



# Insurance Coverage Litigation Committee CLE Seminar

March 4–7, 2015  
Loews Ventana Canyon  
Tucson, AZ



*Social Media: The Impact on Coverage Disputes and Litigation*

## Recent Developments in Discovery of Social Media Content

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## **I. Introduction**

A new survey released by Pew Research Center in early 2015, found that 52% of online adults now use two or more social media sites, a significant increase from 42% of internet users in 2013.<sup>1</sup> In addition, for the first time, more than half of online adults 65 and older (56%) use Facebook.<sup>2</sup> Millennials flocked to Instagram with more than half of internet-using young adults ages 18-29 (53%) using the Facebook-owned photo site.<sup>3</sup> Popular social media sites include:

- Facebook
- LinkedIn
- Google+
- Instagram
- Flickr
- Snapchat
- Tagged
- MeetMe
- Twitter
- Pinterest
- Tumblr
- VK
- Vine
- Meetup
- Ask.fm
- ClassMates

Individuals' willingness to share the details of their lives on social media has created an unrivaled source of evidence, which represents fertile ground for trial lawyers seeking discovery. Social media evidence can be particularly helpful in the areas of personal injury, insurance coverage, employment, and family law, and is already playing a key role in many cases. This paper provides a general overview of the developing case law on discoverability of social media evidence in civil cases, and surveys recent cases where this issue has arisen in the insurance coverage context.

## **II. Why Should You Consider Seeking Social Media Data in Discovery?**

Regardless of how many times individuals are cautioned not to post statuses, photos, or check-ins at local establishments that may reflect poorly on them or their company, many people still turn to social media profiles to express themselves openly and often in a carefree way. In addition, as will be discussed more fully below, there is a limited expectation of privacy in information shared on social media sites. During the past few years, courts have generally rejected the idea of a "social network site privilege" and broadened discovery rules to include relevant social media data, even if technically considered by the poster to be "private."<sup>4</sup>

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<sup>1</sup> Maeve Duggan et al., *Social Media Update 2014*, PEW RESEARCH CENTER (Jan. 9, 2015), [http://www.pewinternet.org/files/2015/01/PI\\_SocialMediaUpdate20144.pdf](http://www.pewinternet.org/files/2015/01/PI_SocialMediaUpdate20144.pdf).

<sup>2</sup> *Id.* at 2.

<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 WL 4403285 (Jefferson Cnty. C.P. Sept. 9, 2010); *Moreno v. Hartford Sentinel*, 172 Cal. App. 4th 1125 (Cal. Ct. App. 2009)

### **III. Standards and Methods of Accessing Social Media Evidence**

Courts have generally treated motions to compel social media information in the same manner as those seeking other information. As one court noted, “[d]iscovery in this area is nonetheless governed by the same legal principles that guide more traditional forms of discovery and digital ‘fishing expeditions’ are no less objectionable than their analog antecedents.”<sup>5</sup> Or as another court put it, once a party satisfies the relevancy requirement, “the resolution of social media discovery disputes pursuant to existing Rules of Procedure is simply new wine in an old bottle.”<sup>6</sup>

Not surprisingly, courts have consistently held that fishing expeditions are not allowed and have required a traditional showing of relevance before ordering broad social media discovery. For example, in *Abrams v. Pecile*<sup>7</sup>, the plaintiff filed suit seeking damages for a variety of claims, including conversion and intentional infliction of emotional distress arising from the defendant’s alleged unauthorized possession of seminude photos of the plaintiff. During discovery, the defendant sought access to the plaintiff’s social networking accounts and the trial court ordered the plaintiff to comply.<sup>8</sup> On appeal, the court disagreed, and found that the defendant failed to show that permitting access would lead to the discovery of relevant evidence.<sup>9</sup> Many courts agree that the critical factor in determining relevance of private portions of a party’s social media site is whether the public portion of the party’s site contains relevant information.<sup>10</sup>

However, not all courts take such a narrow approach as to relevancy. In a recent decision, a Florida appellate court denied a petition for certiorari to quash an order compelling discovery of photographs from plaintiff’s Facebook site.<sup>11</sup> In *Nucci*, the plaintiff brought a personal injury claim against Target arising out of alleged slip and fall in a Target store. Plaintiff put her physical condition at issue by seeking a variety of damages, including bodily injury, physical and emotional pain and suffering, and lost earnings.<sup>12</sup> Target moved to compel access to photographs

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(where a party posts information on a public portion of a social media site, there is no expectation of privacy).

<sup>5</sup> *Winchell v. Lopiccio*, 38 Misc.3d 458, 461 (N.Y. Sup. Ct. 2012) (internal citations omitted).

<sup>6</sup> *Brogan v. Rosenn, Jenkins & Greenwald, LLP*, No. 08-CV-6048, 2013 WL 1742689, at \*6 (Lackawanna Cnty. C.P. Apr. 22, 2013).

<sup>7</sup> 83 A.D.3d 527 (N.Y. App. Div. 2011).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See *McCann v. Harleysville Ins. Co. of New York*, 78 A.D. 3d 1524, 1525, 910 N.Y.S.2d 614, 615 (N.Y. App. Div. 2010) (requiring movant to establish a “factual predicate” based upon public portions of plaintiff’s Facebook account in order to obtain discovery of private portions of the account).

<sup>11</sup> *Nucci v. Target Corp.*, \_\_\_ So.3d \_\_\_, 2014 WL 71726 (Fla. Dist. Ct. App. Jan. 7, 2015).

