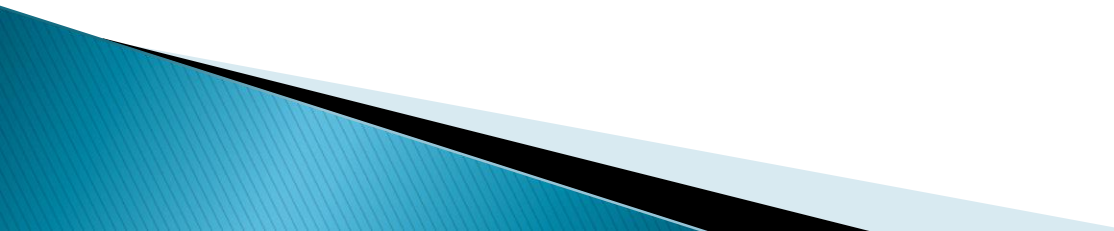


What You Don't Know About Facebook (and Twitter and Instagram...) Could Hurt You

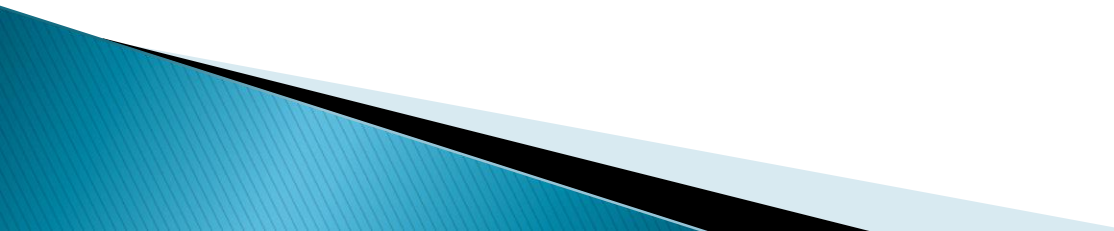
By: Daniel C. Pope, Jr.
Leto Copeley

Issues Involving the Use of Social Media Arise Throughout the Claims Process

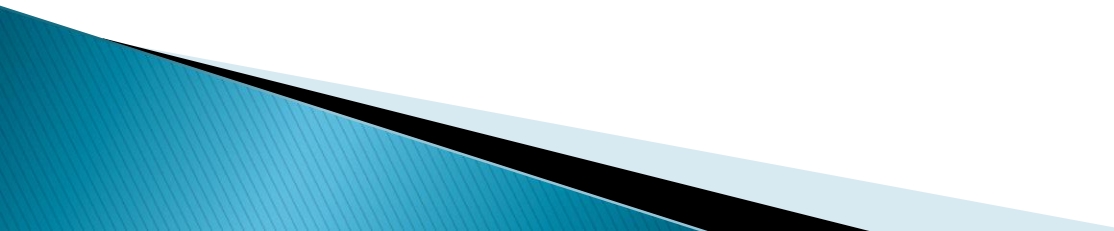
- ▶ Claims Investigation
 - ▶ Discovery
 - ▶ Litigation
 - ▶ Settlement Valuation
- 

We all have an obligation to keep up with technology and its uses

NC State Bar 2014 Formal Ethics Opinion 5:

- ▶ Duty to keep abreast of changes in law and practice, including social media.
 - ▶ Must advise client regarding potential ramifications of social media postings.
 - ▶ But, may not assist in spoliation of evidence.
 - ▶ May not use social media to circumvent other rules.
- 

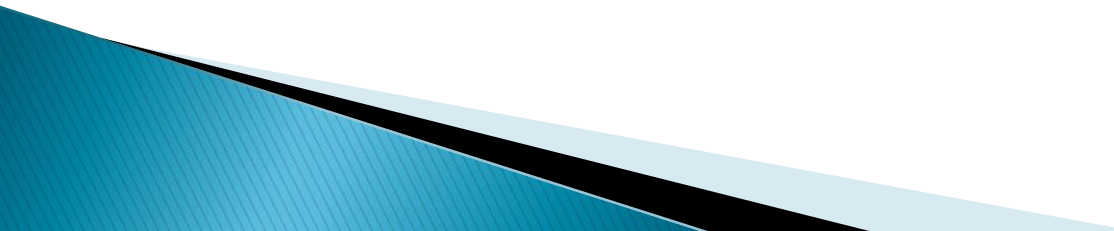
Claims Investigation Uses

- ▶ This tends to be the most frequent use of social media in workers' compensation practice.
 - ▶ Includes the informal use of Google, Facebook, LinkedIn, etc.
 - ▶ Can include the use of professional search services.
 - ▶ Often preliminary to surveillance or discovery.
- 

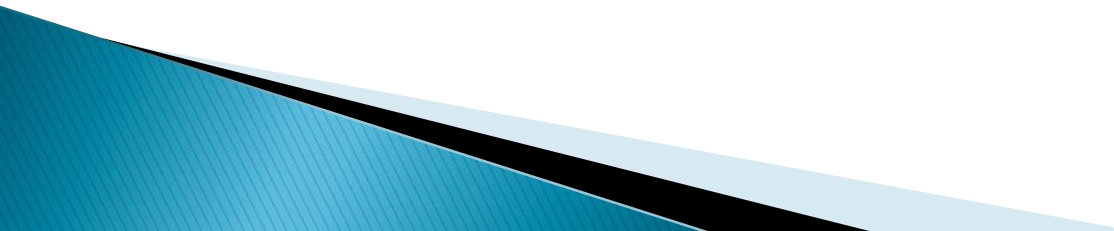
Areas of Concern During Investigation

- ▶ Parties Represented by Counsel
 - 04 NCAC 10A .0617 “No direct contact or communication concerning contested matters may be made with a represented party by the opposing party or any person on its behalf except as permitted by G.S. 97–32 or other applicable law.”
 - Rule 4.2 NC State Bar Rules of Professional Conduct; 2014 Formal Ethics Opinion 5.

