Social Media and the Practice of Law
Course Summary

Attendees will walk away with a better understanding of the do’s and don’ts of social media as it relates to litigation, communicating with judges, “ friending” clients and witnesses, protecting you intellectual property, discovery, jury vetting and instructions, marketing and public relations.

Moderator:
Gina F. Rubel, Esq.

Faculty:
Rachel E. Branson, Esq.
John Encarnacion, Esq.
Eric H. Weitz, Esq.
Hot Topics in Social Media
HOT TOPICS IN SOCIAL MEDIA

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Eric H. Weitz, Esquire
Messa & Associates, P.C.
As the number of social media sites increase, the number of individuals utilizing social media grows. Because social media tools designed to promote businesses become more sophisticated, lawyers are faced with many technical, legal and ethical issues regarding social media. Many seminars exist for attorneys to explore different aspects of social media whether it be social media’s value as an investigative tool, a marketing tool or the actual intellectual property upon which it is built. In the short time allotted for this seminar, we hope to explore just a few of the current trends and issues which are surfacing in the legal environment. These topics are not intended to be a comprehensive analysis of the current state of the law, but rather, as a summary of some of the more interesting issues that are currently making news.

**ARE EMPLOYERS GOING TOO FAR?**

No one can ignore the impact of social media in spreading good or bad news. Historically, businesses could control what news was released, when it was released and how the stories were framed. Now, every employee can blog or post information to social media sites. In minutes, stories can go viral and irreparable harm can occur. As a result, it is no surprise that employers want to monitor the postings of their employees. Since many sites permit users to restrict those that can review a given post, employees cannot use standard techniques to simply monitor information. As a result, many employers are now asking their employees to disclose their usernames and passwords so that the employer can view the private posts of their employees.

States such as Maryland [Senate Bill 433/House Bill 964] and Illinois [Illinois Public Act 097-875] are passing statutes prohibiting employers from requesting or requiring employees or prospective employees to provide their password or other related account information in order to gain access to an account or profile on social networking (i.e. Right to Privacy in the Workplace Act). These statutes make it unlawful for employers to demand access to an employee’s or prospective employee’s account or profile on a social networking website. These statutes do not appear to curb an employer’s monitoring employee usage of computers and email. Furthermore, if employees’ social networking sites have public or semi-public profiles, employers can still access this information.

**IT WASN’T ME!**

The witness is on the stand. The witness’ cell phone is in your hands. Embedded within the data on the phone is a simple text from the witness to his best friend – “I did it, now what do I do?” You ask the witness if he did it. He says he cannot recall. You ask him if the cell phone that you are holding up in front of the jury is his and, after careful examination, he begrudgingly admits that it is his. You then ask if he remembers his text message, show it to him and jury and begin to sit down to make sure that you do not spoil
your victory. Just as you are about to pull your chair up to counsel table, the witness says, “this is my phone, but I did not type that message.” Now what do you do?

The Pennsylvania Supreme Court granted allocatur in Commonwealth v. Koch, 44 A.3d 1147 (Pa. May 15, 2012), to consider this issue. Specifically, the court will face the challenge of determining how a proponent of a text message can fulfill the authentication requirements in Pennsylvania Rule of Evidence 901. The Superior Court found that circumstantial evidence may suffice where the circumstances support a finding that the writing is genuine. Commonwealth v. Koch, 39 A.3d 996, 1003 (Pa. Super. 2011). The Superior Court engaged in a lengthy analysis of different approaches to answering the question of how to authentic text messages. Recognizing that text messages, like emails and instant messages, can be sent by authors other than the owner of that phone or account, the Superior Court decided that the messages were admissible and any doubts as to the identity of the sender or recipient went to the weight of the evidence rather than the admissibility.

JUROR SCRUTINY

After years of preparation and a lengthy trial, a verdict is returned in your favor. You receive an email from your opponent. Presuming the email is an offer of congratulations or an attempt to resolve the matter, you are surprised by its content. Your opponent has filed a motion with the Court asking the Court to enter an Order compelling a juror to execute a consent form authorizing Facebook to release, for in camera review, all items posted during trial. Can the judge do this?

Most seminars and articles about the discoverability of social media center around the Stored Communications Act, 18 U.S.C. § 2701 et seq. The SCA seeks to fill a void left by the Fourth Amendment. The Fourth Amendment provides no protection for information voluntarily disclosed to third parties such as Internet service providers, Facebook or a users community. The SCA addresses this problem by recognizing that consumers have a legitimate interest in the confidentiality of communications in electronic storage. The Act prohibits attempts by courts or others to compel Facebook to disclose this type of information. Cases have been fairly consistent upholding this protection.

That was until a California trial judge wanted to find out what one of the jurors was impermissibly posting during a recently concluded trial. Recognizing the limitations set forth in the SCA, the trial judge in Juror Number One v. Superior Court of Sacramento County, 206 Cal. App. 4th 854 (2012), found a possible loophole. The SCA protects, inter alia, Facebook postings from disclosure when sought by the court or real parties in interest. The SCA does not provide the same protection when the consumer is seeking the same information. As a result, the judge ordered Juror Number One to consent to release the information rather than seeking to compel Facebook to release the information. The court
and appellate court permitted this process finding that it did not implicate the SCA and did not impact any Constitutional rights.

**MORE JUROR SCRUTINY**

Once again, trial has concluded and you cannot help but to wonder how the jury arrived at the conclusion embodied in the verdict. You turn to Facebook and navigate to the jurors’ pages and find that two of the jurors posted comments during and after the trial. You notice that others responded to these posts. Were some of the jurors exposed to extraneous influences? Is a new trial warranted?

In *Commonwealth v. Werner*, 81 Mass. App. Ct. 689 (2012), the Court faced post-trial motions regarding numerous comments by jurors and replies that suggested potential outcomes of the trial to the jurors. Furthermore, moving counsel sought a subpoena directed to Facebook seeking the posts. The court reviewed the substance of the posts independently without a response to the subpoena. The court drew a distinction between exchanges of information that constitute an extraneous influence on the juror’s decision versus the making of mere attitudinal expositions. The court, after a prior appeal, interviewed the jurors and decided that the posts did not influence their decision-making.

Interestingly, citing *U.S. v. Fumo*, 655 F.3d 388 (3d Cir 2011), the court suggested that trial judges provide explicit instructions about the use of social media and conducting Internet research. Recognizing an emerging problem, the court followed the pattern of many courts in recommending stricter instructions to jurors. Does this really work? Has it ever worked? Recognizing that jurors sometimes disregard instructions from the court to refrain from researching, viewing or discussing issues regarding current cases on social media, trial counsel face some ethical considerations while on trial.

**ETHICS**

The New York City Bar recently issued Formal Opinion 2012-2. Recognizing that counsel has immediate access to social media and Internet sites to conduct juror research, issues arose regarding the point at which restrictions might arise. While permitting the use of social media to research jurors, an advocate must refrain from communicating with a juror. The Committee stressed that the Rule [RPC 3.5(a)(4)] prohibits all communication, even if it is inadvertent. Acknowledging that this raises unique issues in the context of modern social media applications, the Committee cautions that counsel may face scrutiny if, for example, they choose to view of juror’s profile on a social media site that sends automated messages to the juror about who viewed their site. This could constitute a form of intimidation that may rise to the level of an actionable offense.
To be certain that attorneys do not attempt to circumvent these restrictions by using false names or aliases, the Committee reminds counsel that RPC 8.4(c) prohibits deception and misrepresentation of any kind.

These issues expand when faced with questions of whether counsel can accept a friend request from a juror, acknowledge that a juror is ‘following’ them on Twitter, or receive reports that a juror has viewed counsel’s profile. Can counsel ‘Tweet’ about daily developments at trial? Can a client blog about an active case? Does counsel need the client’s consent if counsel is not revealing any confidences? Can a party manipulate its website leading up to a trial? What if counsel learns of this conduct?

The questions are numerous and complex. While the bar recognizes the value of social media for marketing and research, it is important to recognize that Disciplinary Committees are not necessarily as forward thinking as the private bar. Caution is the best policy.
Digest: Attorneys may use social media websites for juror research as long as no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the result of the research is that the juror will receive a communication. If an attorney unknowingly or inadvertently causes a communication with a juror, such conduct may run afoul of the Rules of Professional Conduct. The attorney must not use deception to gain access to a juror’s website or to obtain information, and third parties working for the benefit of or on behalf of an attorney must comport with all the same restrictions as the attorney. Should a lawyer learn of juror misconduct through otherwise permissible research of a juror’s social media activities, the lawyer must reveal the improper conduct to the court.

Rules: 3.5(a)(4); 3.5(a)(5); 3.5(d); 8.4

Question: What ethical restrictions, if any, apply to an attorney’s use of social media websites to research potential or sitting jurors?

Opinion

I. Introduction

Ex parte attorney communication with prospective jurors and members of a sitting jury has long been prohibited by state rules of professional conduct (see American Bar Association Formal Opinion 319 (“ABA 319”)), and attorneys have long sought ways to gather information about potential jurors during voir dire (and perhaps during trial) within these proscribed bounds. However, as the internet and social media have changed the ways in which we all communicate, conducting juror research while complying with the rule prohibiting juror communication has become more complicated.