<sup>12</sup> *Id.* at \*1.

on plaintiff's Facebook account, noting that just prior to plaintiff's deposition, there were 1,285 photos on her private Facebook account; two days after her deposition, that number had dropped to 1,249.<sup>13</sup> The circuit judge ordered production of all photographs posted on plaintiff's Facebook account from two years prior to the accident through the present.<sup>14</sup> Plaintiff appealed, claiming that the order compelling production constitutes an invasion of her privacy, and that Target had failed to establish a basis for the order, but instead had requested the photographs on "the mere hope" that the discovery would yield relevant evidence.<sup>15</sup> In affirming the circuit court, the appellate court first found that 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 issues in the lawsuit.<sup>16</sup> Second, the court 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."<sup>17</sup>

Assuming a party is able to meet its burden to establish the relevancy of social media content, the next consideration becomes how to obtain the sought after information. This is often where things can get tricky. There have been a variety of methods utilized by litigants and ordered by courts that are summarized in detail below.

#### **A. Direct Access to Social Media Accounts via Court Order**

One of the most intrusive methods of discovery is to permit the requesting party access to a user's entire social media account. This would be analogous to allowing access to someone's entire office when one file might be relevant. As you might imagine, this has been the least popular method with parties and the courts.

Nonetheless, there are several decisions in which a court has ordered a party to produce his or her login and password information to the opposing party in response to a discovery request.<sup>18</sup> A Pennsylvania court's decision in *Largent v. Reed*<sup>19</sup> demonstrates some of the challenges that can arise. In *Largent*, the court ordered the plaintiff to turn over her Facebook login information to

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at \*2.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at \*4.

<sup>17</sup> *Id.* at \*6.

<sup>18</sup> See, e.g., *Zimmerman v. Weis Markets, Inc.*, No. CV-09-1535, 2011 WL 2065410 (Northumberland Cnty. C.P. May 19, 2011) (ordering plaintiff "to provide all passwords, user names and log-in names for any and all Myspace and Facebook accounts to Defendant within twenty days" of the order).

<sup>19</sup> No. 2009-1823, 2011 WL 5632688 (Franklin Cnty. C.P. Nov. 8, 2011).

defense counsel within 14 days of the date of the court order.<sup>20</sup> Defense counsel then would have 21 days to “inspect [the plaintiff’s] profile.”<sup>21</sup> After that time, the plaintiff could change her password to prevent further access to her account.<sup>22</sup> Although the order identified the defendant’s lawyer as the only individual who would be given the information, the order did not clarify whether the defendant was allowed to view the account once defense counsel had logged in.<sup>23</sup>

Some courts have been reluctant to allow unfettered access to a party’s social media account. In *Trail v. Lekso*<sup>24</sup>, the plaintiff was injured while he was a passenger in a car the defendant was driving.<sup>25</sup> The plaintiff sustained serious injuries and, originally, the defendant denied that he was the driver.<sup>26</sup> During discovery, plaintiff moved for disclosure of defendant’s Facebook page in order to discover information that would prove he was the driver.<sup>27</sup> Later, the defendant admitted that he was the driver and also admitted liability. The defendant also moved to disclose the plaintiff’s Facebook page, and attached two photographs obtained from the plaintiff’s public Facebook page showing Trail “at a bar socializing” and “drinking at a party.”<sup>28</sup> Because Trail did not claim he was bedridden or unable to leave his home, the court therefore found that the photographs were not inconsistent with his injuries.<sup>29</sup> The court denied both the defendant and plaintiff’s motions to compel discovery because the intrusions were not offset by a showing that the discovery would assist the requesting party in formulating their claims or defense.<sup>30</sup> The defendant had already admitted liability, and there was no argument made by the plaintiff that defendant’s Facebook page would provide evidence of damages.<sup>31</sup> The Court stated that a party is not entitled to free-reign access to the private portions of social media websites of an opposing party merely because he asks the court for it.<sup>32</sup> “To enable a party to roam around in an adversary’s Facebook account would result in the party to gain access to a great deal of information that has nothing to do with the litigation and [] cause embarrassment if viewed by persons who are not ‘Friends.’”<sup>33</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> No. GD-10-017249, 2012 WL 2864004 (Allegheny Cnty. C.P. July 3, 2012).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

## **B. Direct Access to Social Media Accounts via Party Consent**

Another way to obtain relevant social media evidence is to seek consent from the party with relevant data. A consent agreement for social media documents can be reached the same way any consent agreement between parties can be reached.<sup>34</sup> Although there is no one way to draft an agreement, it should contain: (1) background information (i.e. username, password, email); (2) document requests (i.e. wall posts, emails, photos, friend lists, etc.); and (3) indemnity (Facebook, Twitter, and other social media sites generally require that a party agree to indemnity before they will produce records).<sup>35</sup> However, agreements between litigants can still present problematic situations.

One such example is *Gatto v. United Airlines*<sup>36</sup>, where the plaintiff voluntarily provided his Facebook password to opposing counsel during a settlement conference.<sup>37</sup> When the defendant's attorney later logged into the account and printed off select portions of the plaintiff's profile as was agreed upon, Facebook sent an automatic message to the plaintiff alerting him that his account had been accessed from an unauthorized ISP address.<sup>38</sup> The plaintiff attempted to deactivate the account but deleted it instead.<sup>39</sup> The data associated with the account was automatically and permanently deleted two weeks later.<sup>40</sup> The court found that the plaintiff had failed to properly preserve relevant evidence and granted defendant's request for an adverse-interference instruction.<sup>41</sup> It is important to work out all of these issues when reaching a consent agreement to ensure neither side runs into these problems.

