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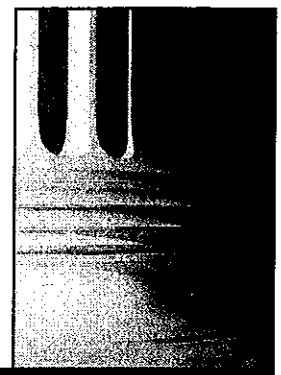

THE WORKERS' COMPENSATION UPDATE

Litigating in an Era of Online Social Networking

by Timothy M. Schafer and Marisa F. Schafer

Introduction

As of May 2011, approximately half of all American adults had a social networking profile, the majority of them having at least one such profile on Facebook.[1] Social media sites, such as Facebook and Twitter, provide an outlet for users to share, often publicly, their thoughts, feelings, pictures and happenings in their daily lives on a contemporaneous, instantaneous and ongoing basis. In fact, Facebook's stated mission is to enable its users to "stay connected with friends and family, to discover what's going on in the world, and to share and express what matters to them."[2] As the use of these websites has grown, attorneys have become increasingly aware of the potential that information valuable to a workers' compensation claim may be there for the taking. This article addresses the accessibility and use in workers' compensation claims of information that may be available on a claimant's online social networking website.

What's Out There?

Workers' compensation attorneys have all, at one time or another, encountered the surveillance footage of a claimant performing exactly that task that he claims to be unable to perform. Surveillance footage and still photography helps to paint a picture as to where a claim is headed and how quickly (or not) some of the underlying issues of a case can be resolved. Facebook, Twitter, and other social media sites may provide the same service; the claimant, thinking he is "unwatched," describes freely, or even posts pictures, of his activities, his plans, and his thoughts about any number of topics. The social media sites belonging to co-workers or other third-party witnesses to a case may also offer descriptive information tending to fill in gaps about the facts of a case and the credibility of the claimant or respondent.

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1. Tom Webster, The Social Habit 2011: The Edison/Arbitron Internet and Multimedia Study 2011, http://www.edisonresearch.com/home/archives/2011/05/the_social_habit_2011.php
2. Newsroom.fb.com/content/default.aspx?NewsAreaId=22.

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Information from social media sites often provides a candid snapshot of events from the perspectives of various individuals. By looking into the content of a claimant's social media sites as part of routine investigation, counsel can learn about claimant's habits, hobbies, and other activities that may contribute to the determination of credibility, compensability, and disability status.

Now I Know What's Out There; Can I get it?

The ease with which one can access information depends largely upon whether the information is made public by the user. If the information is public, it means, in general, that the information is accessible to everyone on the network, without the need to gain permission from the user (often referred to as "friending") to view the information.

• Ethical Considerations Regarding the Discovery of Public Information

The Connecticut Bar Association Committee on Professional Ethics (CPE) has deferred to the New York State Bar Association Committee on Professional Ethics with regard to accessing and using information on public social networking pages.[3] That opinion applies to both represented and unrepresented parties and provides that a lawyer, or third party hired by the lawyer, may ethically view and access profiles of a party to litigation as long as the profile is available to all members of the network and the lawyer neither "friends" nor directs another to "friend" the party. Since the information contained on the social media site is public and unprotected by any privacy settings, the viewing of this information amounts to the equivalent of performing a Google search or other public record search of the party and therefore, does not violate rules of Professional Conduct 4.1, 4.2, 4.3, 5.3(b)(1), or 8.4(c). Those rules proscribe deceptive or misleading conduct, false statements of material facts or of the law, and impose upon attorneys certain responsibilities for the unethical conduct of others. As long as the information is on a public site, the lawyer may personally, or through a third party, access the information.

An informal discovery process (i.e., a general and site-specific internet search) is all that is required in order to obtain this information and the lawyer, or a third party hired by the lawyer, may access the information without the need for formal discovery procedures. This is not to say that the information is admissible for purposes of litigation, but at a minimum is available for consideration.