In addition, the internet appears to have increased the opportunity for juror misconduct, and attorneys are responding by researching not only members of the venire but sitting jurors as well. Juror misconduct over the internet is problematic and has even led to mistrials. Jurors have begun to use social media services as a platform to communicate about a trial, during the trial (see WSJ Law Blog (March 12, 2012), http://blogs.wsj.com/law/2012/03/12/jury-files-the-temptation-of-twitter/), and jurors also turn to the internet to conduct their own out of court research. For example, the Vermont
Supreme Court recently overturned a child sexual assault conviction because a juror conducted his own research on the cultural significance of the alleged crime in Somali Bantu culture. *State v. Abdi*, No. 2012-255, 2012 WL 231555 (Vt. Jan. 26, 2012). In a case in Arkansas, a murder conviction was overturned because a juror tweeted during the trial, and in a Maryland corruption trial in 2009, jurors used Facebook to discuss their views of the case before deliberations. (*Juror’s Tweets Upend Trials*, Wall Street Journal, March 2, 2012.) Courts have responded in various ways to this problem. Some judges have held jurors in contempt or declared mistrials (see *id.*) and other courts now include jury instructions on juror use of the internet. (*See New York Pattern Jury Instructions, Section III, infra.*) However, 79% of judges who responded to a Federal Judicial Center survey admitted that “they had no way of knowing whether jurors had violated a social-media ban.” (*Juror’s Tweets, supra.*) In this context, attorneys have also taken it upon themselves to monitor jurors throughout a trial.

Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney’s ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case. However, social media services and websites can blur the line between independent, private research and interactive, interpersonal “communication.” Currently, there are no clear rules for conscientious attorneys to follow in order to both diligently represent their clients and to abide by applicable ethical obligations. This opinion applies the New York Rules of Professional Conduct (the “Rules”), specifically Rule 3.5, to juror research in the internet context, and particularly to research using social networking services and websites.\(^1\)

The Committee believes that the principal interpretive issue is what constitutes a “communication” under Rule 3.5. We conclude that if a juror were to (i) receive a “friend” request (or similar invitation to share information on a social network site) as a result of an attorney’s research, or (ii) otherwise to learn of the attorney’s viewing or attempted viewing of the juror’s pages, posts, or comments, that would constitute a prohibited communication if the attorney was aware that her actions would cause the juror to receive such message or notification. We further conclude that the same attempts to research the juror might constitute a prohibited communication even if inadvertent or unintended. In addition, the attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable. Third parties working for the benefit of or on behalf of an attorney must comport with these same restrictions (as it is always unethical pursuant to Rule 8.4 for an attorney to attempt to avoid the Rule by having a non-lawyer do what she cannot). Finally, if a lawyer learns of juror misconduct through a juror’s social media activities, the lawyer must promptly reveal the improper conduct to the court.
II. Analysis Of Ethical Issues Relevant To Juror Research

A. Prior Authority Regarding An Attorney’s Ability To Conduct Juror Research Over Social Networking Websites

Prior ethics and judicial opinions provide some guidance as to what is permitted and prohibited in social media juror research. First, it should be noted that lawyers have long tried to learn as much as possible about potential jurors using various methods of information gathering permitted by courts, including checking and verifying voir dire answers. Lawyers have even been chastised for not conducting such research on potential jurors. For example, in a recent Missouri case, a juror failed to disclose her prior litigation history in response to a voir dire question. After a verdict was rendered, plaintiff’s counsel investigated the juror’s civil litigation history using Missouri’s automated case record service and found that the juror had failed to disclose that she was previously a defendant in several debt collection cases and a personal injury action. Although the court upheld plaintiff’s request for a new trial based on juror nondisclosure, the court noted that “in light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters to the court’s attention at an earlier stage.” \textit{Johnson v. McCullough}, 306 S.W.3d 551, 558-59 (Mo. 2010). The court also stated that “litigants should endeavor to prevent retrials by completing an early investigation.” \textit{Id.} at 559.

Similarly, the Superior Court of New Jersey recently held that a trial judge “acted unreasonably” by preventing plaintiff’s counsel from using the internet to research potential jurors during voir dire. During jury selection in a medical malpractice case, plaintiff’s counsel began using a laptop computer to obtain information on prospective jurors. Defense counsel objected, and the trial judge held that plaintiff’s attorney could not use her laptop during jury selection because she gave no notice of her intent to conduct internet research during selection. Although the Superior Court found that the trial court’s ruling was not prejudicial, the Superior Court stated that “there was no suggestion that counsel’s use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of ‘fairness’ or maintaining ‘a level playing field.’ The ‘playing field’ was, in fact, already ‘level’ because internet access was open to both counsel.” \textit{Carino v. Muenzen}, A-5491-08T1, 2010 N.J. Super. Unpub. LEXIS 2154, at *27 (N.J. Sup. Ct. App. Div. Aug. 30, 2010). Other recent ethics opinions have also generally discussed attorney research in the social media context. For example, San Diego County Bar Legal Ethics Opinion 2011-2 (“SDCBA
2011-2”) examined whether an attorney can send a “friend request” to a represented party. SDCBA 2011-2 found that because an attorney must make a decision to “friend” a party, even if the “friend request [is] nominally generated by Facebook and not the attorney, [the request] is at least an indirect communication” and is therefore prohibited by the rule against ex parte communications with represented parties. In addition, the New York State Bar Association (“NYSBA”) found that obtaining information from an adverse party’s social networking personal webpage, which is accessible to all website users, “is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service as Niexi or Factiva and that is plainly permitted.” (NYSBA Opinion 843 at 2) (emphasis added).

And most recently, the New York County Lawyers’ Association (“NYCLA”) published a formal opinion on the ethics of conducting juror research using social media. NYCLA Formal Opinion 743 (“NYCLA 743”) examined whether a lawyer may conduct juror research during voir dire and trial using Twitter, Facebook and other similar social networking sites. NYCLA 743 found that it is “proper and ethical under Rule 3.5 for a lawyer to undertake a pretrial search of a prospective juror’s social networking site, provided there is no contact or communication with the prospective juror and the lawyer does not seek to ‘friend’ jurors, subscribe to their Twitter accounts, send jurors tweets or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror but must not ‘friend’ the juror, email, send tweets or otherwise communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring.” (NYCLA 743 at 4.) The opinion further noted the importance of reporting to the court any juror misconduct uncovered by such research and found that an attorney must notify the court of any impropriety “before taking any further significant action in the case.” Id. NYCLA concluded that attorneys cannot use knowledge of juror misconduct to their advantage but rather must notify the court.

As set forth below, we largely agree with our colleagues at NYCLA. However, despite the guidance of the opinions discussed above, the question at the core of applying Rule 3.5 to social media—what constitutes a communication—has not been specifically addressed, and the Committee therefore analyzes this question below.

**B. An Attorney May Conduct Juror Research Using Social Media Services And Websites But Cannot Engage In Communication With A Juror**

1. Discussion of Features of Various Potential Research Websites

Given the popularity and widespread usage of social media services, other websites and general search engines, it has become common for lawyers to use the internet as a tool to research members of the jury venire in preparation for jury selection as well as to monitor
jurors throughout the trial. Whether research conducted through a particular service will constitute a prohibited communication under the Rules may depend in part on, among other things, the technology, privacy settings and mechanics of each service.

The use of search engines for research is already ubiquitous. As social media services have grown in popularity, they have become additional sources to research potential jurors. As we discuss below, the central question an attorney must answer before engaging in jury research on a particular site or using a particular service is whether her actions will cause the juror to learn of the research. However, the functionality, policies and features of social media services change often, and any description of a particular website may well become obsolete quickly. Rather than attempt to catalog all existing social media services and their ever-changing offerings, policies and limitations, the Committee adopts a functional definition.²

We understand “social media” to be services or websites people join voluntarily in order to interact, communicate, or stay in touch with a group of users, sometimes called a “network.” Most such services allow users to create personal profiles, and some allow users to post pictures and messages about their daily lives. Professional networking sites have also become popular. The amount of information that users can view about each other depends on the particular service and also each user’s chosen privacy settings. The information the service communicates or makes available to visitors as well as members also varies. Indeed, some services may automatically notify a user when her profile has been viewed, while others provide notification only if another user initiates an interaction. Because of the differences from service to service and the high rate of change, the Committee believes that it is an attorney’s duty to research and understand the properties of the service or website she wishes to use for jury research in order to avoid inadvertent communications.

2. What Constitutes a “Communication”?

Any research conducted by an attorney into a juror or member of the venire’s background or behavior is governed in part by Rule 3.5(a)(4), which states: “a lawyer shall not . . . (4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order.” The Rule does not contain a mens rea requirement; by its literal terms, it prohibits all communication, even if inadvertent. Because of this, the application of Rule 3.5(a)(4) to juror research conducted over the internet via social media services is potentially more complicated than traditional juror communication issues. Even though the attorney’s purpose may not be to communicate with a juror, but simply to gather information, social media services are often designed for the very purpose of communication, and automatic features or user settings may cause a “communication” to occur even if the attorney does intend not for one to
happen or know that one may happen. This raises several ethical questions: is every visit to a juror’s social media website considered a communication? Should the intent to research, not to communicate, be the controlling factor? What are the consequences of an inadvertent or unintended communications? The Committee begins its analysis by considering the meaning of “communicate” and “communication,” which are not defined either in the Rule or the American Bar Association Model Rules.⁶

Black’s Law Dictionary (9th Ed.) defines “communication” as: “1. The expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another’s perception. 2. The information so expressed or exchanged.” The Oxford English Dictionary defines “communicate” as: “To impart (information, knowledge, or the like) (to a person; also formerly with); to impart the knowledge or idea of (something), to inform a person of; to convey, express; to give an impression of, put across.” Similarly, Local Rule 26.3 of the United States District Courts for the Southern and Eastern Districts of New York defines “communication” (for the purposes of discovery requests) as: “the transmittal of information (in the form of facts, ideas, inquiries or otherwise).”

Under the above definitions, whether the communicator intends to “impart” a message or knowledge is seemingly irrelevant; the focus is on the effect on the receiver. It is the “transmission of,” “exchange of” or “process of bringing” information or ideas from one person to another that defines a communication. In the realm of social media, this focus on the transmission of information or knowledge is critical. A request or notification transmitted through a social media service may constitute a communication even if it is technically generated by the service rather than the attorney, is not accepted, is ignored, or consists of nothing more than an automated message of which the “sender” was unaware. In each case, at a minimum, the researcher imparted to the person being researched the knowledge that he or she is being investigated.