## **C. Access to Social Media Accounts via the Service Provider & The Stored Communications Act**

Parties can attempt to obtain relevant social media evidence by requesting it directly from the social media service provider.<sup>42</sup> However, subpoenaing information directly from sites like Facebook or Twitter can be challenging.<sup>43</sup> First, social media providers may fight the subpoena to protect the privacy interest of its users.<sup>44</sup> In addition, federal law also makes it more difficult for

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<sup>34</sup> JOSHUA BRIONES AND ANA TAGVORYAN, SOCIAL MEDIA AS EVIDENCE 40 (2013).

<sup>35</sup> *Id.*

<sup>36</sup> No. 10-cv-1090, 2013 WL 1285285 (D.N.J. Mar. 25, 2013).

<sup>37</sup> *Id.* at \*1.

<sup>38</sup> *Id.* at \*2.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at \*\*4-5.

<sup>42</sup> Briones et al., *supra* note 34, at 35.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 36.

providers to hand over communications.<sup>45</sup> Almost all social media service providers will require a subpoena, court order, or other legal document to disclose user information in a civil case.<sup>46</sup>

Courts and service providers must also consider the Stored Communications Act (SCA) in these cases, which was passed by Congress in 1986 as part of the Electronic Communications Privacy Act (ECPA).<sup>47</sup> The SCA generally prevents providers of communication services from disclosing private communications to certain entities and individuals. The SCA divides Internet Service Providers (ISPs) into two categories: electronic communications services (ECSs) and remote computing services (RCSs). An ECS is “any service which provides to users thereof the ability to send or receive wire or electronic communications.”<sup>48</sup> A RCS stores the long-term for processing or storage.<sup>49</sup> While the SCA was enacted long before social media services existed, courts have applied the SCA to limit or prohibit discovery of social media content.

In *Crispin v. Christian Audigier*<sup>50</sup>, a federal court in the Central District of California quashed subpoenas to Myspace and Facebook on the grounds that some of the content on those sites is protected by the SCA. The plaintiff, an artist, alleged that defendants used his artwork in violation of an oral agreement and alleged copyright infringement.<sup>51</sup> The court held that private messaging services provided social networking sites are an ECS, and that social media sites can be both ECS and RCS providers based on the part of the site at issue.<sup>52</sup> The site would be an RCS provider as to wall postings and comments posted on an account.<sup>53</sup> In effect, the court held that inherently private portions of social networking sites are not subject to subpoena under the SCA. The decision has been strongly criticized as applying outdated law to new technology.<sup>54</sup>

Because it is difficult to directly subpoena social media sites directly, counsel are more likely to be successful in getting consent from a party either through negotiation with opposing counsel or a court-ordered consent.<sup>55</sup> In *Glazer v. Fireman’s Fund Ins. Co.*<sup>56</sup>, an employment discrimination action, defendant Fireman’s Fund served a subpoena on LivePerson, a website that provides a

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Pub. L. No. 99-508, 100 Stat. 1848 (1986).

<sup>48</sup> 18 U.S.C. § 2510 (2012).

<sup>49</sup> *Id.* at § 2711.

<sup>50</sup> 717 F. Supp. 2d 965 (C.D. Cal. 2010).

<sup>51</sup> *Id.* at 968.

<sup>52</sup> *Id.* at 986, 990-91.

<sup>53</sup> *Id.* at 988.

<sup>54</sup> Briones et al., *supra* note 34, 38.

<sup>55</sup> See, e.g., *Largent*, 2011 WL 5632688.

<sup>56</sup> No. 11 Civ. 4374 (PGG) (FM), 2012 WL 1197167 (S.D.N.Y. Apr. 5, 2012).

platform for live, on-line advice and consulting services.<sup>57</sup> Fireman’s Fund requested that LivePerson produce communications with plaintiff, which discussed plaintiff’s work performance, relationships with co-workers, views regarding her treatment by Fireman’s Fund, etc.<sup>58</sup> LivePerson objected to the subpoena on multiple grounds, including that the information sought by Fireman’s Fund was protected from disclosure under the SCA.<sup>59</sup> The court ultimately decided it need not determine whether the SCA applied because if it determined that plaintiff’s communications with LivePerson were relevant, it could simply direct plaintiff to consent allow disclosure.<sup>60</sup>

#### **D. Access to Social Media Discovery via Court-Ordered Consent**

If parties cannot come to a voluntary agreement regarding social media discovery, courts will likely consider ordering the disclosure of relevant social media evidence. In *Romano v. Steelcase*<sup>61</sup>, the defendant sought a court order granting defendant access to the plaintiff’s current and past social media pages and accounts, including all deleted pages and posts that defendant believed to be inconsistent with plaintiff’s personal injury claims. The court granted the defendant access to the plaintiff’s social media data because “[t]he information sought by Defendant regarding Plaintiff’s Facebook and Myspace accounts is both material and necessary to the defense of this action and/or could lead to admissible evidence,” and “Defendant’s need for access to the information outweighs any privacy concerns that may be voiced by Plaintiff.”<sup>62</sup> Defendant ultimately relied on the Plaintiff’s Facebook photos to refute claims that her injuries limited her ability to leave her home.

