The Pitfalls in Discovery and Use of Social Media in Workers' Compensation Cases

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Introduction

Social media data is a relatively new source of evidence. Our society increasingly communicates through social media, and it is becoming an important part of the discovery process in both civil and criminal legal actions. The boundaries of discovery and admissibility of social media data are still being defined, but there have been many more court rulings addressing the topic in the last five years. This paper addresses the discoverability and admissibility of social media in civil cases, particularly workers' compensation cases, and cautions employers and insurers regarding accessing social media data and making employment or benefit decisions based upon employees' use of social media.

Discoverability of Social Media

Generally, the standard for discovery of social media information is the same as that for other information. The information sought must not be privileged and must be likely to lead to the discovery of admissible evidence. *See* N.C. R. Civ. P. 26(b)(1); Fed. R. Civ. P 26(b)(1).

The author is not aware of any court recognizing a "privilege" arising from social media data. Commonly recognized "privileges" in discovery are the marital privilege, the doctor-patient privilege, and the attorney-client privilege, which completely bar a litigant from obtaining information conveyed between those individuals and also bar any admission of such evidence. While there is no legal privilege arising from social media data, courts must weigh an individual's expectation of privacy in their social media information against opposing litigants' rights to obtain information critical to pursuing or defending their case. In personal injury or workers' compensation cases, plaintiffs have put their physical and/or emotional condition at issue, so the inquiry is whether the social media information sought may lead to evidence relevant to such conditions.

In applying the general standard for discovery to requests for social media data, courts frequently have held that litigants are not entitled to "fishing expeditions" and some relevance must be shown to obtain social media information. In a workers' compensation case, evidence that relates to the claimants' condition would be potentially relevant. For example, if the claimant has alleged a physical injury, pictures showing the claimant engaged in physical activity bearing on the nature of the claim may be relevant. A new avenue of discovery in workers' compensation cases is data from fit-bits, iWatches, and apps such as Map My Ride, Map My Run, and My Fitness Pal. It is important to note that

even if the plaintiff is not posting to social media after initiating litigation, "friends" may take a video or picture and "tag" the individual, and this information may be discoverable if relevant to the plaintiff's condition.

There may be hurdles, however, for employers and insurers in obtaining social media information, even if they claim that such information is relevant to the claimant's condition. In *Wright v. Yankee Point Marina, Inc. and Seabright Insurance Co*., No. VA02000012633, 2014 WL 199960 (Va. Workers' Comp. Comm'n Jan. 13, 2014), the plaintiff sought workers compensation benefits for knee injuries from an alleged fall at work. The defendant employer and insurer sought broad discovery including all photographs or videos on social networking sites. The full Commission reversed the earlier ruling granting discovery, concluding that the mere possibility that admissible evidence would be produced was insufficient to justify releasing all personal content. The Commission found that the discovery requests were over broad and violated the claimant's privacy expectations. The Commission also declined to conduct an "in camera" review due to time and staffing constraints. One lesson from the *Wright* decision is that employers and insurers seeking social media information should narrowly tailor their requests to create a likelihood that a deputy Commissioner or the full Commission would order the claimant to comply with the request.

Attorneys should be aware of an ethics opinion issued by the North Carolina State Bar pertaining to advising clients on the use of social media. On July 17, 2015, the North Carolina State Bar adopted 2014 Formal Ethics Opinion 5, "Advising a Civil Litigation Client About Social Media." The Opinion responded to three inquiries. The first inquiry asked the Bar to define a lawyer's duty to be knowledgeable of social media and advise the client about the effect of the use of social media. The Bar concluded that lawyers must be aware of relevant technology, including social media. According to the Bar, competent representation "includes advising the client of the legal ramifications of existing postings, future postings, and third party comments."