3. An Attorney May Research A Juror Through Social Media Websites As Long As No Communication Occurs

The Committee concludes that attorneys may use search engines and social media services to research potential and sitting jurors without violating the Rules, as long as no communication with the juror occurs. The Committee notes that Rule 3.5(a)(4) does not impose a requirement that a communication be willful or made with knowledge to be prohibited. In the social media context, due to the nature of the services, unintentional communications with a member of the jury venire or the jury pose a particular risk. For example, if an attorney views a juror’s social media page and the juror receives an automated message from the social media service that a potential contact has viewed her profile—even if the attorney has not requested the sending of that message or is entirely unaware of it—the attorney has arguably “communicated” with the juror. The transmission of the information that the attorney viewed the juror’s page is a communication that may
be attributable to the lawyer, and even such minimal contact raises the specter of the improper influence and/or intimidation that the Rules are intended to prevent. Furthermore, attorneys cannot evade the ethics rules and avoid improper influence simply by having a non-attorney with a name unrecognizable to the juror initiate communication, as such action will run afoul of Rule 8.4 as discussed in Section II(C), infra.

Although the text of Rule 3.5(a)(4) would appear to make any “communication”—even one made inadvertently or unknowingly—a violation, the Committee takes no position on whether such an inadvertent communication would in fact be a violation of the Rules. Rather, the Committee believes it is incumbent upon the attorney to understand the functionality of any social media service she intends to use for juror research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site, and should keep in mind the possibility that even an accidental, automated notice to the juror could be considered a violation of Rule 3.5.

More specifically, and based on the Committee’s current understanding of relevant services, search engine websites may be used freely for juror research because there are no interactive functions that could allow jurors to learn of the attorney’s research or actions. However, other services may be more difficult to navigate depending on their functionality and each user’s particular privacy settings. Therefore, attorneys may be able to do some research on certain sites but cannot use all aspects of the sites’ social functionality. An attorney may not, for example, send a chat, message or “friend request” to a member of the jury or venire, or take any other action that will transmit information to the juror because, if the potential juror learns that the attorney seeks access to her personal information then she has received a communication. Similarly, an attorney may read any publicly-available postings of the juror but must not sign up to receive new postings as they are generated. Finally, research using services that may, even unbeknownst to the attorney, generate a message or allow a person to determine that their webpage has been visited may pose an ethical risk even if the attorney did not intend or know that such a “communication” would be generated by the website.

The Committee also emphasizes that the above applications of Rule 3.5 are meant as examples only. The technology, usage and privacy settings of various services will likely change, potentially dramatically, over time. The settings and policies may also be partially under the control of the person being researched, and may not be apparent, or even capable of being ascertained. In order to comply with the Rules, an attorney must therefore be aware of how the relevant social media service works, and of the limitations of her knowledge. It is the duty of the attorney to understand the functionality and privacy settings of any service she wishes to utilize for research, and to be aware of any changes in the platforms’ settings or policies to ensure that no communication is received by a juror or venire member.
C. An Attorney May Not Engage in Deception or Misrepresentation In Researching Jurors On Social Media Websites

Rule 8.4(c), which governs all attorney conduct, prohibits deception and misrepresentation. In the jury research context, this rule prohibits attorneys from, for instance, misrepresenting their identity during online communications in order to access otherwise unavailable information, including misrepresenting the attorney’s associations or membership in a network or group in order to access a juror’s information. Thus, for example, an attorney may not claim to be an alumnus of a school that she did not attend in order to view a juror’s personal webpage that is accessible only to members of a certain alumni network.

Furthermore, an attorney may not use a third party to do what she could not otherwise do. Rule 8.4(a) prohibits an attorney from violating any Rule “through the acts of another.” Using a third party to communicate with a juror is deception and violates Rule 8.4(c), as well as Rule 8.4(a), even if the third party provides the potential juror only with truthful information. The attorney violates both rules whether she instructs the third party to communicate via a social network or whether the third party takes it upon herself to communicate with a member of the jury or venire for the attorney’s benefit. On this issue, the Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02 (“PBA 2009-02”) concluded that if an attorney uses a third party to “friend” a witness in order to access information, she is guilty of deception because “[this action] omits a highly material fact, namely, that the third party who asks to be allowed access to the witness’ pages is doing so only because she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit.” (PBA 2009-02 at 3.) New York City Bar Association Formal Opinion 2010-2 similarly held that a lawyer may not gain access to a social networking website under false pretenses, either directly or through an agent, and NYCLA 743 also noted that Rule 8.4 governs juror research and an attorney therefore cannot use deception to gain access to a network or direct anyone else to “friend” an adverse party. (NYCLA 743 at 2.) We agree with these conclusions; attorneys may not shift their conduct or assignments to non-attorneys in order to evade the Rules.

D. The Impact On Jury Service Of Attorney Use Of Social Media Websites For Research

Although the Committee concludes that attorneys may conduct jury research using social media websites as long as no “communication” occurs, the Committee notes the potential impact of jury research on potential jurors’ perception of jury service. It is conceivable that even jurors who understand that many of their social networking posts and pages are public may be discouraged from jury service by the knowledge that attorneys and judges can and will conduct active research on them or learn of their online—albeit public—social
lives. The policy considerations implicit in this possibility should inform our understanding of the applicable Rules.

In general, attorneys should only view information that potential jurors intend to be—and make—public. Viewing a public posting, for example, is similar to searching newspapers for letters or columns written by potential jurors because in both cases the author intends the writing to be for public consumption. The potential juror is aware that her information and images are available for public consumption. The Committee notes that some potential jurors may be unsophisticated in terms of setting their privacy modes or other website functionality, or may otherwise misunderstand when information they post is publicly available. However, in the Committee’s view, neither Rule 3.5 nor Rule 8.4(c) prohibit attorneys from viewing public information that a juror might be unaware is publicly available, except in the rare instance where it is clear that the juror intended the information to be private. Just as the attorney must monitor technological updates and understand websites that she uses for research, the Committee believes that jurors have a responsibility to take adequate precautions to protect any information they intend to be private.

E. Conducting On-Going Research During Trial

Rule 3.5 applies equally with respect to a jury venire and empanelled juries. Research permitted as to potential jurors is permitted as to sitting jurors. Although there is, in light of the discussion in Section III, infra, great benefit that can be derived from detecting instances when jurors are not following a court’s instructions for behavior while empanelled, researching jurors mid-trial is not without risk. For instance, while an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore re-emphasizes that it is the attorney’s duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.

III. An Attorney Must Reveal Improper Juror Conduct to the Court

Rule 3.5(d) provides: “a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of her family of which the lawyer has knowledge.” Although the Committee concludes that an attorney may conduct jury research on social media websites as long as “communication” is avoided, if an attorney learns of juror misconduct through such research, she must promptly notify the court. Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider whether the juror’s improper conduct benefits the attorney.
On this issue, the Committee notes that New York Pattern Jury Instructions (“PJI”) now include suggested jury charges that expressly prohibit juror use of the internet to discuss or research the case. PJI 1:11 Discussion with Others - Independent Research states: “please do not discuss this case either among yourselves or with anyone else during the course of the trial. . . . It is important to remember that you may not use any internet service, such as Google, Facebook, Twitter or any others to individually or collectively research topics concerning the trial . . . . For now, be careful to remember these rules whenever you use a computer or other personal electronic device during the time you are serving as juror but you are not in the courtroom.” Moreover, PJI 1:10 states, in part, “in addition, please do not attempt to view the scene by using computer programs such as Goggle Earth. Viewing the scene either in person or through a computer program would be unfair to the parties . . . .” New York criminal courts also instruct jurors that they may not converse among themselves or with anyone else upon any subject connected with the trial. NY Crim. Pro. §270.40 (McKinney’s 2002).

The law requires jurors to comply with the judge's charge and courts are increasingly called upon to determine whether jurors’ social media postings require a new trial. See, e.g., Smead v. CL Financial Corp., No. 06CC11633, 2010 WL 6562541 (Cal. Super. Ct. Sept. 15, 2010) (holding that juror's posts regarding length of trial were not prejudicial and denying motion for new trial). However, determining whether a juror’s conduct is misconduct may be difficult in the realm of social media. Although a post or tweet on the subject of the trial, even if unanswered, can be considered a “conversation,” it may not always be obvious whether a particular post is “connected with” the trial. Moreover, a juror may be permitted to post a comment “about the fact [of] service on jury duty.”

IV. Post-Trial

In contrast to Rule 3.4(a)(4), Rule 3.5(a)(5) allows attorneys to communicate with a juror after discharge of the jury. After the jury is discharged, attorneys may contact jurors and communicate, including through social media, unless “(i) the communication is prohibited by law or court order; (ii) the juror has made known to the lawyer a desire not to communicate; (iii) the communication involves misrepresentation, coercion, duress or harassment; or (iv) the communication is an attempt to influence the juror's actions in future jury service.” Rule 3.5(a)(5). For instance, NYSBA Opinion 246 found that “lawyers may communicate with jurors concerning the verdict and case.” (NYSBA 246 (interpreting former EC 7-28; DR 7-108(D).) The Committee concludes that this rule should also permit communication via social media services after the jury is discharged, but the attorney must, of course, comply with all ethical obligations in any communication with a juror after the discharge of the jury. However, the Committee notes that “it [is] unethical for a lawyer to harass, entice, or induce or exert influence on a juror” to obtain information or her testimony to support a motion for a new trial. (ABA 319.)
V. Conclusion

The Committee concludes that an attorney may research potential or sitting jurors using social media services or websites, provided that a communication with the juror does not occur. “Communication,” in this context, should be understood broadly, and includes not only sending a specific message, but also any notification to the person being researched that they have been the subject of an attorney’s research efforts. Even if the attorney does not intend for or know that a communication will occur, the resulting inadvertent communication may still violate the Rule. In order to apply this rule to social media websites, attorneys must be mindful of the fact that a communication is *the process of bringing an idea, information or knowledge to another’s perception*—including the fact that they have been researched. In the context of researching jurors using social media services, an attorney must understand and analyze the relevant technology, privacy settings and policies of each social media service used for jury research. The attorney must also avoid engaging in deception or misrepresentation in conducting such research, and may not use third parties to do that which the lawyer cannot. Finally, although attorneys may communicate with jurors after discharge of the jury in the circumstances outlined in the Rules, the attorney must be sure to comply with all other ethical rules in making any such communication.