• Ethical Considerations Regarding the Discovery of Non-Public Information

On the other hand, an attorney seeking access to information from non-public social networking sites faces some unique discovery challenges. Non-public social networking pages are pages that are (1) password protected and/or (2) on a private network and/or (3) require permission, or "friend" status, to access. As the lawyer typically will not have the password to directly access the site or the private network, permission would be required to view the information. The Rules of Professional Conduct prohibit a lawyer from personally, or through a third party, gaining information from a non-public social media site of a represented party for use in litigation without formal discovery orders.[4] Rule 4.2 prohibits a lawyer from communicating with a represented party about the subject of representation without the consent of the party's attorney. If a "friend" request is required, the request is in and of itself a violation of Rule 4.2 as it is considered a communication with a represented party.

Rule 5.3(3) generally provides that a lawyer is responsible for the conduct of nonlawyers that he or she retains if the lawyer orders the conduct or ratifies the conduct, and if that conduct would be a violation of the Rules of Professional Conduct if engaged in by the lawyer. So, for example, if an attorney hires a private investigator or any nonlawyer to contact an adverse represented party through a social networking site, the lawyer is responsible for those actions. Since that contact, if performed by the attorney, would violate Rule 4.2 prohibiting direct contact with a represented opponent, the hiring of a third party to specifically perform this task instead of the lawyer would be a violation of Rule 5.3(3). Rule 8.4 states that it is professional misconduct to violate the Rules of Professional Conduct and also to knowingly assist another to do so. It is therefore a violation of the rules to, either yourself or through a third party, "friend" or otherwise attempt to gain permission from the party to access a non-public social media site of a represented party to litigation without a

3. New York State Bar Association, Committee on Professional Ethics, Opinion 843 (September 10, 2010).
4. Connecticut Bar Association, Committee on Professional Ethics, Informal Opinion 2011-4 (March 16, 2011).

formal discovery order permitting such action.

Even when an opponent is not represented by counsel, the Rules of Professional Conduct prohibit the lawyer from personally, or through the assistance of a third party, gaining information from a non-public social media site for use in litigation without formal discovery orders. To support this proposition, the CPE has relied upon Rule 4.3, which provides generally that a lawyer shall not state or imply disinterest. A "friend" request, even if through a third party, violates the obligation to refrain from stating or implying disinterest, since neither the lawyer nor the third-party investigator has made any statement to the adverse party explaining the reason for and nature of the "friend" request.[5]

Further, Rule 4.1 states that a lawyer shall not knowingly make a false statement of material fact to a third person. A "friend" request, even to an unrepresented opponent, presumably omits the material facts that (1) you are adverse to a case involving them, and (2) that you are seeking to gain access to non-public information (3) for the purpose of using it against them in litigation. If a "friend" request does not disclose this qualifying information, an application of the Rules of Professional Conduct would categorize it as an intentional false statement of material fact and prohibited by Rule 4.1.

Rule 8.4(3) prohibits conduct involving "dishonesty, fraud, deceit, or misrepresentation." This rule has been interpreted to again cover those situations where an attorney hires a third person to pose as a "friend," and also serves as another safeguard prohibiting the lawyer from attempting to "friend" the other party directly. The CPE's reasoning is, logically, that an investigator "is not the adverse party's 'friend' under many people's definition of the word," and therefore "posing as a 'friend' is, by itself, dishonest, deceptive, and misrepresents the investigator's role."[6] As discussed above, any conduct by the investigator at the behest of the attorney and in violation of the Rules would be attributable to the attorney directly under Rule 5.3(3). The CPE again assumes that a "friend" request would not disclose that (1) the investigator is hired by the adversary attorney (2) to gain access to any non-public information on the social media site (3) for the purpose of using that information in litigation against that party, such that the request amounts to an intentional false statement of material fact in violation of Rule 4.1, and is therefore dishonest and deceitful under Rule 8.4.

