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The Social Media Goldmine: Maximizing Investigation Results

I. Capitalize on the Social Media Goldmine

The enormous breadth of accessible information offered by the increasingly popular digital world can be an invaluable tool in the defense of, *inter alia*, bodily injury claims arising out of construction site accidents. A strained workers' compensation system and claimant-friendly statutes make expeditious, effective resolution of such claims critical. Social media evidence can assist in accomplishing this and here are some tips on how to maximize this resource:

A. Investigate Effectively

An effective social media investigation involves much more than searching to see if the claimant maintains a Facebook page. In addition to Facebook, Instagram, Twitter, Snapchat, Flickr, and MeetMe are all increasingly popular social networking sites. People often create accounts on these sites under nicknames, so finding out this information about a claimant is helpful. Obtaining information regarding a claimant's friends and relatives is also helpful. A claimant may be savvy enough or adhere to their attorney's instructions to refrain from social media use, but relatives and friends often do not. Email addresses, home and cell-phone numbers, hobbies and general background information such as where a claimant went to college are other pieces of information that can all assist in maximizing the results of a social media investigation. LinkedIn is also a popular networking site, but beware that the claimant will be notified if you click on their profile.

Given the breadth of potentially available information, retaining an investigative company which specializes in social media research is optimal. Social Detection, Inc., for example, developed a unique automated investigative software designed specifically to capitalize on the benefits that social media can provide to the litigation sector. This software collects and analyzes data from not only your most popular social networking sites – e.g., Facebook or Instagram, but the entire web, and returns all relevant information regarding the subject in real time.

Retaining an investigation company such as Social Detection, Inc. is also beneficial for purposes of authenticating social media evidence at trial. Parties offering such evidence must be prepared to authenticate what actually appeared or was displayed on the social site.[1] This can be done by marking

[1] *See*, *O'Connor v. Newport Hosp.*, 111 A.3d 317, 324 (R.I. 2015).

as an exhibit a printout of the post from the site, accompanied by testimony of a witness that he or she accessed the site through their computer or other device by typing the URL associated with the site; read what appeared on the computer screen; and upon reviewing the exhibit testifies that the printout accurately reflects what was on the screen.[2] If the evidence was obtained by counsel as opposed to an investigator, there is the undesirable risk that counsel becomes a necessary witness to authenticate this evidence.

B. When Should I Commence My Investigation?

Commencing a social media investigation close shortly after receipt of a claim or potential claim is generally best practice. At that time, the claimant may yet to have the motive to manipulate reality. Further, plaintiffs' attorneys are becoming more and more aware of the social media realm and the pitfalls it poses for their clients. Many attorneys often say that the first instruction they give to their clients is to privatize any publicly available information on social networking sites and to refrain from all usage of such sites until the resolution of their claim. In Florida, for example, a personal injury lawyer may advise a client pre-litigation to change their privacy settings on social media. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, the lawyer may advise that a client even remove information relevant to the foreseeable proceedings from social media pages so long as the social media information or data is preserved.[3] Accordingly, the earlier a social media investigation is undertaken, generally the greater likelihood of obtaining favorable findings. Also, favorable social media findings can often result in quick and favorable resolutions of claims.

Further, once the claimant has restricted the public settings on his social media accounts, absent party consent, accessing the contents of these accounts will require Court Order or subpoenaing the information directly from the service provided. Accessing social media through these means can prove difficult.

With respect to the treatment of motions to compel social media information, courts generally claim to treat social media evidence the same as other evidence. As one court stated, "[t]he discovery standard we have applied in the social media context is the same as in all other situations – a party must be able to demonstrate that the information sought is likely to result in the disclosure of relevant information bearing on the claims."[4] This may not be entirely accurate, however.

For example, in *Forman v. Henkin*, the plaintiff sought monetary damages for injuries sustained when she fell off one of the defendant's horses.[5] Plaintiff alleged that the accident resulted in cognitive and physical injuries that have limited her ability to participate in social and recreational activities. At her deposition, the plaintiff testified that she maintained and posted to a Facebook account prior to the accident, but deactivated the account at some point after. Defendant sought an order compelling

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[2] *See*, *Toytrackerz LLC v. Koehler*, 2009 WL 2591329, at *6 (D. Kan.); *see also People v. Junior,* 119 A.D.3d 1228, 1231 (N.Y. App. Div. 3d Dept. 2014).

[3] Professional Ethics of the Florida Bar, Opinion 14-1 (June 25, 2015)

[4] *Forman v. Henkin*, 134 A.D.3d 529, 532 (N.Y. App. Div. 2015)(internal citations omitted).

