



2020 Annual Conference
March 18-20, 2020
Dallas, TX

“Instagram THIS!” How Social Media is Transforming Claims

I. The Influence of Social Media

If there is any doubt about the pervasive nature of social media, consider the following facts:

- Facebook has nearly 1.2 billion users—23 percent check their account at least 5 times a day
- There are over 3 million company pages on LinkedIn and 238-plus million users.
- On Twitter, 288 million monthly active users send 400 million tweets a day.
- On YouTube, 100 hours of video are uploaded every single minute.
- Of social media users, 35 percent admit to posting something they later regretted.
- Over 1.7 billion people are on Internet social networking sites.

Social Networking sites have changed the way people interact and are used daily by over 70 percent of the US population. They will continue to increase the amount of information available to investigators as people love to share and promote themselves, their own brand, and their popularity. Fear of being left out and addiction are often cited as key drivers for the growth of social media use.

With these facts in mind, social media is both here to stay and will be a growing source of information used for a variety of purposes, including identifying and shutting down fraudulent insurance claims.

More Statistics:

- Fraud accounts for \$80 billion a year across all lines of insurance. (*Coalition Against Insurance Fraud estimate*).
- Fraud comprises about 10 percent of property-casualty insurance losses and loss adjustment expenses each year;
- Property-casualty fraud thus equals about \$34 billion each year. (*Insurance Information Institute, September 2017*)

State anti-fraud efforts

- 48 states plus the District of Columbia make insurance fraud a specific crime;
- Virginia and Oregon are the lone states without an insurance-fraud law;
- 43 states and the District of Columbia require insurers to report suspected fraud to the state fraud unit or some other law enforcement or regulatory agency. (*Coalition Against Insurance Fraud, October 2015*)
- 41 states and the District of Columbia have a [fraud bureau](#) dealing with multiple lines of insurance, solely workers compensation or both;

II. Social Media Investigations in the Claims Process

Timing is Everything

When to order an initial search depends on many factors and is ultimately a judgment call when all things are considered; at what stage you got the case, the exposure of the case, and more. Getting as much information as possible at the onset is critical. Information needed to investigate:

- Biographical information
- Date of Loss
- Injuries

PRE-SUIT and AT INCEPTION OF LITIGATION:

- A background check and initial search should be executed as soon as possible;
- Take a snapshot of the parties close in time to the incident;
- Verify your own client's version;
- Identify possible areas of risk in your case

DURING DISCOVERY

- Challenge claims made in the Bill of Particulars or at Deposition
- Ascertain possibility of ongoing damages

ON THE EVE OF TRIAL

- Assess current condition of the party;
- Review for recent statements made about pending litigation;
- In personal injury cases, note recent activities that a party had been able to engage in

COST v. Value

The average cost of a social media investigation search is several hundred dollars. The value it provides versus traditional boots on the ground surveillance is substantial. Before you engage a third-party professional you ought to consider the potential value of the information. Evaluate the claim carefully and the monetary value in capturing an image or statement that may validate or debunk injuries.

IDENTIFY, VALIDATE, CAPTURE & PRESERVE: WHEN TO ENGAGE A 3RD PARTY PROFESSIONAL

Social Media Investigations is the method of having trained investigators comb the social networks of claimants sifting through typically personal information looking for court-admissible evidence that has the potential of exposing fraudulent behavior and mitigating losses or terminating the related claims.

The process of exposing this online behavior is best left to a SIU unit or an outside 3rd party, depending on the case, as it is quite time consuming and should be done properly to secure and protect the information discovered. This process includes:

Accurate identification of the claimant

Validation of the information published

Proper capture of this information so that it is indisputable

Preservation of this information –stamped and dated properly

Fundamentally, social media investigation is applied to further develop the basic investigative information generated by most every insurance claim, including witnesses, claimant identification, claimant activity, evidence of disability, and appropriateness of medical care. Where social media is particularly valuable is in its ability to find and leverage relationships tied to claimants that can point to and ideally validate suspicions of exaggerated conduct. These often validate the “red flags” and related proof of the suspected behaviors.

To use this tool most effectively, it is important to understand that skilled expertise is required. As a result, it is not typical for the frontline claim professional to attempt to leverage social network sources, as much as many of them might want to and even feel qualified to do so. In fact, the common rules of evidence suggest that delving into this source of information should be done carefully and with specific and targeted intent. In other words, beyond using properly trained and credentialed fraud professionals, knowing where to go on the Web, how to get there, and which information and in what form may be most useful require professional fraud expertise in the use of social media.