A court similarly found social media evidence discoverable in a case where emotional or mental state was at issue in the case. In *EEOC v. Simply Storage Mgmt., LLC*<sup>63</sup>, a sexual harassment case involving claims of extreme emotional distress, the court allowed discovery of claimants’ Facebook and Myspace “profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and [social network] applications [for the relevant period] that reveal, refer, or relate to any emotion of mental state,” or communications that “could reasonably be expected to produce a significant emotion, feeling,

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<sup>57</sup> *Id.* at \*1.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at \*2.

<sup>60</sup> *Id.* at \*3; *see also In re Air Crash near Clarence Ctr., N.Y., on Feb. 12, 2009*, Nos. 09-md-2085, 09-CV-961S, 2011 WL 6370189, at \*6 (W.D.N.Y. Dec. 20, 2011) (directing plaintiff to consent to disclosure of social media content and other information and noting that defendant may request written authorizations to obtain social media information from third parties if plaintiff’s production was insufficient).

<sup>61</sup> 907 N.Y.S..2d 650, 654 (N.Y. Sup. Ct. 2010).

<sup>62</sup> *Id.* at 657.

<sup>63</sup> 270 F.R.D. 430, 436 (S.D. Ind. 2010).



or mental state.” The court ordered the release of the communications regardless of whether the communications were designated as “private.” “It is reasonable to expect severe emotional or mental injury to manifest itself in some [social media] content, and an examination of that content might reveal whether onset occurred, when, and the degree of distress. Further, information that evidences other stressors that could have produced the alleged emotional distress is also relevant.”<sup>64</sup>

A number of courts have found that a party has sufficiently shown that information contained on a social media site may contain relevant content to the claims. However, many courts have stated that “discovery statutes do not allow the contents of [social media] accounts to be treated differently from the rules applied to any other discovery material...”<sup>65</sup> In *Patterson v. Turner Construction Co.*<sup>66</sup>, the plaintiff claimed damages for physical and psychological injuries, including the inability to work. The court found that social media postings on the plaintiff’s Facebook account, if relevant, were “not shielded from discovery merely because plaintiff used the service’s privacy settings to restrict access, just as a relevant matter from a personal diary is discoverable.”<sup>67</sup>

Courts have not always sided with parties requesting access to social media data. In *Potts v. Dollar Tree Stores*<sup>68</sup>, the plaintiff sought damages for harassment and discrimination based upon plaintiff’s race and a hostile work environment. Defendant filed a motion to compel the production of Facebook and/or other social media data.<sup>69</sup> The court found that the defendant lacked “any evidentiary showing that Plaintiff’s public Facebook profile contains information that will lead to the discovery of admissible evidence.”<sup>70</sup> A general assertion that there might be relevant evidence on a social media account may not be enough for the court to compel discovery responses.

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<sup>64</sup> *Id.* at 435; *see also Mailhoit v. Home Depot*, 285 F.R.D. 566 (C.D. Cal. 2012) (holding in a case involving social media evidence, that while a party may conduct discovery concerning another party’s emotional state, the discovery must still comply with the general principles of discovery under the Federal Rules of Civil Procedure).

<sup>65</sup> *See Loporcaro v. City of New York*, 950 N.Y.S.2d 723 (N.Y. Sup. Ct. Apr. 9, 2012) (granting access to certain portions of plaintiff’s Facebook account, including access to certain deleted materials); *see also Howell v. Buckeye Ranch, Inc.*, No. 2:11-cv-1014, 2012 WL 5265170, at \*2 (S.D. Ohio Oct. 1, 2012) (“Defendants are free to serve interrogatories and document requests that seek information from the [social media] accounts that is relevant to the claims and defenses in this lawsuit. Plaintiff’s counsel can then access the private sections of [plaintiff’s] social media accounts and provide the information and documents responsive to the discovery.”)

<sup>66</sup> 88 A.D.3d 617 (N.Y. App. Div. 2011).

<sup>67</sup> *Id.* at 618 (internal citations omitted).

<sup>68</sup> No. 3:11-cv-01180, 2013 WL 1176504 (M.D. Tenn. Mar. 20, 2013).

<sup>69</sup> *Id.* at \*1.

<sup>70</sup> *Id.* at \*3.

## E. In Camera Review

As discussed above, many courts are concerned over broad access to a party's social media accounts by an opposing party. In an effort to combat this issue, some courts have conducted an *in camera* review before the production of any information. In *Offenback v. Bowman*<sup>71</sup>, the plaintiff requested discovery from plaintiff's social media accounts related to claims that plaintiff's injuries resulted in decreased sociability and lack of intimacy and that plaintiff could not work. The magistrate judge conducted an *in camera* review of the plaintiff's Facebook account and ordered the production of a "small segment" of the content as relevant to the plaintiff's physical condition.<sup>72</sup> Similarly, in *Douglas v. Riverwalk Grill, LLC*<sup>73</sup>, the court conducted an *in camera* review of plaintiff's social media accounts. After reviewing "literally thousands of entries," the court found that the "majority of the issues bear absolutely no relevance" to the case.<sup>74</sup> The court held that the only entries that would be considered discoverable were those written by the plaintiff in the form of "comments" he made on others' posts or updates to his own "status."<sup>75</sup> The court designated the specific entries that it determined were discoverable in the case.<sup>76</sup> In *Barnes v. CUS Nashville, LLC*<sup>77</sup>, the trial judge actually offered to create his own Facebook account and invite two non-parties to "friend" him so that he could view private content on their sites to determine whether the content was discoverable.