1. Rule 3.5(a)(4) states: “a lawyer shall not . . . (4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order.”

2. Missouri Rule of Professional Conduct 3.5 states: “A lawyer shall not: (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law; (b) communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order.”

3. The Committee also notes that the United States Attorney for the District of Maryland recently requested that a court prohibit attorneys for all parties in a criminal case from conducting juror research using social media, arguing that “if the parties were permitted to conduct additional research on the prospective jurors by using social media or any other outside sources prior to the in court voir dire, the Court’s supervisory control over the jury selection process would, as a practical matter, be obliterated.” (Aug. 30, 2011 letter from R. Rosenstein to Hon. Richard Bennet) The Committee is unable to determine the court’s ruling from the public file.
4. California Rule of Profession Conduct 2-100 states, in part: “(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.”

5. As of the date of this writing, May 2012, three of the most common social media services are Facebook, LinkedIn and Twitter.

6. Although the New York City Bar Association Formal Opinion 2010-2 (“NYCBA 2010-2”) and SDCBA 2011-2 (both addressing social media “communication” in the context of the “No Contact” rule) were helpful precedent for the Committee’s analysis, the Committee is unaware of any opinion setting forth a definition of “communicate” as that term is used in Rule 4.2 or any other ethics rule.

7. Rule 8.4 prohibits “conduct involving dishonesty, fraud, deceit or misrepresentation,” and also states “a lawyer or law firm shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts or another.” (Rule 8.4(c),(a.).)

8. New York City Bar Association Formal Opinion 2012-1 defined “promptly” to mean “as soon as reasonably possible.”

9. Although the Committee is not opining on the obligations of jurors (which is beyond the Committee’s purview), the Committee does note that if a juror contacts an attorney, the attorney must promptly notify the court under Rule 3.5(d).

10. People v. Clarke, 168 A.D.2d 686 (2d Dep’t 1990) (holding that jurors must comply with the jury charge).

11. US v. Fumo, 639 F. Supp. 2d 544, 555 (E.D. Pa. 2009) aff’d, 655 F.3d 288 (3d Cir. 2011) (“[The juror’s] comments on Twitter, Facebook, and her personal web page were innocuous, providing no indication about the trial of which he was a part, much less her thoughts on that trial. Her statements about the fact of her service on jury duty were not prohibited. Moreover, as this Court noted, her Twitter and Facebook postings were nothing more than harmless ramblings having no prejudicial effect. They were so vague as to be virtually meaningless. [Juror] raised no specific facts dealing with the trial, and nothing in these comments indicated any disposition toward anyone involved in the suit.”) (internal citations omitted).
“How Social Media Infiltrates the Practice of Law”
How Social Media Infiltrates the Practice of Law

BY GINA F. RUBEL
Special to the Legal

Understanding how to harness social media in the practice of law is a hot topic. From marketing your law practice and trying a case in the media to discovery and jury instructions, social media has infiltrated the way we practice law. It is no longer something that can be ignored or all-out blocked.

There are many firms that prohibit access to social media sites at work. Some actually block entrée, while others simply discourage it. Many claim that social media sites are time-wasters. But social media is not just a productivity issue.

“That’s really the language that masks the larger generational issue,” said Kim Huggins, the author of “GENerate Performance.” According to Huggins, there are four generations of legal practitioners in the workplace: Traditionalists (born before 1946), Baby Boomers (1946-1964), Generation X (1965-1980) and Generation Y (1981-2000). Of them, a large majority of the managing partners and judicial decisionmakers fall into the Traditionalist and Baby Boomer categories.

Then there’s the group into which I fall: Generation X. I went to law school before e-mail or cell phones were mainstream. In fact, my first cell phone was the kind that came in a bag the size of a small suitcase and plugged into the car adapter.

While the Traditionalists and Baby Boomers continue to believe that social media is a fad, Generation Y’s and other early adopters are changing the world virally. If you don’t believe me, just Google (verb) “Wael Ghonim,” Google’s (noun) head of marketing for the Middle East and North Africa. He’s the one who organized the Egyptian revolution in the early 2010s. He’s the one who predicted, “This will be even truer in the future,” he said. “Then, even in the private sector there are limitations as to what an employer can do, even when a rule or policy has been violated. For example, if an employee goes on Facebook or a blog and posts criticisms of the employer, those comments are generally protected speech under the National Labor Relations Act and similar state statutes. There are, however, limitations, especially if the posts are falsely disparaging.”

It is also advisable that you monitor your clients’ online activities. There is much counsel to be given about how employees’ and corporations’ online behavior will affect the company, both proactively and in litigation.

If you represent corporate clients, ask them if they have social media policies, and if they do not, guide them through the development and implementation process.

The specifics of social media policies vary widely depending on industry, usage and corporate culture. Check out SocialMediaGovernance.com and ComplianceBuilding.com, two databases that provide a wide array of examples.

MARKETING

Of the many attorneys I interviewed for this article, most use social media as a way to establish new and nurture existing relationships. According to the ABA’s 2010 Legal Technology Survey Report, 56 percent of attorneys in private practice have a presence in an online social network, an increase from 43 percent in 2009 and 15 percent in 2008.

Andrew R. McRoberts, an attorney with Sands Anderson in Richmond, Va., indicated that many potential clients develop their first impressions of an attorney via the Internet. “This will be even truer in the future,” he predicted.

McRoberts said that his firm has encouraged social media engagement. “With the firm’s support, we blog, use LinkedIn, Twitter and Facebook, and have hosted Internet-based CLEs,” he stated. “Combining these efforts makes each one more effective.”

Donna Ray Chmura, an attorney with Sands Anderson’s Raleigh, N.C., office, said their firm “uses blogs to highlight its niche markets.” The firm has collectively “decided to encourage 100 percent participation of
their attorneys in LinkedIn, and have encouraged attorneys to use Facebook, Twitter and other technologies,” she said. According to Chmura, the use of social media “has been invaluable for our business transactional attorneys in particular to connect with clients and to really understand their current business realities.”

Of his use of social media, McRoberts said “it led to my being selected as one of Virginia Lawyers Weekly’s ‘Leaders in the Law’ for 2010.”

I met McRoberts and Chmura via a social media introduction, and confess that I did look into their online profiles. I even got to know them a little bit by watching the YouTube videos embedded in their attorney profiles on the firm’s website. Now that is a good use of social media marketing!

Disciplinary boards will likely view an attorney’s use of social media as advertising so conform to the applicable rules of professional conduct. The ABA launched the Commission on Ethics 20/20 to review lawyer ethics rules and regulations across the United States in the context of a global legal services marketplace. Topics under exploration include online networking services, paying for online advertising, referrals and leads and lawyer websites.

**DISCOVERY**

When asked about the biggest challenge in dealing with social media, Joel Patrick Schroeder, with Faegre & Benson in Minneapolis, Minn., pointed to e-discovery and the challenges related to production. He pondered how a party can accurately produce a non-static, ever-changing website maintained by a third party (such as Facebook or LinkedIn). He said, “Until better technology is developed, most parties will need to be content with accepting documents from social media as print-outs.”

Schroeder has successfully used such print-outs in an employment discrimination matter. When comparing information contained on a publicly available LinkedIn profile to the plaintiff’s resume, Schroeder noticed inconsistencies. He said, “We were able to prove that the resume originally submitted to our client was fraudulent in several ways.” This comparative evidence limited the plaintiff’s damages, favorably and efficiently resolving the matter.

Fort Myers, Fla., insurance and tort defense attorney John M. Miller of Henderson Franklin Starnes & Holt shared that he was able to discredit a plaintiff using MySpace photos. The plaintiff was “allegedly injured on an inflatable slide” on his client’s premises and “could no longer, as a result of her injuries, engage in horseback riding and riding ATVs.” Miller found photos on the plaintiff’s MySpace profile of the plaintiff engaged in both of those activities several months after the accident in question. The images were introduced during mediation and significantly reduced the overall value of the claim.

So what about information that is not publicly available? Late in 2010, in McMillen v. Hummingbird Speedway, the Court of Common Pleas of Jefferson County (Pa.) allowed the defendant to gain access to the plaintiff’s Facebook and MySpace social networking sites during discovery. The court concluded, “Where there is an indication that a person’s social network sites contain information relevant to the prosecution or defense of a lawsuit … access to those sites should be freely granted.”

This appears to be a trend regarding discovery of social networking sites.

Then there’s the question of information that has been withheld or deleted. I spoke with attorney and law practice management expert Jennifer Ellis of Freedman Consulting Inc. regarding whether anyone had yet gotten themselves into trouble for failing to provide access to social media. Neither she nor the e-discovery experts at Sensei Enterprises Inc. in Virginia had found any reported case law to that effect. Research had not revealed any published opinions holding that the destruction or loss of a social networking page containing content that was potentially relevant to foreseeable or ongoing litigation could lead to sanctions.

However, one decision, Mackelprang v. Fidelity National Title Agency of Nevada Inc., has indirectly held that this may be the case. Although the Mackelprang court determined that MySpace was not required to hand over the plaintiff’s MySpace e-mails, it stated in dicta that if the MySpace page contents were truly created by the plaintiff, then she may be required to hand them over or face sanctions for failing to do so.

**JUROR VETTING & INSTRUCTIONS**

Who would have thought years ago that we could sit in a courtroom on a tiny computer or cell phone with wireless access to the largest databases of individuals and their preferences during jury selection? This is happening all over the country.

During voir dire, ask if the juror reads news online, participates in social networks, shares opinions online, or has his or her own blog.