Technology v. Boots on the Ground

While typical surveillance may be necessary at times, it is engaged for limited and often specific periods of time to watch a claimant’s activities. Social media searches can uncover years of activity before and after the date of loss. It tells a story, often in a subject’s own words and many times offer “witnesses” without intending to. Social Media and Data can provide actual photos, videos and sometimes “statements” (posts) from a person of interest that traditional methods fall short of.

III. Social Media and Litigation

Social Media data regarding a person of interest, fills a critical void in the litigation process. The popularity of social media sites such as Facebook, Pinterest, Vimeo, YouTube, Twitter, and Instagram have forever changed the path with which we gather information on a subject and conduct investigations. Social media can offer both powerful and risky tools for litigators.

Few transformations have affected litigation and litigators as swiftly and as profoundly as social media. In five short years, we've seen a sea change in the way people live, connect, and do business across the Internet. "Web 2.0," a term referring to Internet use that goes beyond merely retrieving information from websites, includes entirely new ways to create content and share information through online social networking. In addition to pervading most of our lives, the social media phenomenon is having a profound effect on every stage of litigation and in virtually every area of practice.

Social media have become a big part of the way litigators do business, and they pose problems in the litigation process from the first-time lawyers meet with their clients until after judgment is rendered. They affect criminal, civil, and family law litigators alike. They are brimming with potential and fraught with danger for both the unwary lawyer and client.

Social Media searches are useful tools in claims assessments as they provide a window into the day to day life of a claimant. Pictures are not only a window into the truth, but perhaps the key to finding additional material in assessing the validity of the claim. In New York, The Second Department has noted that one photo which is deemed related to the claims being discussed may serve as a basis to obtain other social media materials which may not be readily accessible to the public.

A PHOTO PROBATIVE AS TO THE EXTENT OF INJURIES –
Richards v. Hertz Corporation, 100 A.D.3d 728 (2nd Dept. 2012)

"The Dunn defendants demonstrated that McCarthy's Facebook profile contained a photograph that was probative of the issue of the extent of her alleged injuries, and it is reasonable to believe that other portions of her Facebook profile may contain further evidence relevant to that issue. Thus, with respect to McCarthy's Facebook profile, the Dunn defendants made a showing that at least some of the discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on her claim (see *Patterson v. Turner Constr. Co.*, 88 A.D.3d 617, 618, 931 N.Y.S.2d 311; cf. *Abrams v. Pecile*, 83 A.D.3d 527, 528, 922 N.Y.S.2d 16; *McCann v. Harleysville Ins. Co. of N.Y.*, 78 A.D.3d 1524, 1525, 910 N.Y.S.2d 614). While the Supreme Court directed the injured plaintiffs to provide the Dunn defendants with copies of photographs depicting them participating in sporting activities, McCarthy's Facebook profile may also contain other items such as status reports, e-mails, and videos that are relevant to the extent of her alleged injuries. However, due to the likely presence in McCarthy's Facebook profile of material of a private nature that is not relevant to this action, the Supreme Court should conduct an in camera inspection of all status reports, e-mails, photographs, and videos posted on McCarthy's Facebook profile since the date of the subject accident to determine which of those materials, if any, are relevant to her alleged injuries (see *Patterson v. Turner Constr. Co.*, 88 A.D.3d at 618, 931 N.Y.S.2d 311). Accordingly, we remit the matter to the **657 Supreme Court, Kings County, to conduct such an in camera inspection, and thereafter for a new determination of that branch of the injured plaintiffs' cross motion which was for a protective order pursuant to CPLR 3103 striking so much of the demand for authorizations dated March 30, 2010, as related to McCarthy."

While individuals may set their social media profiles to private, the cover photo or profile picture may be enough to obtain a Court Order for Social Media Discovery. While public social media postings are fair game to be obtained, individuals can safeguard their social media lives through privacy settings. The mere existence of a social media page will not justify a Court Order to obtain Social Media Discovery. However, if the profile picture or cover photo on a Social Media page presents the subject in

a manner relevant to their claims, that will open the door to further discovery as to that individual's Social Media presence.

A PROFILE PICTURE CAN BE USED TO ESTABLISH A PREDICATE FOR DISCOVERY –

Spearin v. Linmar, 129 A.D.3d 528 (1st Dept. 2015)

“Defendant established a factual predicate for discovery of relevant information from private portions of plaintiff's Facebook account by submitting plaintiff's public profile picture from his Facebook account, uploaded in July 2014, depicting plaintiff sitting in front of a piano, which tends to contradict plaintiff's testimony that, as a result of getting hit on the head by a piece of falling wood in July 2012, he can no longer play the piano.”

Parties suspicious that their adversary may alter their Social Media presence over the course of a claim's investigation may ask for a Court Order requiring the suspected party to maintain the status quo in their Social Media presence.