[5] *Forman v. Henkin*, 134 A.D.3d 529, 532 (N.Y. App. Div. 2015)(internal citations omitted).

plaintiff to provide an unlimited authorization to obtain records from her Facebook account, including all photographs, status updates and instant messages. The court denied defendant's motion and ordered that plaintiff produce only the photographs she intends to introduce at trial. In doing so, the court held that defendants are required to meet "some threshold showing," a "factual predicate of relevance," before being allowed access to a party's social media information.[6] The mere fact that plaintiff had previously used Facebook to post pictures of herself or to send messages was insufficient to meet this predicate.[7] In a lengthy dissenting opinion, two justices called for a complete re-examination of the court's decisions in this area, asserting that the "threshold showing" requirement contravenes the standard discovery procedure in civil litigation.[8] The dissenting opinion argued that the prohibition on discovery "fishing expeditions" does not mean that there is a preliminary requirement that the party seeking discovery must be able to establish that the other side is in possession of the discovery sought.[9] "Rather, the 'material and necessary' standard only requires a reasoned basis for asserting that the requested category of item 'bear[s] on the controversy'," a showing that it is likely to produce relevant evidence.[10]

Other courts have also conditioned the disclosure of social media information on the defendant making a threshold showing that information exists on those sites which undermines plaintiff's claims. In *Thompson v. Autoliv ASP, Inc.*, the court permitted discovery where material obtained by defendant from plaintiff's public Facebook account negated her allegations that her social networking sites were irrelevant.[11] In *Tompkins v. Detroit Metropolitan Airport*, defendant's discovery request was denied as overly broad where publicly available information was not inconsistent with plaintiff's claim.[12] In *Keller v. National Farmers Union Property & Casualty*, that court held that the defendant failed to make a threshold showing that the publicly available information on plaintiff's social networking sites undermined her claims, and that "[a]bsent such a showing, [defendant] is not entitled to delve *cart blanche* into non-public sections of plaintiff's social networking sites."[13]

We note that not all courts have required this threshold showing. In *Nucci v. Target Corp*., a Florida appellate court denied a petition for certiorari to quash an order compelling discovery of photographs from plaintiff's Facebook site.[14] In *Nucci*, the plaintiff sought recovery for bodily injury, physical and emotional pain and suffering, and lost earnings arising out of an alleged slip and fall in a Target Store.[15] Target moved to compel access to photographs on plaintiff's Facebook account, noting that just prior to the plaintiff's deposition, there were 1285 photographs on the account, and two days

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[6] *Id.* at *531

[7] *Id*.

[8] *Id.* at *539

[9] *Id.*

[10] *Id.*

[11] *Thompson v. Autoliv ASP, Inc.*, 2012 U.S. Dist. LEXIS 85143, 2012 WL 2342928 *4 (D. Nev. June 20, 2012).

[12] *Tompkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387, 388-89 (E.D. Mich. 2012).

[13] *Keller v. National Farmers Union Property & Casualty*, No. CV 12-72-M-DLC-JCL, 2013 WL 27731, at *2 (D. Mont. Jan. 2, 2013).

[14] *Nucci v. Target Corp.,* 162 So.3d 146, 151 (Fla. 4th DCA 2015)

[15] *Id.* at *148.

after her deposition, that number had dropped to 1,249.[16] In affirming the circuit court's order that all of the photographs be produced, the appellate court found that the photographs of plaintiff prior to the accident are the "equivalent of a 'day in the life' slide show produced by the plaintiff before the existence of any motive to manipulate reality," and therefore, are "powerfully relevant" to the damage issue in the lawsuit.[17] The Court further held that "photographs posted on a social networking site are neither privileged nor protected by any right of privacy, regardless of any privacy setting that the user may have established."[18] (Although the Florida court took a much broader approach as to the relevancy of plaintiff's Facebook information, the suspicious deletion of approximately thirty photographs just two days after plaintiff's deposition may have influenced their decision – and justifiably so. This supports the importance of performing an investigation early.)

With respect to subpoenaing information directly from the service provider, as we saw this year with Apple, social media providers may fight the subpoena to protect the privacy interests of its users. Federal law can also impede subpoena efforts. For example, in *Crispin v. Christian Audigier*, the court quashed subpoenas to Myspace and Facebook on the grounds that some of the content on those sites were protected by the Stored Communications Act (SCA).[19] The SCA essentially prevents providers of communication services from disclosing private communications to certain entities and individuals.

