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SOCIAL MEDIA REVOLUTION

THE REVOLUTION CONTINUES:
The current social media landscape and how to get the fruits of your social media investigation into evidence at trial

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THE REVOLUTION CONTINUES

When was the last time you checked your Facebook status? How about your Twitter feed? Posted anything new to Instagram or YouTube? Social media is everywhere and it is increasingly an all-the-time, mobile experience. People of all ages, armed with a high quality camera in their pocket at all times, document everything from vacations to dinner entrees to a new dress. Not surprisingly, claims representatives and litigation attorneys now routinely conduct social media investigations in the hopes of locating information that will help close files and reduce claim costs.

Facebook remains the most popular social media site. Statistics show that its growth has slowed but the level of user engagement has actually increased. As shown on the chart below, Twitter, Instagram and LinkedIn saw significant increases over the past year in the proportion of online adults who now use their sites.

As important as it is to know which social media platforms are popular, those involved in litigation should understand the demographic data associated with the most popular social media sites. Facebook hits almost all demographic groups in huge numbers, but did you know that 23% of adults use Twitter, including over 35% in the 18-29 age group? That number jumps to over
40% for Instagram users!¹ Studies show users in the 30-49 age range use Twitter and Instagram in considerable numbers.

What about YouTube? It isn’t just a place to watch the latest skit from your favorite late night TV host or a video of a water skiing squirrel. More and more people, especially millennials, use YouTube regularly to share videos of recent adventures and experiences. The chart below shows that it isn’t just the younger generation that are using YouTube.

Moreover, according to the Pew Research Center, there are several key findings regarding current social media usage:

1. Multi-platform use is on the rise. Over 50% of adults use two or more social media sites, up from just over 40% in 2013.
2. For the first time, over half of adults 65 and over (56%) use Facebook.
3. Over 50% of young adults (age 18-29) use Instagram, and half of those users access the site daily.
4. 50% of internet users with college degrees use LinkedIn.
5. Almost 70% of Facebook users access the site daily.

It is therefore important to take into account your employee’s demographic information when conducting a social media investigation, and perhaps spend a little more time canvassing the sites they are more likely to be using.

¹ Pew Research Center’s Internet Project Combined Omnibus Survey, Sept. 11-21, 2014
GETTING YOUR SOCIAL MEDIA EVIDENCE BEFORE THE JUDGE

We all enjoy the thrill of finding that piece of social media evidence that is going to help us win the case. However, finding the evidence that helps your case is just the first step. There are three principal hurdles to getting any document or object (including social media information) into evidence:

1. **Relevance**

   Rule 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence.” The Federal Rules of Civil Procedure and its state counterparts permit discovery into “any nonprivileged matter that is relevant to any party’s claim or defense.” The evidence sought need not be admissible as long as it “appears reasonably calculated to lead to the discovery of admissible evidence.” Applying these principles, courts have permitted discovery of social media information where parties have established a basis for requesting the information and have demonstrated that their request is not a “fishing expedition.”

   Social media evidence may be relevant to nearly every type of legal dispute primarily because of the explosive growth in nature and use of social media platforms. Therefore, it is quite likely that your opposing party has uploaded content that “has a tendency to make the existence of” material facts in your case “more or less probable.” Still, a good lawyer should be prepared to articulate to a Court why he or she needs the opposing party’s entire social media profile. Demonstrating to the Court how evidence from your opponent's social media profile may pertain to the contested issues is the task, and it will vary with every case.

2. **Authenticity**

   An attorney seeking to introduce evidence from social networking sites must overcome the hurdle of authentication. Under Rule 901(a), "the requirement of authentication . . . is

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2 For an in depth discussion of authenticating social media evidence, see Joseph, Internet and Email Evidence (Part I), The Practical Lawyer (February 2012); Griffith, Understanding and Authenticating Evidence from Social
satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."3 Here are three steps that may be used to authenticate social media evidence found on the internet in workers’ compensation cases:

1. **Rule 901(b)(1)—Evidence from Someone with Personal Knowledge**

   The easiest step to authenticating social media evidence is simply to ask a witness – the purported author or someone else who was there when the item was created- if it is authentic. This can be done through discovery or stipulation of the parties.