PARTIES CAN REQUEST AN ORDER PRESERVING THE SOCIAL MEDIA STATUS QUO –

Thurmond v. Bowman, 2016 WL 1295957 (W.D.N.Y. 2016)

“By altering her Facebook account, Thurmond violated the Court's May 21 order. Her conduct had the effect of hiding her postings from public view, and hence from defendants' counsel's view. Of course, it does not appear that the postings were deleted, and they remain available for defendants' use, and defendants have not shown that they were prejudiced by Thurmond's conduct in violating the order. Nevertheless, it is troubling that the posts were removed from public view after this Court issued a consent order designed to preserve the status quo of her social media accounts. Also troubling is Thurmond's execution of an affidavit that contained a statement she knew to be inaccurate. Although the false statement was ultimately immaterial to the issues in the pending motions, Thurmond's willingness to sign the affidavit knowing or having reason to know that it included a false statement threatens the integrity of the judicial process. Thurmond's conduct in both respects is certainly a fair subject for cross-examination at trial and could result in the impeachment of her credibility.”

The key theme in the Social Media cases that have been decided thus far, is that parties are not allowed to conduct a blanket request for Social Media materials. The mere hope that a party might find something relevant is not enough of a basis for obtaining a Court Order to produce Social Media materials that are private to the public. A party must be specific in the basis for their request for any such Court Order.

VAGUE ASSERTIONS NOT DISCOVERABLE –

Pecile v. Titan Capital Group, LLC, 113 A.D.3d 526 (1st Dept. 2014)

“They have failed to offer any proper basis for the disclosure, relying only on vague and generalized assertions that the information might contradict or conflict with plaintiffs' claims of emotional distress. Thus, the postings are not discoverable.”

It is important to understand which Social Media platforms would have material regarding the claimant in question. The Courts will not allow for a blanket requirement for a party to make available all Social

Media materials across all platforms. Therefore, any request must aim to be clear and specific and tailored to information related to the claim.

REQUESTS FOR UNRESTRICTED ACCESS ARE OVERBROAD –

Winchell v. Lopiccicolo, 38 Misc.3d 458 (2012)

“The Court finds that Defendants' Request for unrestricted access to Plaintiff's Facebook page is overbroad.”

Parties seeking to protect themselves from damaging Social Media materials do not have many options. Merely setting a Social Media account to private does not protect the individual from having to disclose those materials deemed private.

SETTING ACCOUNT TO PRIVATE DOES NOT SHIELD AGAINST DISCOVERY –

Patterson v. Turner Construction Company, 88 A.D.3d 617 (1st Dept. 2011)

“The postings on plaintiff's online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service's privacy settings to restrict access (*Romano v. Steelcase Inc.*, 30 Misc.3d 426, 433–434, 907 N.Y.S.2d 650 [2010]), just as relevant matter from a personal diary is discoverable (see *Faragiano v. Town of Concord*, 294 A.D.2d 893, 894, 741 N.Y.S.2d 369 [2002]).”

A generalized summary of whether Social Media materials will be required to be produced involves a weighing of different factors. The Courts will look at whether the material in question is material and necessary to the litigation at hand. It will weight that question with the extent of the effect on the privacy rights of the Claimant in question.

STANDARD TEST –

Fawcett v. Altieri, 38 Misc.3d 1022 (2013)

“A survey of cases dealing with the production of social media accounts, in both the criminal and civil contexts, reveal a two-prong analysis before courts compel the production of the contents of social media accounts. This inquiry requires a determination by the court as to whether the content contained on/in a social media account is “material and necessary;” and then a balancing test as to whether the production of this content would result in a violation of the account holder's privacy rights.”

IV. The Risks of Social Media in Litigation

Know what your subject is Posting on Social Media

In a 2014 case out of the Florida Court of Appeals, the daughter of the winning party posted a comment on her Facebook page commenting about the outcome of the lawsuit and the European vacation paid for as a result. The post violated the confidentiality provisions of the parties' settlement and torpedoed the settlement. Chances are that the attorneys had no idea what the daughter was up to, but this case is a good reminder to know what your client OR your adversary's client is posting on social media.

Don't Spoliate or Condone the Spoliation of Evidence

Social media posts, like any other type of “evidence” may be relevant to the litigation in which you are involved. Like any other type of evidence, counsel may not alter or destroy relevant social media posts nor can they direct or assist others in doing so. What happens when you tell your client to “clean up” his Facebook page? In one particularly egregious example of “deceptive and obstructionist conduct,” a lawyer directed his client to clean up his Facebook page, and then ultimately deactivated the client’s account before signing a discovery response the client did not have a Facebook account. The Court levied a collective fine of \$722,000 in sanctions against the lawyer and the client, referred the attorney to the Virginia State Bar. Other less egregious “housekeeping efforts” can also result in spoliation motions and adverse inferences at trial (*see e.g. Gatto v. United Airlines Inc.*, United States District Court, District of N.J., Civil Action No.: 10-cv-1090-ES-SCM [personal injury plaintiff intentionally deactivated Facebook account during discovery, unbeknownst to his lawyer]). In addition to the spoliation dangers presented by social media, *Gatto* dovetails nicely with Point I, *supra*, and serves as an important reminder to know both what your client is posting, and what your client may be deleting.