C. Am I Obligated to Disclose My Findings? Even if Available to the Public?

Whether counsel is required to disclose its findings when the information is available to the public is an often debated issue and something that can be considered in determining when to perform a social media investigation. On the one hand, these records are public and readily available to the plaintiff, who in fact posted them for public view, and as such, should not need to be disclosed. On the other hand, the plaintiff could argue that these records are discoverable as they constitute photographs or videos of the plaintiff which are routinely demanded in discovery. For example, here is an excerpt from a demand our firm recently received which would appear to require disclosure of photographs and videos obtained from plaintiff's social media accounts:

> …all photographs, video-tapes, day-in-the-life films or movies under the control of said defendant or the attorneys or representatives of defendant which are alleged to show the injuries to the Plaintiff, Plaintiff's current condition, Plaintiff's current capabilities, and/or Plaintiff's limitations…

Not disclosing the information can be beneficial as it prevents the plaintiff from having the opportunity to prepare his deposition testimony to mitigate the consequences of his social media posts to his case. Further, the plaintiff is more likely to continue to post photographs and participate in social media if he is unaware that his accounts are being monitored. However, by choosing not to disclose the information, the defendant runs the risk that said information will be precluded if the Court rules that it should have been disclosed.

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[16] *Id.*

[17] *Id.* at *150

[18] *Id. at* *153

[19] *Crispin v. Christian Audigier,* 717 F. Supp. 2d 965 (C.D. Cal. 2010).

In New York there is no case law directly addressing this issue. However, based upon the Court's treatment of a defendant's obligation to disclose surveillance footage, we believe a court could find that the photographs are required to be disclosed. In *Tran v. New Rochelle Hospital Medical Center,* the Court of Appeals, New York's highest court, ruled that plaintiff is entitled to surveillance tapes prior to being deposed.[20] The Court acknowledged the danger of tailored testimony, but held that: "[CPLR §3101(i)] requires full disclosure with no limitation as to timing, unless and until the Legislature declares otherwise."[21] The Court recognized that such a rule enables tailored testimony, but felt constrained based upon the language of CPLR §3101(i). Although the Court's statement in its holding, "unless and until the Legislature declares otherwise," can be interpreted as a request that the Legislature amend CPLR §3101(i), the Legislature has not done so.[22] The language of CPLR §3101(i) provides in relevant part:

> … there shall be full disclosure of any films, **photographs**, video tapes or audio tapes, including transcripts or memoranda thereof, involving a [party]… (emphasis added)[23]

Accordingly, until the legislature amends CPLR §3101(i), or *Tran* is overruled, it is our course of practice to disclose any evidence obtained through social media prior to the plaintiff's deposition. We believe the risk of such evidence being precluded, particularly when it is favorable to our defense, is simply too great. Thus, when handling a claim in New York, the potential downside of early investigation is being required to disclose any findings prior to plaintiff's deposition such that plaintiff is provided the opportunity tailor his testimony so as to minimize its consequences. Plaintiff also will likely refrain from any further social media usage until the resolution of his claim. For the reasons outlined above, however, it remains our opinion that early investigation of social media information is preferable, even when venued in New York.

Florida also does not have any case law directly addressing this issue. Notably, however, Florida takes the exact opposite approach of New York with respect to the disclosure of surveillance. In *Hankerson v. Wiley*, it was established that surveillance video need not be produced until the surveilling party has had the opportunity to depose the subject of the video.[24] The *Hankerson* court concluded that "the benefit of the surveillance may be irreparably lost if the plaintiff is permitted to view the video before [the defendant] has an opportunity to question her."[25] Thus, although we were unable to find any case law in Florida directly addressing the obligation to produce social media information, under the *Hankerson* opinion, a compelling argument exists that counsel is under no obligation to disclose its publically available social media findings of the plaintiff prior to the plaintiff's deposition. This is a strong incentive for commencing the social media investigation as early as possible.

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[20] *Tran v. New Rochelle Hosp. Med. Ctr.,* 99 N.Y.2d 383, 786 N.E.2d 444 (2003).

[21] *Id.* at *380-90.

[22] *Id.*

[23] N.Y.C.P.L.R. art. 3101(i)

[24] *Hankerson v. Wiley*, 154 So.3d 511 (Fla. 4th DCA 2015)

[25] *Id.*

Under Texas law, the timing of disclosure is governed by Tex R. of Civ. Pr. 193.5(a),(b), which requires that "an amended or supplemental response must be made reasonably promptly after the party discovers the necessity for such a response."[26] "It is presumed that an amended or supplemental response made less than 30 days before trial was not made reasonably promptly."[27] An argument can be made that Rule 193.5 can be read to permit the delay of disclosure of social media evidence until after the completion of plaintiff's deposition. The argument being that the necessity for supplementing the discovery responses to disclose this information was not realized until plaintiff testified inconsistently with its content. We note, however, that Texas expressly prohibits gamesmanship when it comes to discovery.[28] If the timeliness of a parties' disclosure is challenged, Texas law requires that the party establish that "the failure to make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice other parties.[29] In *Lopez v. La Madeleine*, the court expressly rejected an argument that a party may withhold photographs and video obtained of the plaintiff, and then introduce the evidence at trial for purposes of impeachment.[30] In doing so, the *Lopez* court noted that the "purpose of the discovery rules is to encourage full discovery of the issues and the facts before trial so that the parties can make realistic assessments of their respective positions in order to facilitate settlements and prevent trial by ambush.[31] Whether this would also apply to social media evidence disclosed at or immediately following the plaintiff's deposition is unclear and we were not able to find any case law directly addressing this issue. We believe a compelling argument can be made that withholding of social media evidence until completion of plaintiff's deposition would not violate Texas law, but caution that there is a possibility that this evidence will be precluded.