“The traditional question-and-answer session known as ‘voir dire’ is being transformed into ‘voir Google,’ sparking concerns about privacy and about whether courts are adequately supervising the process,” Brian Grow of Reuters Legal stated.

At the 2010 Philadelphia Bar Association Bench-Bar Conference in Atlantic City, N.J., Philadelphia Court of Common Pleas Judge Sandra Mazer Moss, along with four Philadelphia lawyers, presented a CLE on technology in the courtroom. Juror vetting was one of the primary issues addressed.

Of the process, many of the judges in attendance from Pennsylvania said they were not comfortable with juror vetting and would not allow it in their courtrooms. However, as Grow so aptly explained, “The federal courts so far have not addressed the issue, … and just two states, Missouri and New Jersey, have said it’s acceptable in some forms.”

I anticipate this is a topic that will continue to remain in the forefront of jury selection procedures.

Litigators should also be addressing social media in their jury instructions. In December, Reuters Legal reported that “since 1999, at least 90 verdicts have been the subject of challenges because of alleged Internet-related juror misconduct and the numbers are increasing rapidly.” Updating your proposed jury instructions is a must.

**OTHER LEGAL ISSUES**

There are many legal topics that are ripe for litigation, judicial direction and practice area expansion as they relate to social media. These include Internet privacy, intellectual property, content ownership, labor and employment law (discrimination, harassment, unfair competition, defamation, disclosure of confidential information, criminal activity, etc.), regulatory compliance, lawyer negligence and ethics violations (unauthorized practice of law, conflict of interest, etc.), constitutional rights (freedom of speech) and more.

Social media is the Wild West. This uncharted territory and its unparalleled reach are game-changers for lawyers, litigants, judges, jurors and witnesses alike.
The Importance of Law Firm Social Media Policies
The Importance of Law Firm Social Media Policies

By: Gina F. Rubel

Social media is a prevalent topics among marketers and public relations practitioners these days. Regardless of industry, social media skeptics and naysayers need to pay attention to the data and statistics that demonstrate its longevity. Although it is not the end-all-be-all, let’s face it; social media is here for the long haul.

I remember when I was a judicial law clerk in the early 90s and we did not have e-mail. E-mail was considered a passing fad. Several years later, when the courts implemented e-mail, they were pigeonholing HR policies into employee usage. Social media is no different. It exists. Individuals and corporations are using it. And smart businesses are implementing policies via HR, marketing and in some cases, IT.

There is a lot of buzz about corporate social media policies and how to engage effectively without jeopardizing your law firm’s reputation or its bottom line. Reuters recently released their social media policy, which prevents their journalists from breaking news on Twitter, essentially prohibiting them from scooping their employer.

At this point there is little debate as to whether companies should be engaging in social media. The new debate has become how to manage your company’s social media presence to avoid gaffes, negative publicity or loss of control over your message and brand. And by management, I don’t mean blocking its use.

According to a report released on February 3, 2010 by Manpower, only 24 percent of companies in the United States have a formal social media policy for employees who use social networking sites such as LinkedIn, Twitter, Facebook and YouTube. To avoid confusion, law firms should absolutely implement social media policies, but it is important that they consider a few things before doing so.

Alice Grey Harrison, APR, shares her guidance in Public Relations Tactics, Considerations for developing a social media policy. She encourages companies to sit back and think about their corporate culture prior to developing their social media policy – and this is especially important for law firms. If your organization has a less formal, relaxed or otherwise progressive culture, then your social media policy should reflect that. (Although this is less likely the case, progressive law firms do exist.) Likewise, if your law firm has a conservative and formal culture (which most do), then you will want to develop a social media policy in keeping with that atmosphere. Either way, consistency is key.

Harrison encourages social media policies to address “who can initiate media on behalf of the organization.” I add that if you don’t already have a media policy for your law firm – it is about time you implement one. She also says you need to define what is “personal and professional.” I agree. This comes up all the time in our office and for our clients and there is a fine line. Some personal interests can easily add to relationship development so discussion of personal interests on personal profiles used for business should be encouraged with caution.

There are also inherent benefits and risks involved with social media in the legal industry. For instance, social media has become a critical issue in litigation from discovery to witness identification to jury instructions. When drafting a social media policy, provide attorneys the tools they need to understand how to manage and harness social media while not running into trouble. In fact, it is even important to share with them sample requested jury instructions, language to use with clients about their usage of social media during litigation, intellectual property issues to be aware of, and the categories of individuals who they should NOT friend online. In fact, judges cannot be Facebook friends with litigants in Florida. I suspect this is going to become a norm throughout the country over time.

It is very important to provide clear guidelines to lawyers and staff. Harrison also outlines the two different schools of thought on this. Essentially, there is the “unified front” approach where the company designates one department or committee to oversee all social media communications. In one respect, this approach works best for firms that are reluctant about engaging in Web 2.0 or those that tend to be more conservative in their message and brand. In another respect, this approach also works well when firms create a digital communications committee to oversee all things online. That being the rare exception, typically these duties fall under HR, IT or Marketing.
There is also the “all-in” approach that allows anyone in the organization to blog, tweet, etc. on its behalf. There are certainly risks to this strategy – which in turn – require additional internal monitoring systems. The benefits include perception of an internal trust that the attorneys and staff will “do the right thing;” the generation of online content and fresh ideas (assuming the attorneys and others engage); and additional search engine optimization (also assuming your engagers have been taught how to incorporate key words and other valuable tools).

No matter which approach your firm takes, you will want to communicate the decision internally. Make sure that your policy stipulates who is designated to use social media on behalf of the organization – including your external marketing and public relations partners.

Whenever you are venturing into a new realm there are risks. If your firm decides to implement a social media policy, offer training for social media usage and guidelines. In fact, you may be able to get CLE credits for your training if you incorporate ethics and substantive issues. Outline in your social media policy what is off limits for employees to discuss via social media and encourage them to ask if they are not sure. Encourage them to include firm approved language that their views are not necessarily those of the firm.

The bottom line is that you should provide the rules and tools for social media success without leaving your law firm vulnerable to a public relations snafu or worse, a lawsuit.

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Social media has certainly taken a stronghold in online communications. There are literally hundreds of tools online to connect, converse, tag, share, review, post, recommend, save and message others.

Within each category of social media tools, there are definitely a few that stand out as frontrunners for lawyers and law firms as they relate to networking, search engine optimization and marketing. Part one of this two-part series focuses on “Social Networking” and “Lawyer and Law Firm Reviews and Recommendations.”

Social Networking

A social networking site is one that is designed to allow multiple users to publish content themselves and share it with others. The information may be on any subject and may be intended for consumption by friends, colleagues, target clients and the many other audiences found online. Social networking sites typically allow users to create a “profile” describing themselves, to exchange public or private messages and list other users or groups they are connected to in some way.

But don’t let the word “private” fool you — as far as I’m concerned, there really is no such thing online.

So, here are a few networking sites that lawyers should be aware of:

- LinkedIn — LinkedIn is my favorite online tool for professional networking no matter what the profession. For lawyers, it’s an excellent tool for building your personal and firm profiles online. LinkedIn groups allow us to connect to people with similar interests or affinities such as alumni groups, hobbyists, professional associations and more.

  One of the ways I use LinkedIn is to research who is affiliated with the various companies that are on my radar as prospective clients or strategic partners. I don’t typically ask to be introduced via LinkedIn, rather, I go for a more direct approach — picking up the telephone and asking. This is an especially great tool to use for law firms that represent businesses.

  At the very least, claim your name and firm name on LinkedIn and build robust profiles that include the words “attorney,” “lawyer,” “law firm” and your specific practice areas. That way, when people are searching on LinkedIn and other search engines, at least there’s a better chance for you and your law firm to be found.

- Facebook — At last count, Facebook had more than 650 million active users and was ranked the number two site in the United States behind Google. It is a blend of personal and professional information and can be used for business.

  I equate the World Wide Web to a very small village where everyone knows everything about you. And while many attorneys wish to remain relatively private — and there’s nothing wrong with that — in order to remain competitive and relevant in the 21st century, it’s important to engage online to some degree. I know many attorneys who use Facebook just for connecting with friends and family and that’s perfectly fine, too.

- Twitter — Twitter is a micro-blog where you can post “tweets” that are no more than 140 characters in length. It has its own special language and can be used to push out information, pull information and to converse with others.

  I don’t think all lawyers or law firms should actively post on Twitter. However, I do think all law firms and lawyers should be monitoring
what’s being said on Twitter. Set up searches for your name, your firm’s name, your clients’ names, your practice areas and listen in on the conversation. Monitor what is being said and be prepared to respond when appropriate.

If you do decide to engage in the conversations on Twitter, various forms of content that are relevant and of value to others include sharing breaking news, important news stories, events, ideas, resources, interesting observations, blog posts, articles, trends, research, opinions, case outcomes, legal tips, information and helpful opinions.

- Google Plus — The jury is still out on Google Plus. I have an open profile and, to date, have found it helpful to have for purposes of Google search rankings (SEO) and to listen in on the Internet techie’s conversation about Google Plus. Other than that, I’ve found it to be a productivity drain as I have received too much spam and have been added to too many circles of people with whom I do not wish to connect.

LAWYER AND LAW FIRM REVIEWS

- Avvo — While there is still much controversy in the legal community regarding lawyer review sites, it appears that Avvo is here to stay; so it’s worth taking the time to either claim or create your own profile. It takes about 15 to 20 minutes to upload your headshot, fill out your profile, add some of your resume information, upload a few publications that you have authored and request endorsements from a client or two. Avvo profiles come up very high in search engines, so add a reminder to review and update your profile once every three or four months.

- Yelp — Yelp is another online site that is built for people to provide their opinions about their experience with various businesses. While Avvo was designed as a lawyer review site — and now includes doctors — Yelp was designed as a consumer site so you can review anything from restaurants and theme parks to professional service providers.