The second inquiry requested the Bar's opinion on whether a lawyer may instruct a client to remove social media postings when litigation is anticipated, but no lawsuit has been filed. In response to the second inquiry, the Opinion first noted that the Professional Rules of Conduct prohibit lawyers from counseling a client or assisting a client to engage in criminal or fraudulent behavior and prohibit lawyers from obstructing an opposing party's access to evidence or unlawfully altering, destroying, or concealing potential evidence. A lawyer must consider whether the removal of social media postings constitutes "spoliation" (intentional concealment, destruction, alteration, or mutilation of evidence) or is illegal. If the removal does not constitute spoliation and is not illegal, the lawyer may instruct the

client to remove existing social media postings. The Opinion states that the lawyer may take printed or digital images of the postings for purposes of preservation. It is prudent to preserve such potential evidence and later determine whether it is discoverable, although the Opinion does not explicitly require a lawyer or a party to preserve the social media postings in printed or digital format.

The third inquiry asks whether a lawyer may instruct a client to change security and privacy settings on social media sites to the highest level of restricted activity. The Opinion states that a lawyer may do so if it does not violate the law or a court order.

Methods of Discovery

There are several methods to facilitate the exchange of social media information during the discovery process.

The most invasive form is obtaining a litigant's login and password information. When comparing this to traditional discovery, it is typically unacceptable to seek access to a litigant's entire file cabinet. Requests must be narrowly tailored to seek the discovery of relevant evidence or information likely to lead to the discovery of relevant evidence. Thus, requiring a litigant to provide login and password information to opposing counsel is not preferred. In some instances, however, courts have required it. A potential pitfall of this method is that with login and password information, a party or lawyer may then be able to access the social media of non-party "friends," who have no involvement in the litigation. This impacts privacy concerns and has been used effectively as a bar the release of login and password information to the opposing party or lawyer.

A method that facilitates the exchange of social media information is a voluntary consent order between counsel for the parties if they are represented. Attorneys representing plaintiffs and defendants will be familiar with consent orders for the exchange of information, including social media information. A voluntary consent order should clarify whether the party and counsel will download the social media content directly and provide it to opposing counsel in written format, or whether the parties will consent to have the social media site, such as Facebook or Twitter, provide the content. Social media sites often have requirements, including indemnity, to which parties must agree before they will provide documents and information. The more practical approach is to have the parties and their counsel provide the content directly.

Subpoenas to social media providers are another method to facilitate discovery of social media, but this approach can be difficult. The social media site may oppose production based upon protecting the privacy of its users. Courts have also relied upon the Stored Communications Act, although it is a decades-old law, to quash subpoenas and preclude parties from obtaining social media data. Since

obtaining social media data directly from social media providers is challenging, the better approach may be to negotiate an agreement with opposing counsel for the party or ask the court to direct a party to allow disclosure.

Courts or Commissioners may order that the content be reviewed confidentially by the court prior to dissemination to the opposing party. This is referred to as an "in camera" review. In a case involving sensitive and confidential information, courts may take advantage of this approach to protect the litigants' privacy. The burden on courts and Commissioners to sift through extensive documents containing social media content is high, however, as indicated in the *Wright* case, and judges with full dockets or Commissioners considering a large volume of claims may be reluctant to take on this additional task.

In light of the North Carolina State Bar opinion discussed above, any party and his or her lawyer should be extremely cautious regarding the preservation of social media data. Attorneys now frequently use "litigation hold letters" to alert key individuals to the filing of a lawsuit and to instruct the individuals to preserve all evidence. Any social media data should be included in these litigation hold letters. Problems may arise if an unrecognized party, such as the opposing party's counsel, accesses an individual's Facebook or other social media site. In one case, *Gatto v. United Airlines*, No. 10-cv-1090, 2013 WL 1285285 (D.N.J. Mar. 25, 2013), the defendant's attorney logged into the plaintiff's Facebook account after the plaintiff voluntarily provided the password. After receiving a message that the account had been accessed, the plaintiff inadvertently deleted the information when attempting to deactivate the account. In such situations, parties and their lawyers should be careful to avoid unintended deletion of social media accounts and the data associated with the accounts. In most instances, the data is not backed up, and deletion is permanent.