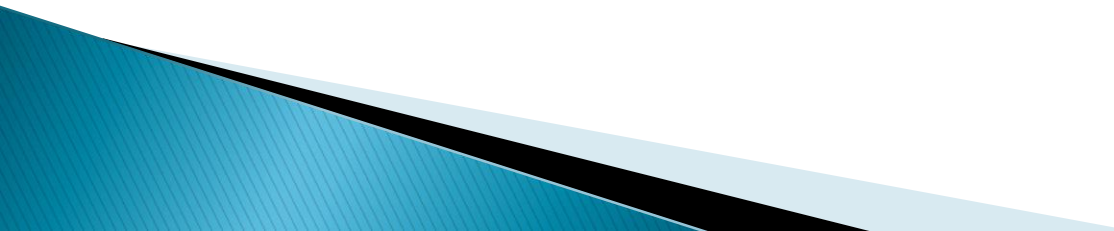
Areas of Concern During Investigation

- ▶ Potential for Misuse Outside of Workers' Compensation Proceedings
 - Employment Discrimination
 - First Amendment Issues for Public Employees
 - NLRB and Protected Concerted Activity
- 

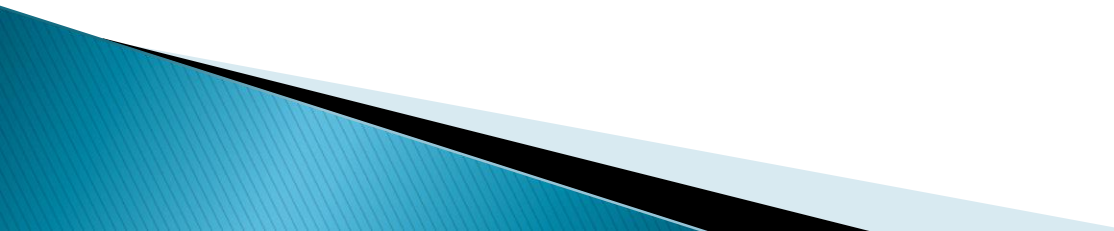
Areas of Concern During Investigation

- ▶ Potential for Misuse (Continued)
 - “Hacking”
 - Employment Policies
 - ▶ Privacy Issues
 - Public postings versus private
 - Privacy can be a two-way street
- 

Discoverability

- ▶ Discovery in Workers' Compensation claims is more limited than what is available in the General Courts of Justice. See, G.S. 97-80(f)
 - ▶ 04 NCAC 10A .0605 provides for the limited use of interrogatories and requests for production of documents.
 - ▶ But, additional means are only available upon approval by the IC or agreement of the parties.
- 

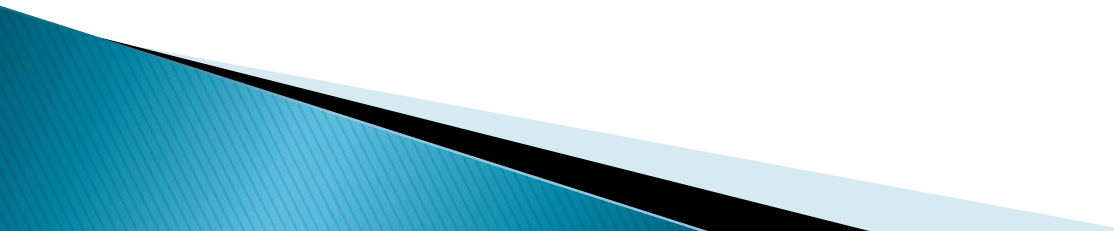
Discoverability

- ▶ General standard for what is discoverable is that the information not be privileged and must relate to relevant matters in dispute. (See, 04 NCAC 10A .0605)
 - ▶ This is somewhat more narrow than the rules governing General Courts of Justice, particularly where claims of “fishing” are made.
 - ▶ Use of Internet research, including social media searches, can help tailor more relevant requests, and help show relevance.
- 

Admissibility

- ▶ Authenticating Social Media Posts
 - Who posted it? “Tagged”
 - When was the photograph taken versus posted?
- ▶ Relevance
- ▶ Hearsay, and its Exceptions
 - Admission by a party opponent
 - Present Sense Impression
 - Excited Utterance (OMG!)
 - Then-existing Condition (physical or mental)

Tips for Effective Use

- ▶ Document what you are finding and when you are finding it. Print what you find.
 - ▶ Pay attention to the details.
 - ▶ False Flag?
 - ▶ Sites other than the “usual suspects.”
 - ▶ Ask Grandma?
- 

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