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INFORMAL DISCOVERY: GOOGLE, FACEBOOK AND BEYOND

Presented and Prepared by:

Matthew R. Booker

mbooker@heyloyster.com

Springfield, Illinois • 217.522.8822

Heyl, Royster, Voelker & Allen

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I. INTRODUCTION

Virtually everyone is familiar with the power of the internet. Through search engines, websites and a multitude of other different resources, anyone can virtually learn and discover information on any topic. This, of course, includes information pertaining to individuals. The purpose of this brief article is to examine some of the issues involved in obtaining information through internet sites, including specifically social networking sites. This is by no means an exhaustive treatise on the subject, but merely to raise some issues related to the prevalence of this type of information, defining what social networking and similar sites are. This article also highlights the significance of such sites, including their use in discovery and investigation of potential and litigated claims, legal and ethical considerations and the use of that information.

It should be noted that electronic informal discovery is very much in its infancy in terms of the claims and litigation process. While there are some reported decisions on these topics, there is certainly no unified movement in the courts to address these types of issues. Various bar groups and other court panels are looking into adopting model rules, but as of yet, very few jurisdictions have even addressed the subject. Therefore, there is no one set of rules that defines the scope and use of this information.

The internet is ubiquitous. Google states that "several hundred million" individual searches are performed each day through its site. Google lists the results of those searches based on the language and other identifying information in the search request. Search results can list several million different websites with corresponding information. Google also has a search feature that searches only images. The obvious use in claims handling as well as litigation is obvious. Simply "googling" a potential claimant or plaintiff's name in a search engine will likely provide information pertaining to that individual. Further investigation, however, is needed to ensure that the individual in the search results is the same individual at issue in the claim or suit.

Google is understandably an invaluable tool in getting started with any sort of informal investigation and discovery. Social networking sites, however, provide an even better and perhaps sharper tool in which to obtain information regarding subject individuals. Section II of this article will describe more background in terms of what exactly a social networking site consists of.

As of 2010, the largest and most popular social networking sites include Facebook and Twitter. Facebook is the largest and one of the oldest social networking sites. Facebook states it has over 400 million active users. Moreover, 50 percent of these active users log on to Facebook in any given day. Thirty-five million users update their status each day with more than 60 million status updates posted each day. Perhaps most importantly to the claims and litigation side, more than three billion photos are uploaded to the site each month. Therefore, Facebook is a large tool

that can be used to obtain information, including the all important photograph, of claimants in litigation.

Twitter is another newer social networking site. As we will see in the next section, Twitter limits entries of "microblogs" to no more than 140 characters. From its inception in 2007, Twitter has grown drastically. There were approximately 5,000 "tweets" a day in 2007. As of early 2010, there are approximately 50 million tweets per day, an average of 600 tweets per second. The amount of information available in these types of social networking sites is vast and unprecedented.

The purpose of this article is to briefly review the legal and ethical considerations of the use of informal discovery including internet searches, and the use of social networking information in the claims and litigation process. There will be a discussion of the background of these types of sites, along with their significance and current claims and litigation practices. We will also discuss their impact on litigation. Next, there will be an overview of the legal and ethical considerations and the use of this material. Lastly, we will provide a list of resources for further investigation on the internet. Clearly, with the amount of users and information being shared in these social networking sites and on the internet in general, many claimants and plaintiffs will be able to be "discovered." This article will hopefully shed some light on the best ways to identify the types of information that can be found, and how to use that information in a legal, ethical and practical manner.

II. WHAT IS SOCIAL NETWORKING?

A. How It Works

Social networking simply refers to internet sites which provide a forum and opportunity for registered and non-registered users to view information posted on those websites by various individuals and entities. Facebook is currently the leading social networking site. It is operated and privately owned by Facebook, Inc. Since its inception in September of 2006, individuals over the age of 13 with a valid e-mail address can become a Facebook user. There is no charge to become a Facebook user. Once an individual becomes a registered user, "friends" can be added. Once these friends are added, messages can be sent to them, information and personal profiles viewed, and various groups can be joined. Additionally, users can join other networks sponsored and organized by different businesses, schools, and other entities. A January 2009 compete.com study ranked Facebook as the most used social network by worldwide monthly active users followed by MySpace.

