

ISSUES ON SOCIAL MEDIA DISCOVERY IN PERSONAL INJURY CASES

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In 2010 Facebook beat out Google and was the top visited website. It is estimate that over two-thirds of the world's internet users are subscribers to at least one social networking site such as Facebook, Twitter, LinkedIn, YouTube and MySpace. These sites contain user generated content including profile information, status updates, photographs, comments, quotes, etc. Often times one can glean the user's opinions, activities, political views, location and physical information from viewing their pages. Currently, facebook has over 1.1 billion active users each month and 665 million active users each day.

As lawyers, we are now faced with many new questions as a result of the social media age.

1. Are we obligated to search for information about our clients, witnesses and other parties, and cases on social media websites?
2. Are we obligated to discuss the use of these sites with our clients and to what extent?
3. Are we obligated to attempt to get the information admitted in Court?

More and more the courts in Pennsylvania are starting to face issues relating to the discovery of a party's social media information. At least trial courts have ruled on the relevance of such information.

Also, the evidence can be used to show events that parties to a case have attended at different time. A party may inquire into facebook to impeach or discredit another party.

Under Pennsylvania Rule of Civil Procedure 4009.1 a party can serve requests for **electronically stored information**. Although never ruled upon this most likely encompasses social media.

The overall trend is that courts are requiring defense attorneys to have at least some facts indicating conflicting testimony with publicly available information in order to obtain private social media information. Without the proper foundation the courts seem hesitant to provide access to the private areas of a person's social network.

Here are some of the Pennsylvania trial court Orders and Opinions:

1) Schuylkill County

In Hoy v. Holmes, NO. S-57-12 (C.P. Schuylkill Co. Jan 31, 2013 Domalakes, J.) the trial court held that material found on the public profile of social media is discoverable. However, the material on the private profile of social media is not discoverable unless the proponent of the discovery can establish a "factual predicate" for the material.

There is also an excellent discussion of social media discovery in the December 11, 2012 edition of the Pennsylvania Law Weekly. Volume XXXV No. 50 titled "Trial Courts Yet to Find Consistency in 'Facebook Race'".

2) Philadelphia County

The Philadelphia case of Martin v. Allstate Fire and Casualty Insurance Company, No. 110402438 (C.P. Phila Dec. 13, 2011 Manfredi, J.) dealt with a pedestrian being struck by a motor vehicle. At the Plaintiff's deposition lawyers for Allstate inquired as to whether the Plaintiff used Facebook. They further inquired as to what her password was and when she refused to provide it they filed a motion to compel. The plaintiff's attorney responded by indicating there was no foundation laid for how the plaintiff used the social networking website, or whether she used it at all to post updates, photographs or comments about the accident or her injuries. Essentially, the plaintiff argued relevance and lack of foundation. The Philadelphia Court agreed with the plaintiff in this case. The information being sought by defense counsel included providing her

user name, password, and signing an authorization and release authorizing Facebook to release a 17 item checklist pertaining to her data and a consent to indemnify Facebook for any incidental damages or costs stemming from the release of the data. The checklist included profile information, status updates, ip address, logins, photos, and wall posts.

3) Franklin County

The Franklin County case of Arcq v. Fields, No. 2008 – Civil – 2430 (C.P. Franklin Co. Dec. 7, 2011 Herman, J.) dealt with a defendant's request for login and password information to social media sites but without any foundation or relevance established by the public portions of the plaintiff's sites that were available. The Court denied the defendant's motion reasoning there is no assumption a plaintiff has posted relevant information on a private page. This was a contrary ruling when compared to the prior Franklin County case of Largent v. Reed v. Pena which dealt with additional defendant pushing defendant's van into a motorcycle. Plaintiff claimed serious and permanent mental and physical injuries. The defendant filed a motion to compel user id and password information to access private portions of plaintiff's sites as the public portions contained contradictory evidence to the claims asserted including photos of her enjoying life and posts of working out at the gym. The Court granted defendant's motion in that case.

4) Northumberland County

The Northumberland County case of Zimmerman v. Weis Markets, No. Civil - 2009 – 1535, 2011 WL 2065410 (C.P. Northumberland Co. May 19, 2011 Saylor, J.) dealt with a defendant's request to seek access to the non-public, private portions of the plaintiff's social media pages in an attempt to find other relevant information. Defendant argued this information was relevant because at plaintiff's deposition he testified he never wears shorts as he is embarrassed by his scar and then photographs to the contrary were available publicly on his Facebook and MySpace pages. The Northumberland County Court granted Defendant's Motion to Compel access to private parts of these sites.

