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“Defining Ethical Social Media Investigations and
Leveraging Social Media Evidence to Craft a Solid Defense”

I. Introduction

Social media evidence, ranging from Facebook status updates to Instagram photograph posts, can provide valuable insight and information about one’s medical condition and level of activity, which makes locating and assessing the social media accounts of litigants and their family members an essential element of any litigation strategy. According to a 2016 survey conducted by the Pew Research Center related to social media use by Americans, 79% of internet users use Facebook, 32% use Instagram, 29% use LinkedIn, and 24% use Twitter.¹

Given the breadth of content that many litigants post online, information found on social media can have significant uses through the life cycle of a lawsuit. However, it should be noted in the past several years key data points have been scrubbed from the metadata sets across all social media venues. Specifically, “Date of Photo” has been removed from the metadata bringing all captures from social media under immediate scrutiny/rejection from plaintiff counsel.

Integrity can be built back into your Social media investigation, but only by creating a timeline using factors such as independently authenticatable dates (rock concerts, holidays, weddings etc.), body habitus, hair style, tattoos and eyewear along frequent updating of the target’s profile throughout the case. By documenting things that do not readily change in context with an authenticated date a narrative can be built over weeks, months, and years. Credibility is then re-established in the investigation on spite of what is and isn’t in the metadata.

II. Benefits of Social Media Investigations

In terms of personal injury and workers compensation claims, social media can aid in investigations by offering photographs or postings prior to surveillance allowing the adjuster to

¹ *Social Media Update*, Pew Research Center, November 11, 2016. <https://www.pewresearch.org/internet/2016/11/11/social-media-update-2016/>.

tailor the traditional surveillance assignment to specific activities or locations. The ability to document pre-existing conditions or create a pre-loss baseline level of activity are also tremendously helpful in arguing Maximum Medical Improvement in the context of workers compensation and minimal changes in daily living or enjoyment of life in the context of civil litigation. Additionally, investigators can use social media to document activities in which the plaintiff may be involved. Social media investigations allow claims professionals to confirm policy application information, facts of loss, alibis, verification of disability status, location of witnesses, etc.

III. Challenges of Social Media Investigations

Though it may seem relatively straightforward to perform social media research, the reality is that currently, many insurers rely solely on claims management to conduct these investigations. This can lead to challenges and negatively impact a company's bottom line for a few different reasons.

i. False positives

Capturing online data from someone that is believed to be the subject, but actually is not, is a costly mistake that insurers cannot afford to make. Insurers have sought "silver bullet" solutions, but these solutions often fall short. Artificial intelligence solutions often have false positive rates in excess of 40%. Asking an adjuster to make a correct ID by comparing photo evidence is also filled with the potential of misidentification and puts your adjuster in a very difficult position in the event of deposition. Proper identification should involve human intervention and the triangulation of at least four separate data points before a definitive ID is determined.

ii. Aliases

It is not uncommon for everyday social media users to have more than one account on social media platforms. In fact, "finsta," a term used for "fake Instagram," is an extremely popular trend among younger Instagram users. "Finsta" accounts contain posts that would not typically be shared with an entire network of friends, which can lead to the discovery of valuable content.

iii. General Lack of Time and Resources

Social media feeds by design are filled with "static." Ads, reposts, memes, and tags involving events not remotely related to the injured claimant fill social media walls with irrelevant information that no adjuster sitting at a desk with 200 open files could ever hope to read or process. Software solutions that screen out the static and organize the relevant captures chronologically automatically need to be considered if social media investigation is expected to be a meaningful component of your claim defense.

iv. Wall-Following Apps

The belief that anyone can anonymously surf social media is no longer true. While it is true that social media venues do not track who comes to an owner's wall, there are now more than 50 apps on Google Play that one can download for free that will tell you:

1. Who came to your wall;
2. How often they returned;
3. What they looked at;
4. How long they looked at it

There are software solutions that can protect the integrity of the investigation and make an investigator's activity look like the actions of a mass marketer. To do these investigations, even using an alias, without the cloaking benefits of software is quickly becoming ineffective and a thing of the past.

IV. Methods of Obtaining Social Media Evidence Post-Suit

a. Discovery Requests

To be useful, discovery requests must be narrowly tailored to produce relevant information and be reasonably calculated to lead to the development of admissible evidence. As a result, courts have upheld social media evidence in various decisions as a valid evidentiary source,² and claims have been terminated as a direct result. Even without direct court adjudication, claims have been successfully denied based on social media-sourced evidence in not just workers compensation, but automobile and general liability claims as well. Clearly, social media must be considered in cases where it may lead to a better and/or quicker claim resolution and help motivate more integrity in the presentation of insurance claims of the future.

b. In-Camera Review

To guard against overly broad disclosure of a party's social media information, some courts have conducted an in-camera review prior to production. For example, in *Offenback v. Bowman*,³ the magistrate judge conducted an in-camera review of the plaintiff's Facebook account and ordered the production of a "small segment" of the account as relevant to the plaintiff's physical condition. Many courts, understandably, have been less than enthusiastic about the idea of doing the parties' burdensome discovery work.⁴

² See, e.g., *Largent v. Reed*, 2009-1823 (Pa. C.C.P. Nov. 8, 2011) (ordering the plaintiff to turn over her Facebook login information to defense counsel within fourteen days of the date of the order. Defense counsel then had twenty-one days to 'inspect [the plaintiff's] profile').