As stated above, once a registered user enters the site, profiles can be created. These can include personal photographs, lists of personal interests, contact information and a host of other more detailed, personal information. Communication with other registered users that have previously been accepted as "friends" can be done through either private or public messages or a chat feature. Registered users can also create and join other interest groups and "like pages" some of which are maintained by businesses as a means of advertising. The primary interactive

feature of Facebook is the "wall." This is a space on every user's profile page that allows friends to post messages for the other user to see. Registered users can also "poke" other registered users. This is simply a notification from one registered user to another. As also stated, photographs can be uploaded and categorized into albums. Lastly, the "status" function allows users to inform their friends of their whereabouts and actions. Depending on privacy settings, anyone who can see a user's profile can also view that user's wall.

One of the most popular features on Facebook is the photos application. Registered users can upload a multitude of photographs, even whole albums. Facebook allows users to upload an unlimited number of photographs, compared with other image hosting services such as Photobucket and Flickr, which apply limits to the number of photos that a user is allowed to upload. Photographs, like other information, can be categorized in terms of privacy settings. That is, registered users can allow for only certain access to various photographs and albums. For example, the privacy of an album can be set so that only the user's friends can see the album, while the privacy of another album can be set so that all Facebook users can see it. Another popular feature of the photos application is the ability to "tag" or label individuals in a photograph. For example, if a photograph contains a registered user's friend, then that user can "tag" the friend in the photo. Once an individual is "tagged" Facebook then sends a notification to the friend that they have been tagged and provides them a link to see the photo.

Twitter is another important, ever-growing social networking site. It is characterized as a "microblogging" service that enables its users to send and read messages known as "tweets." Tweets are text based posts of up to 140 characters displayed on the author's profile page and delivered to the author's subscribers who are known as followers. Senders can restrict delivery to those in their inner circle of friends or, by default, allow open access. All users can send and receive tweets via the Twitter website or other external applications including smart phones. The service is free to use. Twitter boasts that there are more than 100 million users world wide as of 2010. Over the last several years, Twitter has increased by 1500 percent. As a means of comparison, by the end of 2007, there were approximately 500,000 tweets per quarter posted. By the end of 2008, 100 million tweets per quarter were posted. By the end of 2009, two billion tweets per quarter were posted. In the first quarter of 2010, four billion tweets were posted.

B. Demographics

One would think that most users of social networking sites and other similar internet applications are teenagers. This is certainly not the case. On its Facebook data page, the site indicates that individuals over 35 years of age now constitute over 30 percent of registered users. Those individuals age 55 and above grew at a rate of 922.7 percent in 2009. Individuals between the ages of 13 and 17 constituted 10.4 percent of registered users. Those between the ages of 18 and 24 constituted 25.3 percent. Individuals age 25 to 34 constituted 24.8 percent. The largest demographic is the age group of 35 to 54 which constituted nearly a third of all Facebook users. Twitter is a bit more youth-oriented. The median age of a Twitter user is 31 years old, while the median age of a Facebook user is 26. As with Facebook, however, the rates of use among individuals age 35 and older is increasing at a significant rate.

Social networking sites like Facebook and Twitter have been criticized for the opportunity for individuals to post details of their lives that seem rather odd. For example, it is not at all uncommon in such sites to see and read individuals who post what they had for breakfast, what they are going to have for dinner, what television shows they are watching, etc. A San Antonio based market research firm, Pear Analytics, analyzed tweets over a two week period in August, 2009. These tweets were separated into six categories including pointless babble, conversational, pass along value, self-promotion, spam and news. The results are as follows:

- Pointless babbles 41 percent
- Conversational 38 percent
- Pass along value nine percent
- Self-promotion six percent
- Spam four percent
- News four percent

The obvious criticism is that the “pointless babble” outweighs the other, more substantive data that is passed. In recent months, however, the use of Twitter has gained interesting footings. In research reported in the New Scientist in May 2008, those authors found that instant messaging systems like Twitter did a better job of getting information out during emergencies than either the traditional news media or government emergency services. The study also found that those using Twitter during the fires in California in October 2007 kept their followers informed of their whereabouts and the location of various fires minute by minute. Organizations that support relief efforts are also using Twitter, including the American Red Cross. In fact, the Illinois court system also posts information via Twitter.