If your firm has a presence on the Internet, it is imperative for you to take ownership of the firm’s profile on Yelp. So, head on over to Yelp.com, type in your firm name and claim the goods. It will take no more than 15 minutes to set up the firm profile and presto, you can be found on Yelp, too.

Be sure to include all of your practice areas as well as states and counties within which you practice law in the description of your firm. This will help with the search engine optimization.

- Martindale — Almost every attorney has heard of the brand Martindale-Hubbell. Dating back to 1868, the directory has expanded and now has offerings online. I still remember looking at my grandfather’s and my father’s listings in the printed books and being so proud. As a 21st century player, Martindale.com added Martindale Connected, which is marketed as a tool that connects lawyers and law firms worldwide with resources, information and prospective clients.

While I don’t communicate that much on Martindale Connected, I do believe that all lawyers should, at the very least, claim their free online profiles on Martindale.com. Then, you may want to consider joining the free network that was created for the legal community and its professionals for the collaborative benefits and search engine optimization networking opportunities.

The examples in this article are only some of the various online resources that are out there for attorneys to utilize. Some are legal-focused and others are not; however, it is important to remember when engaging with any online community to follow the guidelines laid out by your firm’s social media policy. There is no use in denying the fact that clients and prospective clients, as well as jurors and judges, are all using social networking sites.

Always be mindful of your online presence and remember that you represent your law firm in all communications.

“Sorting Out Social Media for Lawyers Part II” will address “Social Content Sharing” and “Location-Based Services.” Look for the article in tomorrow’s Legal.
By Gina F. Rubel
Special to the Legal

The first installment of this series addressed social networking platforms including LinkedIn, Facebook, Twitter and Google Plus. It also addressed lawyer and law firm review and recommendation sites including Avvo, Yelp and Martindale. Part II of this series focuses on social content sharing and location-based services.

Before getting to the nitty gritty, it’s important to remember that there are hundreds of ways to interact online. The tools outlined in this article stand out as leading contenders for lawyers and law firms as they relate to networking, search engine optimization and marketing.

SOCIAL CONTENT SHARING

Content is king on the Web today. That means the more relevant content that is associated with you, your law firm and your areas of practice, the more likely people are going to find you online when searching for a lawyer. The various forms of content that are highly search engine optimized include documents, presentations, photos and videos.

• Blogging — Consider entering the blogosphere as a reliable and trusted authority by creating a branded blog to support your firm’s mission and goals. Blog is short for “Web log” and is an online communication tool that is frequently updated and is intended for targeted readership.

An effective blog encourages two-way conversation between the author/contributors and those most interested in the subject matter while providing content that is niche focused and targeted to a specific audience. Blogs generally represent the personalities of the authors, companies or organizations that create and maintain them. A blog can help you or your firm to become established as a thought leader in the industry while adding search engine optimized language to the Internet.

The blog should be used to educate target audiences including prospective clients and the media. It should reflect the firm’s voice and thoughts, and encourage and solicit feedback in an effort to build relationships.

Once a blog is launched, it must then be promoted. If you decide to engage in blogging, consider the following ways of promoting it: Integrate the blog into your website; add links to the blog in appropriate e-mail signatures; set up a system to generate links from other blogs; let your target audience know that they can subscribe to the blog via e-mail or RSS; integrate the blog with your social media profiles such as LinkedIn and Facebook.

• Legal OnRamp — Legal OnRamp is marketed as “a collaboration system for in-house counsel and invited outside lawyers and third party service providers.” As of July 2011, the site has just over 6,200 in-house members and nearly 12,000 registered members.

It is worth exploring and sharing blog posts, publications and other content, especially in the groups, which are categorized by practice area, geographic location and other interests — especially if you target in-house counsel for your business development efforts.

• JDSupra — Specifically geared toward lawyers, JDSupra is a networking platform for attorneys to share their portfolio of legal documents, articles, whitepapers, research, newsletters, alerts, court filings and presentations.
online resource allows users to create a portfolio of important documents that can be distributed to targeted audiences. Users can have their profiles connect with their work so that their research is attributed to them.

In 2010, social network website LinkedIn teamed up with JDSupra to co-launch Legal Updates, an application that showcases and distributes legal content on the homepages of LinkedIn users. I was an early user of JDSupra and am a big fan of the site.

- Flickr — Flickr is a photo sharing site. This is a great place for lawyers and law firms to share photos from company events, bar association conferences, presentations and other photos that can be linked back.

Some important things to remember when sharing photos: make sure the photos are named with words that identify it, such as the name of the lawyer and the law firm (PHOTO_001 doesn’t cut it); and make sure to include proper tags that incorporate information like the city and state where your law firm is located, your firm’s practice areas, the names of the attorneys pictured and the law firm, and anything else that you want to search engine optimize.

- YouTube — YouTube is a video-sharing site that is owned by Google. This means it is indexed by Google as soon as a video is posted. It also means that the videos on YouTube are likely going to be posted higher in searches on Google than videos posted on Vimeo or other video sharing sites.

A few tips for sharing videos on YouTube: Create a YouTube Channel for your law firm; be sure to name the video with words that identify it (see Flickr recommendation above); make sure to include proper tags (see Flickr recommendation above); and be sure to share the videos via your social networking sites and embed them on your website and in your blogs (if you’re blogging, of course).

The more relevant content that is associated with you, your law firm and your areas of practice, the more likely people are going to find you online when searching for a lawyer.

LOCATION-BASED SERVICES

Location-based services allow users to share their “location” and connect with others based on where they are. So for example, if you’re at JFK airport awaiting a flight and you post that you’re there, others who are also there can connect with you.

Personally, I’m not a big fan of letting the world know where I am and when; however, there are advantages to these services for lawyers. They include word-of-mouth marketing, law firm reviews, search engine optimization and client research.

The two biggest players in the location-based services are Foursquare and Facebook Places. It’s worth having a company profile on each at the very least and then letting your research team know to monitor these sites for client, witness and adverse party information that can affect any of your cases. And while we’re talking about location, don’t forget to go to Google Maps from your office and claim your real estate.

At the end of the day, it is important to remember that each of these sites offers online real estate. You have the opportunity to own the real estate before anyone else does. So get online, share content, engage with others, be mindful of your online presence and remember that you represent your law firm in all communications.

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Social Media and Discovery
Are Personal Facebook, Twitter and Other Social Networking Pages Discoverable?

A. Pennsylvania Rule of Civil Procedure 4003.1 Scope of Discovery Generally.

1. [A] party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

2. Application to social media - Materials on social networking websites are discoverable in a civil case.

B. A Pennsylvania Court of Common Pleas has ruled that information contained on a Facebook page is discoverable. Largent v. Reed, No. 2009-1823 (C.P. Franklin, Nov. 8, 2011).

1. The plaintiff was a passenger in a multi-vehicle auto accident and claimed serious and permanent physical and mental injuries. She used her Facebook page to play games and, the defendant also alleged that the account included updates and photographs of the plaintiff exercising and with family. The defendant moved to compel discovery of the plaintiff's Facebook login information.

2. “By definition, there can be little privacy on a social networking website.”

3. The court allowed the defendant access to the plaintiff's Facebook account to look for the necessary information over a limited period. After the period elapsed, the plaintiff could change her password to prevent further access.

C. Discovery From Facebook and Other Sites Directly.

1. Facebook's Date Use Policy will permit access pursuant to court orders or subpoenas.

We may access, preserve and share your information in response to a legal request (like a search warrant, court order or subpoena) if we have a good faith belief that the law requires us to do so. This may include responding to legal requests from jurisdictions outside of the United States where we have a good faith belief that the response is required by law in that
jurisdiction, affects users in that jurisdiction, and is consistent with internationally recognized standards. We may also access, preserve and share information when we have a good faith belief it is necessary to: detect, prevent and address fraud and other illegal activity; to protect ourselves, you and others, including as part of investigations; and to prevent death or imminent bodily harm. Information we receive about you, including financial transaction data related to purchases made with Facebook Credits, may be accessed, processed and retained for an extended period of time when it is the subject of a legal request or obligation, governmental investigation, or investigations concerning possible violations of our terms or policies, or otherwise to prevent harm.


What Is the Applicable Scope of Discoverability for Social Media?

A. Social networking site content is discoverable if it is relevant to a claim or defense. E.E.O.C. v. Simply Storage Management, 270 F.R.D. 430 (S.D. Ind. 2010).

1. The E.E.O.C. filed a complaint on behalf of claimants who alleged sexual harassment by a supervisor, while the defendant sought discovery of the claimants’ social networking sites. The Southern District of Indiana ruled that while social network communications may contain relevant information, not everything must be disclosed.

2. The appropriate scope of relevance for Simply Storage is “any profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and SNS applications for claimants . . . for the period from April 23, 2007, through the present that reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state.”

B. Social networking sites are not shielded from discovery solely because they are “locked” or “private.” E.E.O.C. v. Simply Storage Management, 270 F.R.D. 430, 434 (S.D. Ind. 2010).

1. Even “private” posts are shared with others.

2. Confidentiality interests can be addressed by an appropriate protective order.
Sample Discovery Requests

A. Interrogatories

1. Identify and describe any social media accounts you have used since January 1, 2010, including the URL for each specific account. For purposes of this interrogatory, social media accounts includes, but is not limited to, blogs, Facebook, MySpace, Twitter, or similar genre.

2. At any time from January 1, 2010 to January 1, 2012, have you been a member of any social networking sites, including but not limited to Facebook, MySpace, or LinkedIn? If your answer is anything other than an unqualified “No,” please (a) provide your dates of membership and (b) produce the website addresses for each of your profiles and, to the extent they are password protected or set to “private,” grant access to counsel for defendant to access your profile on each site.

B. Requests for Production

1. A duly acknowledged and executed written authorization granting this defendant access to Plaintiff's current and historical Facebook, MySpace and Twitter pages and accounts, including all deleted pages and related information. Please note, in addition to this request for an Authorization, Plaintiff is required to preserve the content of these Internet pages and is requested that any process of document or content destruction, deletion, or change hereby cease immediately.