• Statutory and Additional Legal Considerations

The general rule with regard to non-public social networking information is that a lawyer may not directly, or through a third party, request access to the information by way of seeking "friend" status with the party. Rather, where the information is protected, formal discovery procedures such as depositions and written interrogatories and/or requests must be employed. However, parties should be aware that legislation is in place that may complicate access to an individual's social networking data. Currently, the Stored Communications Act (SCA), 18 U.S.C. §§ 2701 - 2712 (2006), part of the Electronic Communications Privacy Act, specifically prohibits social networking sites from disclosing a user's content without express permission of that user. In other words, Facebook will reject, on established legal grounds, any general civil subpoena issued by counsel without the consent of the user to turnover a user's communications, including his or her own postings and postings by other users on the Facebook wall. Instead, a signed consent must be given by the user, to be provided to the social networking operator (i.e., Facebook's legal department), or the user himself must provide the information.

Assuming the party posting the information does not provide consent, the lawyer must seek a commissioner's order for the consent, [7] and may even request that the information be sent directly to the Workers' Compensation Commission so that evidentiary issues can be immediately resolved.[8] With the relaxed rules under the Workers' Compensation Act and the fact that little motion practice is specifically authorized, the availability of this avenue is in question. It is perhaps more realistic to ask the commissioner to order a claimant directly to provide the social networking data, as a judge might order a party to produce electronic discovery in civil court, with the attending penalties for

5. *Id.*
6. Connecticut Bar Association, Committee on Professional Ethics, Informal Opinion 2011-4, at p. 4 (March 16, 2011).
7. However, *see Bass v. Miss Porter's School*, 2009 U.S. Dist. LEXIS 99916 (D. Conn. Oct. 27, 2009), wherein Facebook reached an agreement with counsel to provide certain data after receiving defendant's subpoena.
8. *Bass*, supra, at *3 (the court ordered the plaintiff to produce 1) all responsive Facebook discovery to the Defendant and 2) everything produced from Facebook to the Court for *in camera* review);

failing to comply: a dismissal of the claim, for example. Once obtained, the information would be subject to further scrutiny by both the parties and the commissioner to determine whether it is in fact admissible at trial. The evidentiary implications of discoverable information are discussed later in this article.

While the SCA addresses the discovery of social networking data and the need for consent of the user for disclosure of information, it is currently questionable as to whether a claimant can be compelled to turn over his username and password to his attorney, the opposing party, or the judge in order that his social media data be obtained. However, in late April 2012, Rep. Eliot Engel (D-N.Y.) and Rep. Jan Schakowsky (D-Ill.), introduced to the House of Representatives the Social Networking Online Protection Act, more commonly referred to as SNOPA. SNOPA would "prohibit current or potential employers from requiring a username, password, or other access to online content."[9] In early May 2012, Democrats introduced the Password Protection Act of 2012 (PPA), which would also prevent employers from forcing employees and job applicants into sharing information from their personal social media accounts. Since discovery issues in workers' compensation claims inevitably involve both the employer and the employee, it remains to be seen whether, and to what extent, SNOPA and PPA will affect the manner in which the parties are able to obtain social media data in litigation.

• A Note On Privacy

Many of our clients will bemoan, "But I'm using the privacy settings; my Facebook account is private!" Alas, this is akin to a person claiming that a statement made to a friend was private because it was said at a party that was invitation only. The case law clearly supports the conclusion that a person has no reasonable expectation of privacy when he uses or subscribes to social networking sites.[10]

Okay I've Got It; Can I Use It?

Once an attorney has been able to obtain social media data, from Facebook or Twitter for example, she is still faced with the evidentiary constraints of having that information admitted into the record before the commission as credible, relevant, and reliable evidence. Workers' compensation commissioners, under Connecticut General Statutes §31-298, have broad discretion to consider evidence, and the rules of evidence are generally relaxed. However, a commissioner may not totally disregard all rules of evidence, and the attorney proffering or objecting to the consideration of the evidence still has the obligation to properly create a record, lay a foundation and/or preserve his client's due process rights. The major evidentiary obstacles that confront a proffer of social media data are the relevance of the data, whether the data contains hearsay, and whether it can be properly authenticated.