With all of the information that is flowing in social networking sites, there are bound to be instances where a potential claimant or plaintiff is mentioned, posts messages, uploads photos, etc. Only by understanding the nature of social networking sites like Facebook and Twitter, can that information be accessed in order to assist with the handling and defense of claims. The above mentioned social networking sites are not the only such sites. Other popular sites include MySpace, YouTube, blogger.com and Xanga.

III. THE SIGNIFICANCE OF SOCIAL NETWORKING SITES

The significance of recent developments in social networking sites to claims handling and litigation has been shown in a number of recent cases. For example, in November of 2009, MSNBC.com reported that a woman lost her insurance benefits over photographs that were uploaded to Facebook. As the AP story related, a Canadian woman on sick leave for depression initiated litigation against her insurance company’s decision to cut her benefits. This followed the insurance company rescinding her coverage. The company acted after an agent found photos of the woman vacationing, at a bar and at a party. These photographs apparently included the woman “having a good time” at a Chippendales bar show, at a birthday party and

on vacation. The insurance company argued that the woman's benefits that she was receiving while on sick leave for depression were clearly unwarranted given the Facebook photographic postings. The woman, after being confronted with the photographs, claimed that she took several "four day trips" when she was feeling especially low, or on the advice of her psychiatrist.

Another case involved the significance of posting information on social networking sites in a criminal context. A college student was recently sentenced to five years and four months in prison for driving under the influence of alcohol and vehicular manslaughter of her passenger. The sentence came partly as a result of pictures on her MySpace page. As part of the prosecution's case, the district attorney presented the pictures taken from the driver's MySpace page, posted after the date of the August accident, depicting the driver partying and drinking with friends. The prosecutor said the pictures were used to show the supposed lack of remorse by the driver.

One of the fastest growing ways in which social networking sites and information is being used in courts comes in the way of divorce cases. A recent Time.com article relayed a custody case where a mother testified under oath to the court that she had not been drinking. Her MySpace page, however, which the ex-husband relayed to the court, had actual dated photos of her drinking and smoking various substances. Another case described a mother listing herself on a dating site as single with no children, which the opposing attorney used to cast doubt on her truthfulness.

Another manner in which the use of the internet, social networking and other instant messaging applications have impacted litigation and legal proceedings is the use of those types of tools by jurors. In a case from South Dakota, *Russo v. Takata Corp.*, plaintiffs sued a seatbelt manufacturer for negligent design. A jury trial resulted in a defense verdict. However, the verdict was eventually vacated and a new trial was ordered after it was revealed that, during jury deliberations, several of the jurors had "googled" the defendant, *Takata*. The issue the jurors were considering was whether the defendant had any notice or knowledge of problems. Based on the "googling" of the defendant by one of the jurors, the defense verdict was vacated and a new trial was ordered.

Cases of jurors doing outside research are becoming all the more familiar. In March 2009, a federal judge received a note from a juror reporting that another juror had conducted research on the internet. This juror had, in addition to "googling" the case as well as the parties involved, searched Wikipedia for relevant legal and technical definitions. Yet another similar scenario, a sitting juror researched the criminal defendant on-line, discovered the defendant's prior sex offender conviction and subsequently shared this information with fellow jurors. This, of course, resulted in a mistrial with the curious juror eventually being held in contempt and ordered to pay the cost of two days of jury deliberations. Perhaps one of the most shocking instances of a juror using the internet and social networking sites inappropriately occurred in November 2008 in an English jury. This juror apparently was undecided on how to vote, so she posted details of the case on her Facebook page with the request "I don't know which way to go, so I am holding a poll." An anonymous tip then alerted the presiding judge to the posting and to the fact that an

undisclosed number of people had responded, some with guilty verdicts. The juror was dismissed from the case.

As can be seen, the internet, social networking sites and internet search engines are becoming an increasingly important factor in all phases of investigation through trial. With the amount and types of information that can be obtained, special care must be taken in how to handle, preserve, and use that information. The next section will discuss the legal and ethical issues surrounding this type of information.