Prospective or sitting Juror- Do it Ethically

Various ethics opinions (*see e.g.*, the NY County Lawyer Association Opinion 743 (2011) the New York City Bar Association Commission on Professional Ethics Formal Opinion 2012-2 (2012) say it is okay to research prospective and sitting jurors through social media. However, make sure you do not communicate with the individual in the process, so you don’t run afoul of the “no contact” rule. *See, e.g.*, Rule 3.5 of the New York Rules of Professional Conduct. It is therefore critically important before you, a colleague or agent conduct any social media research about a juror, that you understand how the network operates. For example, certain jurisdictions find the automatic system-generated notice, “Katy Cole has viewed your LinkedIn profile,” to be a “communication” and therefore an improper communication with a prospective juror (or witness, or party).

Understand the Impact of what you “share”

Finally, it is important to remember that the essence of the legal profession is confidentiality and discretion. And yet, there are many public examples of lawyers demonstrating, on social media, a lack of judgment when, for example, they share tweets or posts about clients or trial strategies. Such behavior is really a recipe for disaster as a *lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation.* Therefore, a comment about even a generic/unidentified client or a case runs the risk of violating one’s duty of confidentiality to the client. *See, e.g.*, [“*Blogging Assistant PD Gets 60-Day Suspension for Posts on Little-Disguised Clients*,”](#) American Bar Association, May 26, 2010.

V. What Should You Expect from Your Social Media Investigator?

Social Media data has provided a reliable means of determining a plaintiff’s credibility. A highly qualified social media investigator will comb all social media websites and collect and capture evidence;

Ultimately mitigating risk to the insurance companies. Information uncovered has added to the successful litigation of countless claims. It is an invaluable tool and will continue to play a critical role in claims.

Social Media and Data can provide actual photos, videos and often “statements” (posts) from a person of interest that traditional methods fall short of.

KNOWLEDGE AND EXPERTISE SPECIFIC TO THE INSURANCE DEFENSE WORLD

While much of social media investigations rely on the latest software and search engines, it is worthwhile to consider that an investigator familiar with insurance law and the process of defending claims is quite valuable. Consider injuries for instance; a knowledgeable investigator will have a keen eye for images or activities that are in direct conflict with a claim. It can be as obvious as a cartwheel or as simple as carrying groceries.

THOROUGH AND ACCURATE INVESTIGATION IN IDENTIFYING THE PERSON OF INTEREST

Capturing a slew of images and videos can be golden in defending a claim. However, if it turns out to be the wrong “John Smith”, your case can go up in flames. Its critical that your Social Media Investigation team validate the person of interest and supports it. This is often done by cross checking multiple relationships on multiple platforms.

COMPREHENSIVE INVESTIGATION OF ALL ONLINE PRESENCE

While Facebook and Twitter are all the rage, a qualified investigator should forage ALL online presence of a claimant. Often, more information can be found on a bowling league or soccer team’s website than on traditional social media platforms.

EXECUTIVE SUMMARY PINPOINTING WHAT HAS BEEN DISCOVERED

A professional social media investigation firm should provide an executive summary outlining what information they extracted on all social media and internet platforms. Such reports and their accompanying information are of primary importance as this is a time- consuming initiative and a claims professional and/or counsel should be directed to all the pertinent information in the report including images, video and comments. Included but not limited to

Web links to ALL information provided

Date and time stamp on all images captured

Highlight comments that are significant

Highlight of all dates on each social media/internet posts

Proper order of all images by date and organized by platform

Proper adherence to this will provide you with a fully exchangeable report for discovery or disposition.

UPON REQUEST: VIDEO THE PROCESS

There are unique situations where a judge may grant an order that a social media platform of a claimant be opened for a limited period and possibly in the presence of opposing counsel to capture online information. This may require it to be videotaped for proper admission. For this you should engage a social media investigation firm that is qualified and available to conduct same.

AVAILABLE FOR EXPERT TESTIMONY

If a case goes to trial, like any other expert engaged in the claim, a social media investigator is no different (for this purpose) than a typical private investigator. They should be available and willing to testify about the investigation they conducted.

Many courts have permitted the discovery of social media content. To be useful, discovery demands 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, 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 auto 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