2. Each diary, log, journal or other document (including, but not limited to, electronic information, e.g., Facebook, My Space, and blogs) kept or known by Plaintiff that in any way relates to Plaintiff's alleged damages.

3. Any and all wall posts; status updates; notes; mini-feeds; shares; friends lists; groups; events; videos; message inboxes (received messages); message outboxes (sent messages); and/or photographs and users’ comments, as contained on Plaintiff’s Facebook account between January 1, 2010 to January 1, 2012.

4. Any and all tweets; posts; status updates; notes; videos; messages received; messages sent; and/or photographs and users’ comments, as contained on Plaintiff’s Twitter account between January 1, 2010 to January 1, 2012.
Largent v. Reed, PICS Case No. 11-4463 (C.P. Franklin Nov. 8, 2011)
"Facebook helps you connect and share with the people in your life."\(^1\) But what if the people in your life want to use your Facebook posts against you in a civil lawsuit? Whether and to what extent online social networking information is discoverable in a civil case is the issue currently before the Court.

\(^1\) http://www.facebook.com.
Defendant Jessica Rosko\(^2\) has filed a *Motion to Compel Plaintiff Jennifer Largent's Facebook Login Information*. Rosko has a good faith belief that information on Jessica Largent's Facebook profile is relevant to Rosko's defense in this matter. For the following reasons, the Court holds that the information sought is discoverable, and we will grant the motion to compel.

**Background**

1. **Underlying Facts**

   This case arises out of a chain-reaction auto accident that occurred four years ago. According to the pleadings, Plaintiff Keith Largent was driving a 1986 Honda Shadow Motorcycle on Lincoln Way East in Chambersburg, with Plaintiff Jessica Largent as a passenger. Compl. ¶¶ 4, 19. At an intersection, Rosko collided with a minivan driven by Additional Defendant Sagrario Pena, pushing the van into Plaintiffs' motorcycle. Id. ¶¶ 6-7. As a result of the crash, Plaintiffs allege serious and permanent physical and mental injuries, pain, and suffering. Id. ¶¶ 11-14, 17, 21-24, 27.

   On April 27, 2009, Plaintiffs filed their four-count Complaint against Rosko. Plaintiffs allege two counts each of negligence and loss of consortium. On July 20, Rosko filed an Answer with New Matter, to which Plaintiffs filed a Reply on August 11. The pleadings joining Pena as an additional defendant are not relevant here, and he is not a party to the instant motion.

   During the deposition of Jennifer Largent, taken May 18, 2011, Defense counsel discovered that she has a Facebook profile, that she had used it regularly to play a game called FrontierVille, and that she last accessed it the night before the deposition. Def.'s Mot. to Compel, Ex. A, Dep. of Jennifer Elaine Largent, 90-91, 94. Rosko refused, however, to disclose any

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2. Ms. Rosko was formerly known as Jessica Reed. Def.'s Answer with New Matter ¶ 3. The Court will refer to her by her current name.
information about the account, and Plaintiffs’ counsel advised that it would not voluntarily turn over such information. Id. This motion to compel followed on August 1, 2011.

II. Facebook

Facebook is a free social networking site. To join, a user must set up a profile, which is accessible only through the user’s ID (her email) and a password. Facebook allows users to interact with, instant message, email, and friend or unfriend other users; to play online games; and to upload notes, photos, and videos. Facebook users can post status updates about what they are doing or thinking. Users can post their current location to other friends, suggest restaurants, businesses, or politicians or political causes to “like,” and comment or “like” other friends’ posts.3

Social networking websites like Facebook, Google+, and MySpace are ubiquitous. Facebook, which is only seven years old, has more than 800 million active users, 50% of whom are active on the site at any given day.4 Facebook has spawned a field of academic research, books, and a movie. Social networking websites also have a dark side—they have caused criminal investigations and prosecutions and civil tort actions. See, e.g., Chapman v. Unemp’t Comp. Bd. of Review, 20 A.3d 603 (Pa. Cmwlth. 2011) (employee fired for posting on Facebook while at work); United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009) (woman criminally prosecuted for breaching MySpace’s terms of use); In re Rolando S., 129 Cal. Rptr. 3d 49 (Ct. App. 2011) (prosecution of a juvenile who hacked another child’s Facebook account and posted

3. Facebook currently does not allow a person to “dislike” (or in Facebook parlance, “un-like”) a friend’s post, probably for good reason.

vulgar material therein); Finkel v. Dauber, 906 N.Y.S.2d 697 (Sup. Ct. Nassau 2010) (lawsuit concerning allegedly defamatory material posted in a Facebook group).

Facebook has a detailed, ever-changing privacy policy. Only people with a user account can access Facebook. For all practical purposes, anyone with an email account can set up a Facebook account. Users can set their privacy settings to various levels, although a person’s name, profile picture, and user ID are always publicly available. At the least restrictive setting, named “public,” all 800 million users can view whatever is on a certain user’s profile. At an intermediate level, only a user’s Facebook friends can view such information, and at the least restrictive, only the user can view his or her profile. Facebook also currently allows users to customize their privacy settings.

Facebook alerts users that Facebook friends may “tag” them in any posting, such as a photograph, a note, a video, or a status update. A tag is a link to a user’s profile:

If someone clicks on the link, they will see your public information and anything else you let them see.

Anyone can tag you in anything. Once you are tagged in a post, you and your friends will be able to see it. For example, your friends may be able to see the post in their News Feed or when they search for you. It may also appear on your profile.

You can choose whether a post you’ve been tagged in appears on your profile. You can either approve each post individually or approve all posts by your friends. If you approve a post and later change your mind, you can always remove it from your profile.

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5. To comply with federal law, one must be 13 or older to have a Facebook account. This policy is apparently hard to enforce and is openly flouted.

If you do not want someone to tag you in their posts, we encourage you to reach out to them and give them that feedback. If that does not work, you can block them. This will prevent them from tagging you going forward.

If you are tagged in a private space (such as a message or a group) only the people who can see the private space can see the tag. Similarly, if you are tagged in a comment, only the people who can see the comment can see the tag.  

Therefore, users of Facebook know that their information may be shared by default, and a user must take affirmative steps to prevent the sharing of such information.

Facebook also alerts users that it may reveal information pursuant to legal requests:

**Responding to legal requests and preventing harm**

We may share your information in response to a legal request (like a search warrant, court order or subpoena) if we have a good faith belief that the law requires us to do so. This may include responding to legal requests from jurisdictions outside of the United States where we have a good faith belief that the response is required by law in that jurisdiction, affects users in that jurisdiction, and is consistent with internationally recognized standards. We may also share information when we have a good faith belief it is necessary to: detect, prevent and address fraud and other illegal activity; to protect ourselves and you from violations of our Statement of Rights and Responsibilities; and to prevent death or imminent bodily harm.  

**Discussion**

Rosko has moved to compel Jennifer Largent to disclose her Facebook username and password. She claims that, as of January 2011, Largent’s Facebook profile was public, meaning that anyone with an account could read or view her profile, posts, and photographs. Rosko says that certain posts on Largent’s Facebook account contradict her claims of serious and severe

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7. Facebook Data Use Policy—Sharing and finding you on Facebook, http://www.facebook.com/about/privacy/your-info-on-fb#friendsshare.

8. Facebook Data Use Policy—Some things you need to know, http://www.facebook.com/about/privacy/other (internal hyperlinks removed).
injury. Specifically, Rosko claims that Largent had posted several photographs that show her enjoying life with her family and a status update about going to the gym.

Jennifer Largent responds that the information sought is irrelevant and does not meet the prima facie threshold under Pennsylvania Rule of Civil Procedure 4003.1. She further argues that disclosure of her Facebook account access information would cause unreasonable embarrassment and annoyance. Finally, she claims that disclosure may violate privacy laws such as the Stored Communications Act of 1986, Pub. L. No. 99-508, tit. II, § 201, 100 Stat. 1848 (codified as amended at 18 U.S.C. §§ 2701-12).

I. Discovery Standard

In Pennsylvania,

a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Pa. R.C.P. 4003.1(a). It is no objection that the material sought will be inadmissible at trial, so long as the material “appears reasonably calculated to lead to the discovery of admissible evidence.” Pa. R.C.P. 4003.1(b). Therefore, the material Rosko seeks must be relevant and not privileged.

The Pennsylvania discovery rules are broad, and the relevancy threshold is slight. E.g., George v. Schirra, 814 A.2d 202, 204 (Pa. Super. 2002). Relevancy is not limited to the issues raised in the pleadings, and it carries a broader meaning than the admissibility standard at trial. Id. at 205; 9 Goodrich Amram 2d § 4003.1(a):(6).
There are no Pennsylvania appellate opinions addressing whether material contained on social networking websites is discoverable in a civil case. This is most likely because social networking is a recent phenomenon and issues are just beginning to percolate in the courts. See Evan E. North, Comment, Facebook Isn’t Your Space Anymore: Discovery of Social Networking Websites, 58 U. Kan. L. Rev. 1279, 1308 (2010) (noting social networking websites’ effect on discovery).


In Offenback, a personal injury case, the court ordered the plaintiff to turn over data contained on his Facebook page in a form mutually agreeable to the parties. Offenback, 2011

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9. Counsel’s citation of these cases (via an online Pittsburgh Post-Gazette article and an article written by an attorney from a law firm specializing in plaintiffs’ personal injury representation) is inadequate. Counsel is reminded that the proper way to cite an unreported case is, at minimum, to provide a docket number so that the Court does not need to conduct a wild goose chase to find the case.
WL 2491371, at *2-3. Specifically, the court ordered Offenback to turn over information that contradicted his claim of injury. Id. In Simply Storage, a Title VII sexual harassment case, the court allowed discovery of Facebook material including status updates, communications between two plaintiffs who alleged emotional distress injuries, and photographs and videos. Simply Storage, 240 F.R.D. at 436. In Romano, a personal injury action, the court ordered access to all the plaintiffs’ social networking website information. Romano, 907 N.Y.S.2d at 657.