IV. LEGAL AND ETHICAL CONSIDERATIONS

As stated previously, this area of the law and the use of information in claims and litigation is still relatively new. There are very few published decisions and there are even fewer guides from authoritative sources in the best way to handle, preserve and use this information. Nevertheless, some recommendations can be made. A word of caution. Any contact of plaintiffs via MySpace, Twitter or other social networking sites, may be viewed as an inappropriate and illegal contact with an opposing party. Therefore, the utmost care must be exercised and advice of counsel should be sought before endeavoring to use these resources.

Rules of evidence still apply to this type of information. That is, attorneys or other individuals seeking to use photographs, comments or connections discovered on an individual's social networking site, *i.e.* Facebook or Twitter, must satisfy the rules of evidence. The individual states have specific rules as to the use of this type of evidence. The federal rules of evidence provide a baseline for many states, though that is not at all certain. In fact, Illinois has not universally adopted the federal rules of evidence.

Under the federal rules, the information must be "relevant" to the issue at hand. Relevance is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." That clearly indicates that not all information and evidence posted or visible on a social networking site will necessarily be admissible in litigation, as other rules limit the admissibility of relevant evidence at a trial.

Therefore, the information that was found on a social networking site or internet must have some ability to make the existence of any fact that is important to the case more or less probable. For example, photographs showing a plaintiff who claims soft tissue injuries of the neck ingesting alcohol at a party would not be "relevant" to any issue in the case. Conversely, photos of a plaintiff claiming soft tissue injuries drinking alcohol from a "funnel and tube," which demonstrate the soft tissues of the neck being hyperextended, may be admissible to rebut plaintiff's testimony of her inability to do certain activities.

Other evidentiary considerations will also likely come into play with this type of information and evidence. For example, the Federal Rule of Evidence 403 suggests that "evidence will not be

admitted if the probative value of potential evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury." Therefore, an item may be relevant but so prejudicial or likely to lend prejudice to the case, that it will not be admitted. For example, a photograph depicting an individual with asthma and claiming difficulty breathing lighting a marijuana cigarette may or may not be admissible. A court could find that the prejudicial effect of the ingestion of marijuana would outweigh the probative value of the evidence. Therefore, any time this type of evidence is sought to be used, either in claims handling or litigation, careful consideration must be given to the legal context in which it is being used. Simply downloading and printing photographs of claimants and plaintiffs and using them at trial is, number one, improper, and number two, likely to lead to very significant evidentiary questions being asked.

The Philadelphia Bar Association is one of the only entities in the country that has issued any sort of information and discussion regarding the use of social networking site information and obtaining that information. The Philadelphia Bar Association issued an opinion in March 2009 in which an attorney from the bar had inquired whether or not it would be proper to obtain information contained in a social networking site of a potential adverse party. The article discussed the ways to get that information. One of the issues raised in the analysis was whether the information was posted as "public."

As detailed above, individual users on sites such as Facebook can modify their privacy settings. If no modifications are made, then that information is generally available to anyone with access to the internet. Some users have edited their privacy settings so only their "friends" can access that information. One of the issues raised was whether an attorney or someone acting on their behalf can send a "friend request" to an individual on Facebook so as to become a friend and access that information. The recommendation from the Philadelphia Bar Association was that that would be an inappropriate manner in which to obtain information. By having another individual deliberately concealing the purpose of the "friend request" would allow the suggestion that the attorney was inducing an adverse party to provide information. The committee further went on to indicate that even if the attorney did not know if the adverse party would permit access and accept the friend request did not remove the "deception."

Therefore, the following guidelines can be gleaned from a review of cases and bar position papers. Information contained in social networking sites on the internet can be used in claims and litigation. However, no "deceptive" practices should be incorporated or used in obtaining that information. There are no discovery rules or ethical guidelines that prohibit the use of social networking tools in formal and informal discovery. Based on all the above, attorneys or claims professionals should not contact an adverse party through a "friend request" or "tweet" or other similar private message. The reason for this is that lawyers and claims professionals are not generally permitted to speak with an opposing party without an attorney present. The same should and seemingly does apply to online communications. This prohibition cannot get circumvented by asking a third party outside of the law firm or claims professionals to contact the same opposing party through a "friend request" or similar device. The bottom line is relatively straightforward: if that information can be accessed through public means without

deceptively requesting the information from the individual or one of the individual's friends, it is "fair use."