Not all courts have been interested in combing through the contents of parties' social media accounts. In *Tompkins v. Detroit Metropolitan Airport*<sup>78</sup>, the court rejected the parties' suggestion that it conduct an *in camera* review of the content, explaining that "such review is ordinarily utilized only when necessary to resolve disputes concerning privilege; it is rarely used to determine relevance." The court in *Ledbetter v. Wal-Mart Stores, Inc.* similarly declined to grant plaintiff's request for an *in camera* review of plaintiff's Facebook and Myspace accounts.<sup>79</sup>

Finally, in *Holter v. Wells Fargo and Co.*, the court ordered plaintiff's counsel to review plaintiff's private social media accounts, identify any relevant material, and produce it to

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<sup>71</sup> No. 1:10-CV-1789, 2011 WL 2491371 (M.D. Pa. June 22, 2011).

<sup>72</sup> *Id.* at \*\*2-3.

<sup>73</sup> No. 11-15230, 2012 U.S. Dist. LEXIS 120538 (E.D. Mich. Aug. 24, 2012).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> No. 3:09-00764, 2010 WL 2196591 (M.D. Tenn. May 27, 2010).

<sup>78</sup> 278 F.R.D. 387, 389 n.4 (E.D. Mich. 2012).

<sup>79</sup> No. 06-cv-01958-WYD-MJW, 2009 WL 1067018 (D. Colo. April 21, 2009).

defendant's counsel in discovery.<sup>80</sup> The court found that information on plaintiff's social media site was potentially relevant to her liability and damage claims, but declined to allow Wells Fargo to have unfettered access to those accounts. "Just as the Court would not give defendant the ability to come into plaintiff's home or peruse her computer to search for possible relevant information, the Court will not allow defendant to review social media content to determine what it deems is relevant."<sup>81</sup>

#### **IV. Discovery of Social Media Content in Insurance Coverage Cases**

Insurance companies and their adjusters now regularly seek discovery of social media content in insurance coverage cases. Requests for production of social media content arise in a variety of insurance types of insurance-related litigation, but are most common in matters resulting from automobile accidents, workers' compensation and health matters, and property damage claims. In those types of cases, evidence contradicting coverage, or even potential insurance fraud, may have been unknowingly documented in photographs and other postings by the claimant or "friends" of the claimant. As a result, insurers argue that information on social media sites is relevant and discoverable because the plaintiffs/insureds in these cases have placed their physical and mental conditions at issue or through claims regarding the condition of property at the time of the alleged loss. The following is a survey of selected, recent decisions involving discovery of social media content in insurance coverage actions.

##### **A. Decisions Granting Discovery of Social Media Content**

*Beye v. Horizon Blue Cross Blue Shield of New Jersey.*<sup>82</sup> The plaintiffs were parents suing on behalf of their minor children who had been denied coverage or received reduced health care coverage for treatment of eating disorders. Defendant Horizon Blue Cross Blue Shield ("Horizon") sought discovery concerning plaintiffs' eating disorders and related health conditions, including production of emails, journals, diaries and communications, such as entries on websites like "Facebook" or "Myspace."<sup>83</sup> Plaintiffs opposed discovery on the grounds that disclosure would be harmful to the parties' health and place them at risk for relapse.<sup>84</sup> They further argued that the contents of postings on social media sites were not relevant to whether or not the insurer breached the policy as the insurer did not dispute that the beneficiaries suffer from eating disorders and that Horizon could obtain information regarding parties' physical condition

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<sup>80</sup> 281 F.R.D. 340, 344 (D. Minn. 2011).

<sup>81</sup> *Id.*

<sup>82</sup> No.06-5337 (FSH), 2007 WL 7393489 (D.N.J. Dec. 14, 2007).

<sup>83</sup> *Id.* at \*2.

<sup>84</sup> *Id.* at \*1 n. 1.

and systems from their parents and healthcare professions who are treating them.<sup>85</sup> The court limited Horizon’s discovery requests, but based upon what it viewed as a diminished expectation of privacy posted information, ordered production of “entries on webpages such as ‘Myspace’ or ‘Facebook’ that the beneficiaries [minor children with eating disorders] shared with others. The privacy concerns are far less where the beneficiary herself chose to disclose the information.”<sup>86</sup>

***Davenport v. State Farm Mut. Automobile Ins. Co.***<sup>87</sup> Plaintiff Caroline Davenport sought uninsured motorist coverage from State Farm for injuries she incurred during an automobile accident. State Farm served written discovery requests, seeking all photographs posted by plaintiff on her social networking sites, and photographs posted by others where plaintiff was tagged or otherwise identified.<sup>88</sup> State Farm also sought production of all computers, cell phones, laptops, smart phones and other, similar electronic devices used by, owned by, or in any way accessible to plaintiff to gain access to social media sites.<sup>89</sup> Plaintiff objected to the discovery on the basis that it was not reasonably calculated to lead to the discovery of admissible evidence, as overly broad, and to the extent that it would improperly invade plaintiff’s privacy.<sup>90</sup> The court granted in part and denied in part the motion, and required plaintiff to produce all photographs added to any social networking site since the date of the accident that depict plaintiff, regardless of who posted the photograph. The court noted that while social networking content is neither privileged nor protected by any right of privacy, discovery requests must nevertheless be tailored to seek information that is reasonably calculated to lead to the discovery of admissible evidence to prevent a party from engaging in a “proverbial fishing expedition.”<sup>91</sup> The court found that State Farm’s discovery requests seeking production of “every photograph” added since the date of the accident were overly broad, but required production of all photographs depicting plaintiff, whether posted by her or by others in which she was “tagged.”<sup>92</sup> The court also denied State Farm’s request for access to plaintiff’s laptop and other electronic devices as overly broad, finding that State Farm did not have a “generalized right to rummage at will through information that Plaintiff has limited from public view.”<sup>93</sup>

## **B. Decisions Denying Discovery of Social Media Content**

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at \*1 n. 3.