• Relevance

The Connecticut Rules of Evidence Sec. 4-1 defines relevant evidence as evidence "having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." Not all evidence obtained from a social media site is relevant to the case at hand. A claimant may use Twitter or Facebook to vent anger at a situation or say negative and unflattering things that he or she may not otherwise repeat in public. However, such statements do not necessarily affect the validity and compensability of a workers' compensation claim, and therefore may not be relevant to that claim. For example, in *Maron v. Virginia Polytechnic Institute*,[11] the plaintiff, Shana Maron, sued Virginia Tech for gender discrimination under the Equal Pay Act. After the jury found in her favor, the U.S. District Court Judge, James Turk, threw out the verdict and ordered a new trial. Shana Maron went to Facebook to vent her frustration to her friends, calling Judge Turk "a turkey," and "a biased bully." When counsel for the defense learned of these postings, they sought an order from the court directing Maron to turn over all of her Facebook posts about the case. In support of their motion, counsel argued that they could use the comments about the judge to impeach the plaintiff when her case came up for trial a second time. Judge Turk, however, disagreed with the defendant's position, and ruled that her statements were

9. http://engel.house.gov/index.cfm?sectionid=24&itemid=3199
10. See *United States v. Gines-Perez*, 214 F. Supp. 2d 205, 225 (D.P.R. 2002).
11. *Maron v. Virginia Polytechnic Institute and State University*, 7:08-cv-00579 (D. W. Va, Turk, USDJ).

not material to her claim of gender discrimination.[12]

Of course, if the plaintiff's posts had revealed dishonest or illegal behavior, the argument would be made that the posts are relevant since they go to the credibility of the witness, and thus tend to make the existence of any material fact more or less probable. However, there is seldom strict adherence to the rules of evidence in workers' compensation matters, and the Compensation Review Board has had occasion to dismiss an appeal on relevancy grounds by stating that a trial commissioner "has the legal background to filter out any irrelevant evidence when making his decision."[13]

• Hearsay

It is probable that counsel will often encounter multiple layers of hearsay within any discovered social media data, and should be prepared to voice appropriate objections to the admission of such statements. For example, let us say that a claimant, Joe Smith, posts on Facebook one day that he is "tired and sore." The claimant is currently collecting temporary total disability benefits for a back injury allegedly sustained on the job. Under the claimant's Facebook post, Joe's friend Steve posts, "lol probably cuz you went crazy at that party last night." Hearsay is defined in Sec. 8-1 of the Connecticut Rules of Evidence as "a statement, other than one made by the declarant while testifying at the proceedings, offered in evidence to establish the truth of the matter asserted." Claimant's counsel will, therefore, object to the admission of Steve's comments to the claimant's Facebook post as hearsay, if the post is offered to establish the truth of the matter asserted. Would the ruling on the objection be affected if the claimant cryptically responded to the post with, "yeah, right."? What if the data was offered to show that claimant was able to sit at and use the computer, and was familiar with the use of Facebook? Claimant's counsel might then object and call for the redaction of Steve's post as more prejudicial than probative in an attempt to prevent the commissioner from being distracted by a hearsay statement.

Although the statement might well be excluded in civil court (assuming some exception does not apply), and admission of hearsay material without an opportunity to cross-examine the declarant may raise due process issues, the commissioner is not constrained by the rules of evidence, and has broad discretion to determine the admissibility of evidence.[14] Furthermore, the rules of evidence themselves provide a loophole in Sec. 8-9 with the residual exception to the hearsay rule, which permits an extrajudicial statement to come into evidence when there is a reasonable need for the statement, which is supported by other guarantees of trustworthiness and reliability. Certain states permit the admission of "persuasive hearsay" as distinguished from "worthless rumor or gossip" into the record at workers' compensation hearings, and the workers' compensation commissioner "may be given credit for the ability to distinguish one from the other."[15]

• Foundation and Authentication

Once relevancy is established and hearsay objections are resolved, only evidence that can be properly authenticated can be admitted. Connecticut Rules of Evidence Sec. 9-1 provides that admissibility of evidence is conditioned on the requirement of authentication, which is "satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be." Foundation for social media data may be established by the investigator, attorney, or paralegal who found the information about the claimant on the internet. That witness should be prepared to testify how and when the social media data was obtained, in order to confirm that a copy of that data is accurate. Of course, now that the internet is readily accessible on smartphones and tablets, the information might be retrieved in the courtroom directly.