Attorneys and litigants should take particular caution when dealing with unrepresented parties. Although it may seem advantageous to employers or insurers to obtain the social media data of a claimant who lacks the sophistication to understand the use and function of social media information, this action risks court-imposed sanctions or criminal prosecution, as discussed more fully below.

Admissibility of Social Media

The admissibility of social media evidence during a hearing or trial is a distinct concept from the discovery of such evidence. The most common objections to admissibility are that the evidence is not relevant or that the evidence will be prejudicial, confusing, or will be a waste of time under Federal Rules of Evidence 401 and 403 and the corresponding North Carolina Rules of Evidence. If social media

data is provided during discovery, there should be an accompanying objection to the admissibility of the evidence.

In workers' compensation cases, there is a unique factor in the admissibility of social media evidence because the "fact trier" is also the "gatekeeper." In other words, when considering whether the evidence is admissible, the deputy Commissioner, or decision maker in a workers' compensation case—unlike the jury in a jury trial—is not shielded from access to the data, which may impact the ultimate decision as to the award.

Employers Should Use Caution When Accessing or Using Social Media Data

Since the legal landscape related to social media law is still being defined, employers should be cautious about basing employment and benefit decisions upon employees' actions on social media sites. Employers should have any written social media policies reviewed by an employment lawyer for compliance with federal and state law. In enforcing written social media policies, employers must consistently enforce the policy to avoid any claim that adverse action was taken on the basis of an employee's race, gender, national origin, religion, disability, pregnancy, or other protected class.

Public employees are entitled to specific protections to exercise their right to speech. The federal appellate courts have articulated the test for determining whether a public employee's speech is protected in different ways. The Fourth Circuit described the test in *McVey v. Stacy*, 157 F.3d 271 (4th Cir.1998):

> In order to prove that a retaliatory employment action violated a public employee's free speech rights, the employee must satisfy the three prong-test we laid out in *McVey v. Stacy*, 157 F.3d 271 (4th Cir.1998) (the "*McVey* test"). First, the public employee must have spoken as a citizen, not as an employee, on a matter of public concern. Id. at 277. Second, the employee's interest in the expression at issue must have outweighed the employer's "interest in providing effective and efficient services to the public." *Id*. Third, there must have been a sufficient causal nexus between the protected speech and the retaliatory employment action. *Id*. at 277–78.

Ridpath v. Bd. of Governors Marshall Univ., 447 F.3d 292, 316 (4th Cir. 2006) (footnote omitted); *see also Dougherty v. Sch. Dist. of Philadelphia*, 772 F.3d 979, 987 (3d Cir. 2014) (articulating a different three-pronged test). Although the case did not involve social media, the Fourth Circuit stated in *Ridpath* that "the place where the speech occurs is irrelevant: An employee may speak as a citizen on a matter of public concern at the workplace, and may speak as an employee away from the workplace." *Ridpath v. Bd. of Governors Marshall Univ*., 447 F.3d 292, 316-17 (4th Cir. 2006) (citing *Urofsky v. Gilmore*, 216 F.3d 401, 406–07 (4th Cir.2000) (en banc)). Arguably, under *Ridpath*, comments posted to Facebook or other

social media sites would be protected and not treated differently from other statements, since it is irrelevant where the speech occurs. *Ridpath* related to comments made by an athletics administrator about an NCAA investigation.