<sup>87</sup> No. 3:11-cv-632-J-JBT, 2012 WL 555759 (M.D. Fla. Feb. 21, 2012).

<sup>88</sup> *Id.* at \*1

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at \*2.

<sup>93</sup> *Id.* (citing *Tompkins v. Detroit Metropolitan Airport*, No. 10-10413, 2012 WL 179320, at \*2 (E.D. Mich. Jan.18, 2012)).

***McCann v. Harleystville Ins. Co. of New York.***<sup>94</sup> Harleystville requested access to plaintiff Kara McCann’s Facebook account to search for evidence regarding whether she had sustained a serious injury as the result of an automobile accident. In moving to compel discovery, Harleystville could not cite to any information on the public portions of McCann’s Facebook page that arguably contradicted her claims. The appellate court therefore affirmed the trial judge’s denial of the discovery motion, finding that Harleystville “essentially sought permission to conduct a ‘fishing expedition’ into plaintiff’s Facebook account based on the mere hope of finding relevant evidence.”<sup>95</sup> However, court reversed the trial judge’s entry of a protective order in favor of McCann, finding Harleystville was not barred from seeking access to plaintiff’s Facebook page in the future if circumstances warranted that discovery.<sup>96</sup>

***Keller v. National Farmers Union Property & Casualty Co.***<sup>97</sup> Plaintiffs Jennifer and Gloria Keller sought coverage from National Farmers Union (“NFU”) under an automobile policy for unpaid medical expenses and uninsured motorist benefits. Jennifer Keller had been injured in an automobile accident and claimed injuries to her head, neck and back. NFU sought production of all of plaintiffs’ social media website pages and all photographs posted thereon from the date of the accident to the present. Plaintiffs objected on the grounds that the requests sought irrelevant information, were overbroad and constituted harassment.<sup>98</sup> In moving to compel production, NFU argued that the social media site information was discoverable because plaintiffs had put Jennifer Keller’s physical condition at issue by alleging “a host of physical and emotional injuries” and that information on the social networking sites might undermine or contradict those allegations.<sup>99</sup> After noting that content of social networking sites is not protected from discovery merely because a party deems the content “private,”<sup>100</sup> the court held that a party seeking discovery of social networking information must make a threshold showing that publicly-available information on those sites undermines the non-movant’s claims.<sup>101</sup> The court found that NFU failed to come forward with any evidence that the public content of plaintiffs’ postings undermined their coverage claims, and that “[a]bsent such a showing, NFU is not entitled to delve *carte blanche* into non-public sections of Plaintiffs’ social networking accounts.”<sup>102</sup>

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<sup>94</sup> 78 A.D.3d 1524, 910 N.Y.S.2d 614 (N.Y. App. Div. 2010).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> No. CV 12-72-M-DLC-JCL, 2013 WL 27731 (D. Mont. Jan. 2, 2013)

<sup>98</sup> *Id.* at \*2.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at \*4, (citing *EEOC v. Simply Storage Management, LLC*, 270 F.R.D. 430, 434 (S.D. Ind. 2010); and *Glazer v. Fireman’s Fund Ins. Co.*, No. 11 Civ. 4374 (PGG) (FM), 2012 WL 1197167 (S.D.N.Y. Apr. 5, 2012)).

<sup>101</sup> *Id.* at \*4.

<sup>102</sup> *Id.*

***Brogan v. Rosenn, Jenkins & Greenwald, LLP.***<sup>103</sup> Plaintiffs Thomas and Wendy Brogan brought claims against their legal counsel and abstracting and title insurance companies for damages arising from alleged failure to identify a recorded easement prior to plaintiffs’ purchase of real property.<sup>104</sup> Defendant Conestoga Title Insurance Company (“Conestoga”) denied that the plaintiffs had asserted a valid title defect claim.<sup>105</sup> Plaintiffs moved to compel access to the Facebook login name, user name and password for a paralegal in Conestoga’s claims department.<sup>106</sup> Plaintiffs had learned during a deposition of a former Conestoga employee that he had communicated via Facebook with the paralegal regarding his deposition subpoena, who had recommended that he contact Conestoga’s counsel to discuss the title insurance claim in advance of his deposition.<sup>107</sup> Conestoga produced four Facebook messages exchanged between the paralegal and the former Conestoga employee relative to his deposition, but refused to provide plaintiffs with access to her Facebook account user name and password.<sup>108</sup> Plaintiffs argued that they were entitled to full access to the paralegal’s Facebook account because of “irreconcilably inconsistent” deposition testimony by the paralegal and former Conestoga employee.<sup>109</sup> Conestoga objected on the grounds that the discovery request was overly broad and that it sought information that was protected by a general right of privacy. The court rejected any right of privacy, and found that social media content is discoverable where the moving party makes a “threshold showing of relevance by articulating some facts, gleaned from the publicly available portions of the user’s social networking account, which suggest that pertinent information may be contained on the non-public portions of the member’s account.”<sup>110</sup> The court denied plaintiffs’ motion, finding that the threshold showing had not been made. “While a limited degree of ‘fishing’ is to be expected with certain discovery requests, parties are not permitted to ‘fish with a net rather than a hook or a harpoon.’” [Citation omitted.]<sup>111</sup>

***Progressive Ins. Co. v. Herschberg.***<sup>112</sup> Progressive Insurance Company brought a petition to stay arbitration proceedings by its insured, Marc Herschberg, arising out of uninsured motorist benefit claims. Herschberg sought coverage from Progressive for knee injuries resulting from a motor vehicle accident, claiming that he was “unable to work, had difficulty walking, and was unable to

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<sup>103</sup> No. 08 CV 6048, 2013 WL 1742689 (Lackawanna Cnty. C.P. Apr. 22, 2013).