On the other hand, authentication of the information poses other difficulties, since there are currently no safeguards in place to prevent individuals from opening Facebook or Twitter accounts in the name of another person. Therefore, even if a copy of the data is accurate, the proponent of the evidence must offer proof that the claimant actually authored the data being offered, usually by obtaining testimony from the author in the form of an admission that he wrote the post, or testimony from some other witness to the writing of the post by the alleged author. The require-

12. http://www.lexisnexis.com/community/labor-employment-law/blogs/labor-employment-commentary/archive/2011/11/03/when-plaintiffs-post-about-their-case-on-facebook.aspx
13. *Paige v. The Hartford Insurance Group, et al.*, 4594 CRB-2-12-12 (January 9, 2004); See also *Flowers v. Benny's of Connecticut*, 1527 CRB-2-92-10 (April 26, 1994).
14. *Nelson v. Deb's Inc.*, 2228 CRB-3-94-12 (June 20, 1996); aff'd 45 Conn. App. 909 (1997).
15. *Reynolds Metals Co. v. Indus. Comm'n*, 402 P.2d 414, 417 (Ariz. 1965).

ment that a document or other evidence be properly authenticated is actually enforced quite frequently in the workers' compensation forum, as the weight to be given a piece of evidence can only be determined if the evidence is authentic.[16]

The rules of evidence are undoubtedly relaxed in the workers' compensation forum, but counsel on either side of the claim should be careful to create a record consistent with their general principles. Claimants' counsel should be especially cognizant of the potential for attempts to admit irrelevant and extraneous information from a client's profile or Facebook "wall," as well as the likelihood of layers of hearsay in evidence from social networking sites, in order to properly protect her client's due process rights when that data is offered into evidence. Respondents' counsel should note the importance of properly laying a foundation and authenticating the evidence obtained from the internet so there is little room for doubt as to the author of the information and methods by which the information was obtained. Of course, in the end, the trial commissioner has broad discretion to determine whether to admit the social media data and the degree to which it will be regarded as credible evidence.

Counseling Your Client

For claimants' attorneys, it is important to properly canvass your client so as to avoid (or be prepared for) harmful discovery issues. Be sure to ask whether your client has any social networking accounts and advise them to activate the privacy settings on the account, but also warn them against deleting information from the account or taking other action that would lead to spoliation of evidence. If your client has accounts that are public, both you and your client should assume that the information there will be accessed and used by the respondent. You should be diligent and do your own search for public information. Some may go so far as to advise that the accounts be closed,[17] or that a client restrict access even further by preventing their network from "tagging" them in posts, or posting to their sites. Also consider advising your client as to the possibility of "friends" being called as witnesses to provide testimony about information they are posting on their social network account. Postings on social networking sites often lack context and can leave a claimant struggling to explain what really was meant at a moment when credibility is of utmost importance. Avoiding the problem altogether may be the safest bet.

Respondents' attorneys should include a search of social networking sites in their preliminary and ongoing investigation of claims. Even private accounts may show a claimant's updated work status as part of the public profile on the site. Beyond that, be sure to commence formal discovery procedures if you do not find any public information but have a good faith belief that such discovery requests will lead to relevant and admissible information.

Editors' note: Attorney Timothy M. Schafer and Attorney Marisa S. Schafer are partners in the law firm of Schafer and Schafer, LLP in Stamford, CT.

16. *Nelson*, supra; *Caganiello v. Hartford*, 135 Conn. 473, 475 (1949); *Balkus v. Terry Steam Turbine Co.*, 167 Conn. 170, 177 (1994).
17. Before counseling a client to close a social networking account, the attorney should familiarize himself with the policies of those sites regarding access to information on closed accounts. Facebook, for example, permits temporary deactivation of an account but also permits permanent deletion of an account, which could be considered evidence spoliation. Be sure to talk this through with your client! http://www.facebook.com/help/?page=185698814812082