Using the information in claims and/or litigation can prove to be another issue. In terms of litigation, information and photographs that are in the possession of defense counsel must be shared with opposing counsel through normal discovery, assuming that normal discovery requests have been sent. For example, if defense counsel obtains photographs of a plaintiff engaged in activities which postdate the occurrence, and which the plaintiff claims she was unable to perform, those photographs must be shared with plaintiff's counsel. There is some question as to the timing and production of those photographs, however. For example, they should be tendered as part of normal discovery. Illinois Rules of Evidence and Discovery will not allow parties to produce evidence at the time of trial which was not previously disclosed. Therefore, as soon as the information is discovered and a formal discovery request has been received, they should be produced without hesitation. Their use can also be valuable in terms of mediation. Often, parties will not attend a mediation individually. Rather, they will have friends or family members accompany them. Discussing, using and making the plaintiff aware of the subject information in a mediation process can also prove very beneficial in motivating a plaintiff toward settlement.

V. CONCLUSION

The information that parties place on the internet may be valuable in evaluating and defending claims. While social networking sites will not always (and likely not often) provide useful information, it is worth the small time investment to check the major social networking sites for claimant's profiles and pictures. Additionally, social networking sites can be useful in tracking down and contacting witnesses and other third parties. For example, Facebook allows you to contact a user with a written message without requesting or being approved as a friend. The public information and resources contained on social networking sites can be used to your advantage. However, one must keep in mind the new ethical and legal pitfalls that social networking presents.

VI. ADDITIONAL RESOURCES

The following are additional resources that should be investigated with potential claimants or plaintiffs:

www.facebook.com

www.myspace.com

www.twitter.com

www.spokeo.com (look up anyone by name, phone number, etc.)

<https://www.dmdc.osd.mil/scra/owa/home> (Find out if someone is in the military)

<https://extapps.ama-assn.org/doctorfinder/home.isp> (Find physicians)

www.craigball.com/hotlinks.html
www.macattorney.com/tools.html
www.searchsystems.net
www.ceoexpress.com/default.asp



Matthew R. Booker

- *Partner*

Matt has spent his entire legal career with Heyl Royster, beginning in 2000 in the Springfield office. His practice focuses on healthcare law, representing physicians, hospitals, long-term care facilities, and other similar healthcare organizations. His defense of these entities involves a range of issues including licensure, discipline, fraud and abuse, risk management, staff concerns, and defense of malpractice and other civil litigation.

With his extensive litigation experience, Matt has personally defended a variety of civil cases, taking more than 25 to verdict. In recent years, he has developed a special focus on long term care and nursing home litigation. Many of his cases are against top Chicago and national counsel with settlement demands often in the millions of dollars.

Matt's experience in the healthcare arena is vast. He began working in a hospital at the age of 15. After graduating from college, he began work as a registered nurse in a Central Illinois emergency room. While there, his responsibilities included charge nurse positions as well as house supervisor. Working as a nurse, he obtained trauma nurse specialist certification, was an advanced cardiac life support instructor and achieved certification in pediatric advanced life support. He also was directly involved in the training of paramedics at various level one trauma centers.

Matt has also presented and lectured to various healthcare groups and other educational entities involving medical record privacy, nursing practice, and long term care litigation. He has also presented courses on evidence and evidence presentation. He has co-authored *Smart Evidence, Medical Malpractice*, and an evidentiary guide for medical malpractice cases.

Professional Associations

- American Bar Association
- Illinois State Bar Association
- Sangamon County Bar Association
- Adjuster's Association of Central Illinois (Secretary)
- Defense Research Institute
- Illinois Association of Defense Trial Counsel

Court Admissions

- State Courts of Illinois
- United States District Court, Central and Southern Districts of Illinois

Education

- Juris Doctor (Magna Cum Laude), Southern Illinois University School of Law, 1999
- Bachelor of Science-Nursing, Illinois Wesleyan University, 1995