<sup>104</sup> *Id.* at \*1.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at \*3.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at \*5.

<sup>111</sup> *Id.* at \*8.

<sup>112</sup> 000014/10, 2011 WL 1991960 (N.Y. Sup. Ct. May 5, 2011)

lift heavy objects, run, ski, dance or walk up stairs.”<sup>113</sup> Progressive denied coverage, claiming that Herschberg testified falsely regarding his alleged physical disabilities.<sup>114</sup> Progressive cited to photographs posted by Herschberg on public portions of his Facebook page after the accident, depicting Herschberg engaged in a variety of activities including standing on top of a pool slide, climbing the ladder to the pool slide, bending over a boat trailer, etc., which were posted in an album entitled “Another Day of Play. . . . I gotta get a job!”<sup>115</sup> As a result of this evidence, Progressive sought unlimited access to Herschberg’s Facebook account. The court denied without prejudice Progressive’s request for unlimited access to Herschberg’s Facebook account, finding that the demand was “overly broad, and there is no showing that the material sought is necessary and not cumulative.”<sup>116</sup>

***Chauvin v. State Farm Mut. Automobile Ins. Co.***<sup>117</sup> Plaintiff Kathleen Chauvin was involved in an automobile accident and sought to recover benefits from State Farm under Michigan’s “no fault” statute. State Farm sought production of plaintiff’s email address and password for Facebook, all Facebook account information for plaintiff including photographs, messages, status posts, wall posts, etc., and the names, addresses and telephone numbers of all of plaintiff’s friends on Facebook. The magistrate judge denied State Farm’s motion, finding that the Facebook information was irrelevant to the claim, particularly since State Farm had denied coverage on the basis that plaintiff’s current medical condition was unrelated to the accident. The magistrate also found that any information that State Farm could obtain through plaintiff’s Facebook account could also be obtained through other means. The magistrate judge concluded that allowing State Farm unfettered access to plaintiff’s Facebook account and “friends” would amount to “a fishing expedition at best and harassment at worst.” The trial judge affirmed the magistrate’s order.<sup>118</sup> The trial judge also affirmed the magistrate’s award of costs against State Farm, finding that the magistrate judge had not abused her discretion, even though some courts have allowed discovery of the same type of social media information in other cases.<sup>119</sup>

***Wright v. Yankee Point Marina, Inc. and Seabright Ins. Co.***<sup>120</sup> Plaintiff Cynthia Wright sought benefits from her employee and its workers compensation carrier for injuries allegedly sustained to her knee as a result of a fall at work. Wright’s physical condition was at issue due to her claim

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> No. 10-11735, 2011 U.S. Dist. LEXIS 121600 (E.D. Mich. Oct. 20, 2011).

<sup>118</sup> *Id.* at \*3.

<sup>119</sup> *Id.* at \*\*3-4.

<sup>120</sup> No. VA02000012633, 2014 WL 199960 (Va. Workers’ Comp. Comm’n Jan. 13, 2014).

for lifetime medical benefits and temporary total disability benefits.<sup>121</sup> Defendants sought discovery from Wright of “all photographs or videos posted by the claimant, ‘tagging’ or depicting the claimant, or anyone else on her behalf on Facebook, Myspace, or any other social networking site from the time period beginning September 1, 2010 to the present and continuing.”<sup>122</sup> Defendants also sought a complete Facebook archive and electronic copies of Wright’s profiles on Facebook and Myspace during the period in question.<sup>123</sup> Wright objected on the grounds that she had a right of privacy for communications contained on a site that she had restricted from public viewing, and because the requests overreaching, overbroad, invasive and not reasonably calculated to lead to the discovery of admissible evidence.<sup>124</sup> Defendants countered that the requested social media content was relevant to establishing claimant’s post-accident activities, and as a result, her lack of physical disability.<sup>125</sup> On appeal from an earlier ruling granting the discovery, the full Commission reversed that decision, finding that deciding the request required a balancing of the conflicting interests of the claimant’s privacy with defendants’ right to discovery regarding the matter at issue. “Before compelling access to a claimant’s private social media site, the defendant should provide credible information to show that the content of the site is of sufficient materiality to overcome the claimant’s reasonable expectation of privacy. While not finding that one rule can be allowed to all cases, we agree that the mere potential that admissible evidence will be uncovered is insufficient to justify the release of all personal content that will necessarily be disclosed by responding to the discovery.”<sup>126</sup> The Commission characterized defendants’ discovery requests for social media information as “untargeted, over broad, and violative of the claimant’s expectation of privacy.”<sup>127</sup> Finally, the Commission determined that it would not conduct an in camera review of material from Wright’s social media sites as it had “neither the time nor the staff to wade through reams of documentation. . . .”<sup>128</sup>

## **V. Ethical Considerations When Dealing with Social Media**

Attorneys may access and view any public portions of social media profiles and accounts of an adverse party.<sup>129</sup> However, “friending” or requesting to follow a represented adverse party is likely to violate applicable Rules of Professional Responsibility. Many ethics authorities have

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<sup>121</sup> *Id.* at \*1.