D. Investigate Ethically

Access requests such as "friend" requests on Facebook, "following" users on Twitter or Instagram, or seeking to "connect" on LinkedIn can subject counsel to prosecution for attorney misconduct. Model Rule 4.2(a) of the Model Rules of Professional Conduct prohibits a lawyer representing a client from communicating with a person represented by another lawyer regarding the subject matter of the representation, unless the other law consents.[32] Model Rule 8.4(a) provides: "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Accordingly, while there have not been any decisions directly addressing this issue, we expect that, if the purpose of sending an "friend" request or similar access request was to obtain information related to an

[26] Tex. R. of Civ. P. 193.5(a),(b)

[27] *Id.*

[28] *Lopez v. La Madeline of Tex., Inc.*, 200 S.W.3d 854, 861-863 (Tex. App. – Dallas 2006, pet. Denied).

[29] Tex. R. of Civ. Pr. 193.6

[30] *Id.*

[32] American Bar Association, Center for Professional Responsibility. (2013). *Model rules of professional conduct.* Retrieved from http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html.

ongoing litigation, the lawyer's conduct in sending (or directing another to send) the request would likely be held to violate Model Rule 4.2 and/or Model Rule 8.4.

Recently, in *Robertelli v. New Jersey Office of Atty. Ethics,* two defense attorneys are accused of monitoring the private Facebook account of a plaintiff suing their client.[33] The Facebook account was initially publically viewable, but after the plaintiff made the account private, the attorneys accessed the account by having a paralegal at their firm send a Facebook friend request to the plaintiff without revealing her employer. The director of the New Jersey Office of Attorney Ethics filed a complaint against the defense attorneys, accusing them of, *inter alia*, communicating with a represented party without proper consent and engaging in conduct "involving dishonesty, fraud, deceit or misrepresentation."[34] The New Jersey Supreme Court, New Jersey's highest court, ruled that the case could go forward and it is currently ongoing.[35]

It is also imperative to remain aware of each state's rules and ethics opinions in this regard. For example, the Philadelphia Bar Association has concluded that it is unethical deception for an attorney to "friend" an unrepresented person whom the opposing side intends to call as a witness, without revealing that the lawyer is seeking information that can be used against that witness.[36] Conversely, the New York City Bar has stated that an attorney or agent may send a "friend request" to unrepresented persons without disclosing the reasons for making the request, so long as the attorney or agent uses their real name and profile.[37]

Lawyer's should also be aware of their obligations to preserve any social media evidence. Social media evidence is subject to the same duty to preserve as other types of electronically stored information (ESI). The duty to preserve ESI is generally triggered when a party reasonably foresees that evidence may be relevant to the litigation. Accordingly, social media content should be included in litigation-hold notices instructing the preservation of all relevant evidence.

For example, in *Lester v. Allied Concrete Co.,* a Virginia trial court granted the defendant's request that an adverse inference instruction be given to the jury after it was discovered that plaintiff deleted her social media posts.[38] The plaintiff was sanctioned in the amount of $178,000, and the plaintiff's attorney was sanctioned in the amount of $544,000 because it was discovered that he advised the plaintiff to delete the posts.[39]

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[33] *Robertelli v. New Jersey Office of Atty. Ethics,* 2016, N.J. LEXIS 323 (April 19, 2016).

[34] *Id.* at *12.

[35] *Id.* at *13.

[36] Phila. Prof'l Guidance Comm., Op. 2009-02 (2009), *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf.

[37] NYCBAR Comm. On Prof'l Ethics, Formal Op. 2010-2 (2010), *available at* http://www.nycbar.org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02.

[38] *Lester v. Allied Concrete Co.,* Nos. CL08-15, CL09-223, 2011 WL 8956003 (Va. Cir. Ct. Sept. 1, 2011).

[39] *Id.*

E. Takeaways and Tips

The popularity of social media is continuing to grow, and in turn, so too is the goldmine of evidence it offers. With the construction industry expected to experience solid growth in 2016, maximizing this resource can be invaluable in bringing about quicker and more efficient resolution of construction-related claims. Critically, many jurisdictions have developed, or are in the process of developing, ethical rules related to the use of social media information. Thus, it is important to be informed and diligent in complying with these ethical rules when tapping into this resource.