed Burden-Shifting Balancing Test Using
Honeybaked Ham Co.

Recall that in E.E.O.C. v. Original Honeybaked Ham Co.,212 the
court appointed a special master because it was concerned about privacy and
was not convinced about all “alleged areas of relevant information” the
defendant claimed, even though the defendant made a requisite showing of
relevance for some of the information.213 There were no credibility issues
regarding the producing party; rather, the court was skeptical about the
requesting party’s requests even after a showing of relevance as to some
content.214 As such, under the proposed burden-shifting balancing test, the
court would have likely conducted a minimal in camera review for its own
confidence, and then, if it was unsure about a particular portion, the court
could still direct the producing party to review that particular portion
thoroughly.215 In doing so, the court would be able to make sure that the
defendant is not fishing, and would be able to save costs for litigants.216

5430974, at *2 (D. Colo. Nov. 7, 2012) (noting special master appointed by court was a forensic
expert).
210 See Giacchetto v. Patchogae-Medford Union Free Sch. Dist., 293 F.R.D. 112, 117
(E.D.N.Y. 2013) (expressing reluctance to obligate third party social hosts to review social media
accounts for discovery).
211 See supra note 73 and accompanying text (explaining social host may need to participate
if producing party has access to account).
212 2012 WL 5430974, at *2.
213 See id. at *3 (expressing doubt as to defendant-requesting party’s discovery requests).
214 See id. at *2.
215 See supra Part V, Section A (stating courts can order producing party to review particular
areas thoroughly during in camera process).
216 See supra Part V, Section A (explaining this proposition).
Hiring a special master would be more costly and time consuming than the court performing a minimal in camera review, and then the producing party bearing the burden of thorough review of the court’s selected portion.\textsuperscript{217} Hence, under the proposed rule, in Honeybaked Ham Co., the burden would have ended up on the producing party and there would be no need for outsourcing.\textsuperscript{218} Recall that in Honeybaked Ham Co. the court hired a special master to examine whether all of the defendant’s requested areas were relevant.\textsuperscript{219} Under the proposed approach, applying a minimal in camera review, the court would have already pre-screened this question, and there would be no need for a special master.\textsuperscript{220}

As shown, using the proposed approach, the analysis does not have to become lengthy or complicated unless credibility becomes at issue or the producing party claims privilege.\textsuperscript{221} In most cases, therefore, a court will simply conduct a minimal review and the producing party will bear the burden.\textsuperscript{222} This result only slightly departs from the traditional approach of having the producing party bear the burden.\textsuperscript{223}

VI. IMPROVEMENTS TO BURDEN REDUCTION

As previously stated, there are tools within the Fed. R. Civ. P. that a producing party can use to reduce his or her burden of production.\textsuperscript{224} As such, there are only a few burden reduction points to add to the methods that are already in place or in use.\textsuperscript{225}

First, where a court must perform a thorough in camera review because credibility is at issue, the court can allocate the burden to a special master and have the producing party bear the cost burden as part of the

\begin{itemize}
  \item \textsuperscript{217} See Honeybaked Ham Co., 2012 WL 5430974, at *2 (stating all contributed to review even though a special master was appointed); see Fulcrum Inquiry, supra note 81 (arguing collaborative efforts between court, litigants, and special master may increase costs and reduce efficiency).
  \item \textsuperscript{218} See supra Part V, Sections A-B (deeming special masters unnecessary when no credibility or contests to discoverability or privilege exist).
  \item \textsuperscript{219} See Honeybaked Ham Co., 2012 WL 5430974, at *2-3.
  \item \textsuperscript{220} See Supra Part V, Sections A-B.
  \item \textsuperscript{221} See supra Part V, Section A (demonstrating how Honeybaked Ham Co. would result under proposed approach).
  \item \textsuperscript{222} See supra notes 215-216 and accompanying text (Under the proposed approach, without credibility issues as to a producing party, a court would have conducted minimal review placing the burden of any additional review on producing party.).
  \item \textsuperscript{223} See cases cited supra note 46 (showing that majority of courts place burden of review on producing party).
  \item \textsuperscript{224} See supra Part IV.
  \item \textsuperscript{225} See supra Part IV (listing and explaining burden-reducing methods).
\end{itemize}
producing party’s sanctions for his or her dishonesty. On the other hand, where a court must perform a thorough review because the producing party contests discoverability or privilege, the court may elect a special master and have the producing party bear the costs if the contest was obviously unwarranted. Second, whether collaborative effort between a special master, the litigants, and the court is efficient is debatable because the purpose of appointing a special master is to reduce costs and save the courts time; a collaborative effort would be counter-productive and inefficient.

Lastly, because courts and litigants are still shying away from predictive coding, Congress should amend the Fed. R. Civ. P. to reflect the effectiveness and acceptance of predictive coding, and should include a list of encouraged appropriate uses. The amendment should reflect the following draft or a similar version:

Predictive coding or technology-assisted review ("TAR") is an effective way to reduce the burden of review, especially in cases where an overwhelming amount of content is involved. The use of this technology is not required, but highly recommended. The technology is acceptable and in line with the policies of the Fed. R. Civ. P. that promote efficiency and cost reduction. Litigants should especially consider predictive coding in complex, large data volume cases.

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227 See id. (outlining limitations on ESI).
228 See Fulcrum Inquiry, supra note 81 (noting special master can perform review inexpensively and more timely than courts with filled dockets).
229 See Da Silva Moore v. Publicis Groupe, 287 F.R.D. 182, 183 (S.D.N.Y. 2012) (“Computer-assisted review is an acceptable way to search for relevant ESI [electronically stored information] in appropriate cases.”); see also Rio Tinto PLC v. Vale S.A., 306 F.R.D. 125 at 127 (S.D.N.Y. 2015) (“In the three years since Da Silva Moore, the case law has developed to the point that it is now black letter law that where the producing party wants to utilize TAR [technology assisted review] for document review, courts will permit it.”).
230 See Da Silva Moore, 287 F.R.D. at 189 (“Computer-assisted review is an acceptable way to search for relevant ESI in appropriate cases.”). In Da Silva Moore, the court also said, “[C]omputer-assisted review is an available tool and should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review.” Id. at 193. See Rio, 306 F.R.D. at 127; see also supra Part III (outlining Congress’s efforts to improve efficiency in discovery of ESI); supra Part V, Section B (describing predictive coding and its uses).
VII. CONCLUSION

The proposed burden-shifting test outlined in this note departs only slightly from tradition, as the plaintiff would still bear the burden in most cases. The test, however, takes into consideration other factors such as conduct, which the traditional approach fails to address adequately. Though minimal in camera review would take less time than a thorough review, adding the step of a minimal in camera review would still be time-consuming for courts. The impact of a minimal in camera review, however, would make the time spent worthwhile. In the end, the producing party will be the one with most of the burden—like the traditional approach—but the initial screening process via minimal in camera review would protect the court’s interest of not having to deal with many discoverability and privilege disputes, and would more greatly protect the integrity of the discovery process. “Relevance is in the eye of the beholder,” and a court’s eyes are the best pair to review social media content for relevance in the first instance, even if the court only takes a quick glance.

Rochella T. Davis

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