<sup>122</sup> *Id.* at \*2.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at \*3.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See, e.g., NYSABA Comm. on Prof'l Ethics, Op. 843 (2010), available at <http://www.nysba.org/CustomTemplates/Content.aspx?id=5162>.



begun to address this issue. In addition, general rules, such as those addressing communications with represented parties, can come into effect in this context. For example, in Minnesota, “a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”<sup>130</sup> Many other states have similar rules. Although this rule does not specifically mention social media, it can most certainly be applied in a scenario involving an attempt to get information from an adverse party online. Lawyers must still keep in mind all of the regular professional rules before seeking information from a party online.

It is less clear what the ethical implications are of “friending” or requesting to follow an unrepresented party. It is important to check state rules and state bar ethical opinions to determine the best course of action. The New York City Bar, for example, has stated that an attorney may engage in truthful, non-deceptive “friending” of unrepresented persons. The New York City Bar approves of this approach as long as the lawyer does not do things such as create “a fraudulent profile that falsely portrays the lawyer or agent as a long-lost classmate, a prospective employer or friend of a friend.”<sup>131</sup> The lawyer must disclose his or her real name. The Philadelphia Bar Association has taken a different approach, declaring that an attorney may not “friend” an unrepresented person whom the other side intends to call as a witness without revealing that the lawyer is seeking information that could be used against the witness.<sup>132</sup> Opinions like these often make references to general rules of professional conduct and apply them in the social media context.

Lawyers must also be aware of issues related to preservation of social media evidence. In *Lester v. Allied Concrete Co.*, a Virginia trial court reduced a \$6.2 million loss of consortium award to a plaintiff in a wrongful death action to \$2.1 million, sanctioned the plaintiff’s attorney in the amount of \$544,000, and sanctioned the plaintiff in the amount of \$178,000 because plaintiff’s counsel advised the plaintiff to delete social media posts.<sup>133</sup> The case involved the death of the

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<sup>130</sup> MINN. RULES OF PROF’L CONDUCT R. 4.2.

<sup>131</sup> 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>. The NYBSA has written “Social Media Ethics Guidelines” covering a variety of topics available at [http://www.nysba.org/Sections/Commercial\\_Federal\\_Litigation/Com\\_Fed\\_PDFs/Social\\_Media\\_Ethics\\_Guidelines.html](http://www.nysba.org/Sections/Commercial_Federal_Litigation/Com_Fed_PDFs/Social_Media_Ethics_Guidelines.html).

<sup>132</sup> 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](http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf).

<sup>133</sup> *Lester v. Allied Concrete Co.*, Nos. CL08-150, CL09-223, 2011 WL 8956003 (Va. Cir. Ct. Sept. 1, 2011).

plaintiff's wife. A photo showed the plaintiff holding a beer can and wearing a shirt saying "I ♥ Hot Moms." The Virginia Supreme Court reversed the remittitur, but the sanctions award was upheld.<sup>134</sup> The lawyer later consented to a five-year suspension of his license to practice law.<sup>135</sup>

## **VI. Conclusion**

Social media sites such as Facebook and Twitter have become the dominant mode of communication in the 21st Century. These sites can offer a treasure trove of valuable information, and mining that information is fast becoming a critical element of discovery in a wide variety of criminal and civil actions, including insurance claim adjustment and coverage litigation.

While the technology may be cutting edge, discovery of social media information is subject to the same requirements as any other evidence. The party seeking the information must show that the requests are reasonably calculated to lead to the discovery of admissible evidence, and no recognized privilege or protection applies. The right of privacy will continue to be at the center of discovery disputes regarding social media information; however, most courts have held that any minimal privacy interest is outweighed by the need to obtain the information.

Social media information is subject to the same rules governing preservation of potentially relevant information as any other evidence. Social media information should therefore be expressly addressed in litigation hold letters, and counsel must take all reasonable steps with their clients to prevent spoliation of potentially relevant, electronically stored information. Failure to do so may subject both counsel and their clients to potential monetary and other sanctions.

Finally, many jurisdictions have either developed or are in the process of developing ethical rules regarding social media use. Counsel must therefore be diligent in complying with these ethical rules, including avoiding *ex parte* communications with represented parties or engaging in potentially deceptive social media communications with non-parties, through "friending" or other means.

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<sup>134</sup> *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013); see also *Katiroll Company, Inc. v. Kati Roll and Platters, Inc.*, No. 10-3620 (GEB), 2011 WL 3583408 (D.N.J. Aug. 3, 2011) (defendant committed technical spoliation by changing Facebook profile picture, which was alleged to show infringement on plaintiff's trade dress, and was directed by the court to place the profile picture back on the public portion of the site and allow plaintiff's counsel to print relevant material).

<sup>135</sup> Debra Cassens Weiss, *Lawyer agrees to five-year suspension for advising client to clean up his Facebook photos*, ABA JOURNAL (Aug. 7, 2013, 2:19 PM CDT), [http://www.abajournal.com/news/article/lawyer\\_agrees\\_to\\_five-year\\_suspension\\_for\\_advising\\_client\\_to\\_clean\\_up\\_his\\_f/](http://www.abajournal.com/news/article/lawyer_agrees_to_five-year_suspension_for_advising_client_to_clean_up_his_f/)