5) Jefferson County

The Jefferson County case of McMillen v. Hummingbird Speedway, Inc., No. 113-CD, 2010 WL 4403285, PICS No. 10-3174 (Jefferson Co.

September 9, 2010, Foradora, P.J.) dealt with suit to recover damages for injuries plaintiff sustained when he was rear ended by the Defendant during a cool down lap during a stock car race. The injuries included permanent impairment, loss of impairment of general health, strength, vitality and inability to enjoy pleasures of life. In written discovery, plaintiff was asked whether he belonged to any social network computer sites, as well as for his username, login and password. Plaintiff asserted he belonged to Facebook and My Space, but that his username and login information were confidential. Defendant was able to view the public portions of plaintiff's Facebook account, which revealed comments about fishing and attendance to the Daytona 500, following the date of the injury. Defendants filed a motion to compel the private post portions of these accounts. The Court granted their Motion. The Court reasoned the relational harm to the privacy right was outweighed by the benefit of the information to disposing of litigation and indicated no privilege exists under Pennsylvania Law for information posted in non-public sections of social media websites.

6) Bucks County

The Bucks County case of Piccolo v. Patterson and Allstate Insurance Co. 2009 - Civil - 04979 (C.P. Bucks Co. May 5, 2011 Cepparulo, J.) involved an issue of scarring where the Plaintiff posted photographs of his injury on his Facebook page. Defense counsel requested Plaintiff designate him as a friend so that he could access her non-public information and access his photographs. The Court determined that sufficient photographs had been disclosed and exchanged and there was no evidence that a review of the public portion of plaintiff's account suggested inconsistency or that non-public information would be relevant. Defense argued that gaining access to photographs is akin to surveillance and Plaintiff argued there was no foundation or relevance that would outweigh Plaintiff's right to privacy. The Court agreed with the Plaintiff. However, no opinion was authored.

7) Luzerne County

The Luzerne County Case of Kalinowski v. Kirschenheiter and National Indemnity Company, No. 6779 of 2010 (C.P. Luz. Co. 2011 Van Jura, J.) involved a motor vehicle accident in which the Plaintiff testified she had MySpace and Facebook pages, personally as well as from a business he operated. The plaintiff refused to provide login information and defense

filed a motion to compel directing the plaintiff to preserve the contents of the pages and compel login information. In an Order without an Opinion, the Court denied Defendant's Motion to Compel without prejudice leaving the door open for the issue to be revisited, but did grant the Defendant's Motion to preserve and Order the Plaintiff not to delete or destroy any of the content on the website. In this case the Defendant already had access to the public portions of the Facebook and My Space pages and there was no offer of proof as to the relevancy to the public portions. Plaintiff argued that (1) defense was only seeking to embarrass Plaintiff, (2) that defense had ample access to information on public pages of sites, and (3) where Plaintiff contended that private pages related in part to Plaintiff's business and that no wage loss claim was being presented.

8) Montgomery County

In Gallagher v. Urbanovich, No. 2010-33418 (C.P. Montgomery Feb. 27, 2012) the trial court in the Court of Common Pleas in Montgomery County, Pennsylvania granted the Plaintiff's Motion to Compel discovery of the Defendant's social media information. Judge Carpenter directed the Defendant to respond to interrogatories which asked for the Defendant to provide the Plaintiff's counsel with his Facebook username, email and password. The court also orders the Defendant not to delete or otherwise erase any information on his Facebook account.

Importantly, from the defense perspective especially, there is no indication as to why the discovery was being sought or as to why it was alleged to be relevant.