2. **Rule 901(b)(3)—Use of an Expert or Comparison by the Fact Finder**

   If the owner is not willing to authenticate the evidence, computer forensic experts can be retained to authenticate the evidence. These professionals will be able to use metadata and other markers to trace the evidence back to the creator.

3. **Rule 901(b)(4)—Distinctive Circumstances or Characteristics**

   Lawyers should look at content they know is authentic and look for Internet addresses, dates, circumstances and other factors that are unique to the person you claim authored it. The trier of fact can make a determination of authenticity based upon the “circumstantial evidence” presented.

   Although less common in the workers’ compensation arena, a number of courts have required more evidence than just a distinctive profile page to authenticate a specific posting on the site. They have held, quite understandably, that the proponent of the evidence must show that a specific person authored the writing, and not just that the writing came from that person’s account.” Concerns for hacking, unauthorized users, fictitious accounts, raise the likelihood of third parties creating unauthorized posts. The proponent of the evidence can address these concerns when laying the foundation through authentication by distinctive characteristics of the posting itself, testimony from a witness with knowledge of the posting, and process testimony, such as forensic computer evidence. The proponent can also authenticate the evidence using corroborating non-distinctive characteristics on profile pages or posts with additional evidence.4

   3. **Exclusionary Rules**

   Social media evidence must satisfy the remaining exclusionary rules of evidence, chiefly character evidence and inadmissible hearsay.

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3 *United States v. Simpson*, 152 F.3d 1241, 1250 (10th Cir. 1998).
4 For a detailed discussion of these methods of authentication, see Griffith, *Understanding and Authenticating Evidence from Social Networking Sites*, at 217-20.
Under Rule 404(a), evidence of a person’s character or character trait is “not admissible for the purpose of proving action in conformity therewith on a particular occasion…..” Courts have recently been forced to apply Rule 404 in the context of social media evidence. Ultimately, these issues are decided on a case by case basis.

Under Rule 801(c), hearsay “is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Most of the information attorneys will seek to admit from social media websites will qualify as “out-of-court” statements potentially subject to the hearsay exclusion. However, under Rule 801(d)(2), any postings on a profile by a party opponent would qualify as "admissions" and therefore would be admissible.

4. Ethical Considerations

Attorneys and employer representatives need to avoid initiating contact with a represented opposing party. The issue of what constitutes “contact” is a matter of debate. ABA Model Rule 4.2 prohibits a lawyer from “communicating with a person the lawyer knows to be represented by another lawyer in the matter.” It is generally opined by various bar associations that friending or otherwise connecting with a represented party is impermissible. But what about a non-lawyer claims professional? Can they make contact? If the information is to be used by counsel at trial, the same rules likely apply.

Courts generally agree there is no privacy interest in content uploaded to social media websites, whether the user has privacy settings or not, because the information posted on these sites is intended to be shared. Lawyers and claims professionals should still tread carefully in pursuit of social media discovery because reckless and over-zealous research tactics may be deemed to be unethical and lead to evidence being excluded at trial.

Finally, insurance professionals conducting an investigation into an employee’s social media content may also be limited by the rules of professional and ethical responsibility as well as their respective company’s procedural guidelines. It is important to recognize that many companies have procedural guidelines concerning the proper use of company computer equipment by employees. Insurance professionals should consult their employers as to the extent they may utilize social networking to conduct claim research.

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5 United States v. Phaknikone, 605 F.3d 1099, 1103 (11th Cir. 2010) (finding that MySpace photographs of the criminal defendant flashing a gun in his car with a child in the backseat was “classic evidence of bad character”).

6 See Joseph, Internet and Email Evidence (Part 1), at 26-30 (citing cases); Grimm, Ziccardi and Major, Back to the Future: Lorraine v. Markel American Insurance Co. and New Findings on the Admissibility of Electronically Stored Information, at 20-30 (electronic evidence and the hearsay rule).