Several federal courts have addressed whether public employees' Facebook posts are protected under the First Amendment. In *Mattingly v. Milligan*, No. 4:11CV00215 JLH, 2011 WL 5184283 (E.D. Ark. Nov. 1, 2011), the district court held that Facebook posts by an employee in the county clerk's office regarding the firings of co-workers subsequent to a hotly-contested election was speech on a matter of public concern and entitled to First Amendment protection. In *Gresham v. City of Atlanta*, the court held that a Facebook post about law enforcement services provided by the Atlanta Police Department addressed a matter of public concern. Although the court considered it a close question, the court concluded that the plaintiff's speech did pertain to an issue of public concern and was entitled to First Amendment protection. *Gresham v. City of Atlanta*, No. 1:10-CV-1301-RWS, 2011 WL 4601020, at *2 (N.D. Ga. Sept. 30, 2011) *adhered to on reconsideration*, No. 1:10-CV-1301-RWS, 2012 WL 1600439 (N.D. Ga. May 7, 2012) *and aff'd*, 542 F. App'x 817 (11th Cir. 2013).

The National Labor Relations Act protects concerted activity in the workplace—employees' rights to act together to address employment conditions—whether or not the employees are unionized. In 2010, the National Labor Relations Board ("NLRB"), a federal agency responsible for enforcing the National Labor Relations Act, began receiving charges related to employers' social media policies and actions taken by employers in response to employees' social media activity. In response to requests from employers and to promote consistency in enforcement actions, the Acting General Counsel of the NLRB released three memos in 2011 and 2012 providing details about investigations in dozens of social media cases. The first report, issued August 18, 2011, described fourteen cases. In four cases, the Office of General Counsel found that employees who discussed terms and conditions of employment with fellow employees on Facebook were engaging in "protected concerted activity." In five other cases, Facebook and Twitter posts were found not to be protected under the Act. In five cases, employers' social media policies had some aspect that was found to be overbroad.

The second report, issued January 25, 2012, also reviewed fourteen cases, half of which involved employers' social media policies. Five of the policies were found to be unlawfully broad, one was lawful, and one was found to be lawful after it was revised. Several employee discharges were found to be unlawful because they arose from unlawful social media policies. In one case, the NLRB upheld the discharge because the employee's posting was not work-related. The primary points emphasized in the January 2012 report are: (1) employer social media policies should not prohibit employees from

discussing employee wages or working conditions, which are protected activities under federal labor law; and (2) an employee's social media posts generally are not protected if they are merely complaints or "gripes" not related to group activity among employees.

The third report, issued May 30, 2012, examined seven employer social media policies and found six to have portions that were lawful and other portions that were unlawful. The seventh policy was found to be unlawful in its entirety.

In addition to General Counsel memos, the Board has issued decisions in cases involving discipline for social media postings, which are precedential in future cases. In one decision, issued September 28, 2012, the Board found that the firing of a car salesman for Facebook postings did not violate federal labor law, where the post related to an incident at a nearby car dealership. In a second decision, issued December 14, 2012, the Board found that a non-profit organization violated federal labor law when it fired five employees who participated in Facebook postings about a co-worker who planned to complain about their work performance, concluding that the Facebook conversation was concerted activity protected by the National Labor Relations Act. A summary of the NLRB's General Counsel memos and Board decisions can be found at www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media.

It is very important to alert defense counsel that defendants who pull Facebook posts without consent may violate the Facebook terms of service. Violating the terms of service of Facebook may be a federal crime. Federal prosecutors have in some cases prosecuted individuals for violating a website's terms of service under the 1986 Computer and Fraud Abuse Act, and governing US Attorneys' Manuals on prosecuting computer crimes specifically discuss terms of service violations as a basis for criminal liability.

Conclusion

Although the traditional standards of discovery apply to social media information, the rapidly changing nature of social media requires litigants and attorneys to stay informed both on the legal ramifications of discovery and admissibility of social media information and the practical methods of accessing and using such data. It is important for attorneys to instruct and guide clients to avoid potentially violating the law in deleting social media data and other uses of social media. Employers and insurers should be wary of making employment and benefit decisions based on employees' use of social media. The legal impacts from such decisions are unpredictable and may lead to expensive and protracted litigation.