9) Middle District of Pennsylvania

In Offenback v. L.M. Bowman, Inc. 2011 WL 2491371 (M.D.Pa. June 22, 2011 Carlson, M.J.) a Federal Middle District Magistrate Judge grants requests of Defendant and Plaintiff for *in camera* review of Plaintiff's private Facebook page and the court picks and chooses what is to be disclosed.¹

¹ For more information on cases involving social media discovery Pennsylvania the Tort Talk blog by Pennsylvania lawyer Dan Cummins is excellent. Go to the following link.
<http://www.torttalk.com/2012/01/facebook-discovery-scorecard.html>

Some of the other issues which may arise in discovery of social media information are:

- Is the information authentic?
- Can you obtain the information directly from the social media site? Most likely not under the federal Stored Communications Act. 18 U.S.C. Section 2701; See also Crispin v. Audiger, 717 F.Supp.2d 965 (C.D.Cal. May 26, 2010).
- Is there a duty to preserve? Most likely is you know the client has information which will be discoverable. You should or watch out. Lester v. Allied Concrete Co., Virginia Circuit Court Sept. 23, 2011); Gatto v. United Air Lines, Inc., D.N.J March 25, 2013)
- How do you address the issue with your client? At the very beginning of the case and at the initial meeting.
- How can you obtain information from a Defendant? Investigate the public areas of the various sites for information to establish a foundation.

The conclusions and themes from the cases seem to be leading in the direction that:

1. There is no constitutional right to privacy or any privilege that prohibits discovery of a party's social media activity;
2. Material found on the public portions of one's social media sites is discoverable; and
3. Material located on one's private pages of a social media profile are discoverable upon a showing of a factual predicate suggesting that allowing discovery of the private profile will lead to relevant information. If no such factual predicate is established, discovery of the private pages will not be allowed.²

² A sample Motion and Brief by Dan Cummins, Esquire seeking social network information in Pennsylvania can be accessed at Google documents at:
https://docs.google.com/file/d/0B83Pxa3TYcXMYTJIMjcwODYtMzM5ZC00MTNlWJhM2QtZDIyOGI0MzA3YmVj/edit?hl=en_US

INSTRUCTIONS TO CLIENT (Courtesy Dave Landay, Esq)

Re: Facebook And Other Social Networking Sites

If you belong to a public social networking account such as Facebook, MySpace, You Tube, Twitter, Google Buzz, etc., I STRONGLY recommend that you stop writing or posting to your account until your case is completely over. I am not suggesting that you delete or destroy writings or postings that you have already made, however, even if you think they may be harmful to your case. This could be considered intentional destruction of evidence.

If you choose not to stop writing or posting, I warn you to use great caution. Whatever you write or post, or have written or posted, may fall into the hands of the defense attorney or insurance company. It is now standard practice for them to run computer searches and investigations to obtain information about your personal life. They will try to obtain it without your knowledge or permission. Increasingly, they will demand that you provide them with your account passwords. They will also ask the Court to order release of your password information.

If you have such a site, you should immediately verify that all your settings are on PRIVATE (the highest setting possible) and nothing is public. Even with the highest privacy settings, you should only write or post items that cannot be used to hurt you. These sites are open to the public. The law is unclear if or to what extent privacy laws apply.

I understand you may decide to keep your site(s). If so, I make the following specific recommendations:

DO NOT...

- Allow anyone to become a “friend” on a website like Facebook unless you are absolutely sure you know that person.
- Post any photographs or videos of yourself (or enable others to “tag” you).
- Write or disclose anything about your personal life that you would be embarrassed to have a defense attorney use against you in front of a judge and jury.
- Send e-mails regarding your case to anyone except me.
- Send texts regarding your case to anyone except me.
- Enter insurance websites.
- Participate in blogs, chat-rooms or message boards.

I have seen an increase in electronic surveillance of these types of accounts and sites by insurance companies, investigators, and defense attorneys. They hope to

discover information to embarrass, humiliate or hurt you. They will look for pictures or comments by you or your friends that they can take out of context to prove that your injury is exaggerated or false. I have seen innocent, harmless joking between private “friends,” used and distorted by insurance companies to try to convince a judge and jury that a plaintiff is dishonest.

Be aware that the insurance companies may ask the Court to order release of all information contained within your home computers and laptop hard drives regarding the issues I have discussed above. I have seen insurance companies subpoena cell phone records to obtain transcripts from texting. I have seen them subpoena Facebook and other social networking sites.

Asking you to limit your social networking is a great inconvenience. But your case is very important. I cannot protect you fully unless you follow my warnings and instructions. Finally, my office and staff members may sometimes use social media. Our policy is not to “friend” our clients until the legal case has concluded. This is because we are in an Attorney-Client relationship with you and need to establish clear boundaries to protect this relationship for so long as your case is active.

If you have any questions or concerns about this, do not hesitate to contact my office.