³ 2011 WL 2491371 (M.D. Pa. June 22, 2011).

⁴ See, e.g., *Tomkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387 (E.D. Mich. 2012) (holding that the parties' suggestion that it conduct an in camera review, explaining that "such review is ordinarily utilized only when necessary to resolve disputes concerning privilege; it is rarely used to determine relevant.")

B. Admissibility and Authentication

The primary concern in admitting social media evidence is the potential for such evidence to be fraudulent, fabricated, or manipulated. Anyone familiar with social media sites can understand these concerns. Depending on the jurisdiction, some or all of the following avenues for authentication should be used: 1) Testimony from the creator of the profile and relevant postings; 2) Testimony from the person who received the message; 3) Testimony or affidavit about the distinctive aspects in the messages revealing the identity of the sender; 4) Testimony regarding the account holder's exclusive access to the social media account; and 5) Testimony from the social networking website connecting the posting to the person who created it. In addition, counsel should consider sending preservation letters to opposing counsel directing him or her to preserve any potentially relevant social media evidence to avoid spoliation sanctions.

The rules for admissibility for workers compensation are less stringent and are much easier to navigate. In workers compensation, there is no need to bring the users of social media to the witness stand. With a complete metadata set for each capture, magistrates across the country have ruled social media posts as self-authenticating under Federal Rule of Evidence 902. However, in order to strengthen this position, it is best to follow a "chain of custody" similar to the recovery of property evidence. Specifically:

1. Recover the data in the same manner in every investigation;
2. Store the data in the same way for every case;
3. Preserve the data in a 3rd party administered server with SOCS-2 security accreditation. This immediately eliminates all claims of spoilage and tampering;
4. Have one contact point for retrieval; and
5. Make sure your evidence custodian has a CV that stands up under cross exam.

V. Ethical Issues Associated with Social Media Investigations

A. Public v. Private Accounts

Before accessing a claimant's social media account to collect information, you must determine whether the information is "publicly available." Publicly available information is social media activity or information that is visible to anyone and does not require direct contact with the claimant. Thus, an attorney may access and review public portions of a claimant's social media page. Private or semi-private information, however, requires the viewer to "friend" or "follow" the claimant to access their social media activity.

Accessing private social media activity raises ethical considerations and boundaries that you must research to avoid committing a violation. A fundamental boundary is the prohibition against communicating with a represented party. ABA Model Rule 4.2 is usually interpreted as

prohibiting an attorney or his agent—including investigators and third-party vendors—from making a friend request to a represented party.

Similarly, an attorney violates her ethical obligations by attempting to gain access to a private account using a fake profile or other deceptive tactics, and such conduct violates ABA Model Rule 8.4. Ethical boundaries of social media investigation of social media investigation are issues that must be considered when developing discovery strategies. Note, however, the ethical opinions and guidance vary from jurisdiction to jurisdiction and are undecided in some instances.

However, do not stop with the injured claimant in your investigation. Profiles for friends and relatives should be identified and reviewed if they are public. Cross tags of your target on the public profile of a relative are admissible. With increasing user sophistication, usable information about your target’s activity is recovered more than half the time from profiles other than that of the injured claimant.

The overriding ethical consideration that needs to be evaluated on a case--by-case basis is, “Does the information I am recovering unfairly prejudice the jury against the target” and “Does the information I recover compromise the integrity of my investigation.” If the answer to either of these questions is “yes” you should reconsider if the capture in question belongs in the file.

B. Investigation of Juror’s Social Media

Generally speaking, investigations of jurors’ social media are permitted as long as the methods utilized by the attorney or designee are ethically sound. In April 2014, the ABA’s Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 466, titled “Lawyer Reviewing Jurors’ Internet Presence” stated that:

Unless limited by law or court order, a lawyer may review a juror’s or potential juror’s Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.⁵

Given the clear language of the rule, sending “friend requests” to a juror has significant legal and ethical implications, and several state bar associations have adopted rules prohibiting *ex parte* communications with jurors.⁶ The issue of impermissible *ex parte* communications also arises from the automatic notifications jurors may receive from the social media platform, specifically when their profile is viewed by one of the parties. However, the ABA’s formal opinion 466 (2014) stated that “the fact that a juror or potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).”⁷

⁵ ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 466, at 1 (2014).

⁶ ²Am. Bar Ass’n CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct: Rule 3.5: Impartiality and Decorum of the Tribunal*, AM. BAR ASS’N (Sept. 29, 2017).

⁷ ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 466, at 1 (2014).

VI. Conclusion

Social media and online investigations are not one-time exercises in the life of a claim. Social media investigations deserve the same attention and prudence as other, more traditional, investigations from claims professionals and defense attorneys. The common thread for both legal and claims professionals is to avoid fraud or misrepresentation to procure otherwise private information about claimants. Thus, the best practice is to perform due diligence in accessing a claimant's social media information and periodically check a claimant's public sites along with other traditional methods of information gathering during the investigation process.