As far as the threshold relevancy inquiry is concerned, it is clear that material on social networking websites is discoverable in a civil case. Pennsylvania’s discovery rules are broad, and there is no prohibition against electronic discovery of relevant information. Furthermore, courts in other jurisdiction with similar rules have allowed discovery of social networking data.

Rosko claims a good faith basis for seeking material contained on Jennifer Largent’s Facebook account. Largent has pleaded that she suffers from, among other things, chronic physical and mental pain. Compl. ¶ 21. At her deposition, Largent testified that she suffers from depression and spasms in her legs, and uses a cane to walk. Def.’s Mot. to Compel, Ex. A 65, 85. Rosko claims that Largent’s formerly public Facebook account included status updates about exercising at a gym and photographs depicting her with her family that undermine her claim for damages. The information sought by Rosko is clearly relevant. The information sought by Rosko might prove that Largent’s injuries do not exist, or that they are exaggerated. Therefore, Rosko satisfies the relevancy requirement.

II. Privilege and Privacy Concerns

Having determined that Rosko satisfies the threshold relevancy requirement, the Court must determine whether privilege or privacy rights protect against discovery. Privileged matter is
not discoverable. Pa R.C.P. 4011(c); 4003.1(a). The term “privilege” refers only to those recognized by the common law, statutory law, or the Constitution. S.M. ex rel. R.M. v. Children & Youth Servs. of Del. Cnty., 686 A.2d 872, 874-75 (Pa. Cmwlth. 1996). If either Pennsylvania’s law of privilege or statutory law, such as the Stored Communications Act, prohibits disclosure, the relevant information Rosko seeks is not discoverable.

A. Privilege Under Pennsylvania Law


There is no confidential social networking privilege under existing Pennsylvania law. McMillan 2010 WL 4403285. There is no reasonable expectation of privacy in material posted on Facebook. Almost all information on Facebook is shared with third parties, and there is no reasonable privacy expectation in such information.10 Cf. Commonwealth v. Proetto, 771 A.2d 823, 828 (Pa. Super. 2001).


The Court holds that no general privacy privilege protects Jennifer Largent’s Facebook material from discovery. No court has recognized such privilege, and neither will we. By

10. There may be a reasonable expectation of privacy in undelivered Facebook email messages. That expectation of privacy vanishes once the email reaches the intended recipient. Commonwealth v. Proetto, 771 A.2d 823, 828 (Pa. Super. 2001); accord United States v. Lifshitz, 369 F.3d 173, 190 (2d Cir. 2004). (“[Computer users have no reasonable] expectation of privacy in transmissions over the Internet or e-mail that have already arrived at the recipient.”).
definition, there can be little privacy on a social networking website. Facebook’s foremost purpose is to “help you connect and share with the people in your life.” That can only be accomplished by sharing information with others. Only the uninitiated or foolish could believe that Facebook is an online lockbox of secrets.

B. The Stored Communications Act

The Court next must determine whether the Stored Communications Act (SCA or Act) prohibits disclosure of Jennifer Largent’s Facebook information. The SCA is part of the Electronic Communications Privacy Act, Pub. L. No. 99-508, 100 Stat. 1848 (1986). The SCA fills the gaps left by the Fourth Amendment, which weakly protects the digital and electronic worlds. Orin S. Kerr, A User’s Guide to the Stored Communications Act, and a Legislature’s Guide to Amending It, 72 Geo. Wash. L. Rev. 1208, 1212-13 (2004). The SCA does this by creating limits on the government’s ability to compel Internet Service Providers (ISPs) to disclose information about their users, and it places limits on ISPs’ ability to voluntarily disclose information about their customers and subscribers to the government. See 18 U.S.C. §§ 2702-03.

Crucial to the resolution of this motion, the SCA regulates only ISPs or other types of network supporters. It divides 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.” 18 U.S.C. § 2510(15). An RCS stores data long-term for processing or storage. Id. § 2711(2). The terms are somewhat confusing because they reflect the state of computing technology as it existed in 1986 (a time before smartphones, Facebook, and the World Wide Web). Kerr, 72 Geo. Wash. L. Rev. at 1213.

11. Largent argues that disclosure of her Facebook information “may violate privacy laws.” Pis.’ Answer to Def.’s Mot. to Compel ¶ 21. As she cites only the SCA, it is the only authority that the Court addresses.
To simplify greatly, RCSs store information for longer periods of time than ECSs. The SCA applies differently to each but, as will be apparent below, the minutiae are irrelevant for our purposes.

Only one court has addressed whether Facebook is an entity covered by the SCA. See Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965 (C.D. Cal. 2010). In Crispin, the defendants served subpoenas upon Facebook and other social networking sites seeking information about the plaintiff’s online postings. Id. at 969. The plaintiff filed a motion to quash the subpoenas arguing, among other things, that the SCA prohibited disclosure. Id. In a comprehensive opinion, the court held that Facebook is both an ECS and an RCS, depending on which function of the site is at issue. Id. at 987-88, 990.

The court granted the motion to quash. In doing so, it held that civil subpoenas are never permissible under the SCA. Id. at 975-76 (quoting Viacom Int’l, Inc. v. YouTube, Inc., 253 F.R.D. 256, 264 (S.D.N.Y. 2008); In re Subpoena Duces Tecum to AOL, LLC, 550 F. Supp. 2d 606, 611 (E.D. Va. 2008); O’Grady v. Super. Ct., 139 Cal. App. 4th 1423 (2006)).

Crispin is distinguishable. In that case, the defendants sought information via subpoena to Facebook and other social networking sites. In this case, Rosko seeks the information directly from Jennifer Largent. The SCA does not apply because Largent is not an entity regulated by the SCA. She is neither an RCS nor an ECS, and accessing Facebook or the Internet via a home computer, smartphone, laptop, or other means does not render her an RCS or ECS. See Kerr, 72 Geo. Wash. L. Rev. at 1214. She cannot claim the protection of the SCA, because that Act does not apply to her. “The SCA is not a catch-all statute designed to protect the privacy of stored

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Internet communications.” Id. Rather, it only applies to the enumerated entities. Largent being neither an ECS nor an RCS, the SCA does not protect her Facebook profile from discovery.

III. Breadth of Discovery Request

Finally, having determined that the information sought by Rosko is relevant and not privileged, the Court must consider whether her request is overbroad. No discovery is permitted if it is not relevant to the pending action or if it would cause unreasonable annoyance, embarrassment, oppression, burden, or expense. Pa. R.C.P. 4011. The mere existence of some annoyance or embarrassment is insufficient to bar discovery. 9A Goodrich Amram 2d § 4011(b):1. Unreasonableness is determined on a case-by-case basis.

As we noted above, Largent has no privacy rights in her Facebook postings, and there is no general Facebook social networking privilege. Furthermore, she cannot claim the protections of the Stored Communications Act.

We further note that, in filing a lawsuit seeking monetary damages, Largent has placed her health at issue, which vitiates certain privacy interests. Any posts on Facebook that concern Largent’s health, mental or physical, are discoverable, and any privilege concerning such information is waived. Gormley v. Edgar, 995 A.2d 1197, 1206 (Pa. Super. 2010); Kraus v. Taylor, 710 A.2d 1142 (Pa. Super. 1998), alloc. granted, 727 A.2d 1109 (Pa. 1999), and alloc. dismissed, 743 A.2d 451 (Pa. 2000).

Largent complains that Rosko’s motion is akin to asking her to turn over all of her private photo albums and requesting to view her personal mail. Pls.’ Answer to Def.’s Mot. to Compel ¶ 23. But those analogies are mistaken in their characterization of material on Facebook. Photographs posted on Facebook are not private, and Facebook postings are not the same as
personal mail. Largent points to nothing specific that leads the Court to believe that discovery would cause unreasonable embarrassment. Bald assertions of embarrassment are insufficient. As the court stated in McMillan, Facebook posts are not truly private and there is little harm in disclosing that information in discovery.¹³

Nor does the Court believe that allowing Rosko access to Largent’s Facebook profile will cause unreasonable annoyance. The court notes that the entire cost of investigating Largent’s Facebook information will be borne by Rosko. Also, Largent can still access her account while Rosko is investigating. As Rosko argues, this is one of the least burdensome ways to conduct discovery.

Finally, the Court finds it significant that the only two Pennsylvania trial courts (of which we are aware) have granted discovery in identical situations. Zimmerman, 2011 WL 2065410; McMillen 2010 WL 4403285. The cases cited by Largent, though to the contrary, lack any persuasive authority because those orders are unsupported by any written opinion or memorandum.

We agree with Rosko that information contained on Jennifer Largent’s Facebook profile is discoverable. It is relevant and not covered by any privilege, and the request is not unreasonable. We will thus allow Rosko access to Largent’s Facebook account to look for the necessary information. Plaintiff Jessica Largent must turn over her Facebook login information to Defense counsel within 14 days of the date of the attached Order. Defense counsel is allotted a

¹³ The Court does not hold that discovery of a party’s social networking information is available as a matter of course. Rather, there must be a good faith basis that discovery will lead to relevant information. Here, that has occurred because Jennifer Largent’s profile was formerly public. In other cases, it might be advisable to submit interrogatories and requests for production of documents to find out if any relevant information exists on a person’s online social networking profiles.
21-day window in which to inspect Largent's profile. After the window closes, Plaintiff may change her password to prevent any further access to her account by Defense counsel.

An Order follows.
November 7, 2011, the Court having reviewed Defendant Jessica Rosko' Motion to Compel Plaintiff Jennifer Largent's Facebook Login Information, Plaintiffs' Answer thereto, the briefs, the record, and the law,

**IT IS HEREBY ORDERED** that Defendant's Motion to Compel be, and hereby is, GRANTED.

**IT IS FURTHER ORDERED** that Plaintiff Jennifer Largent shall turn over to Defense counsel her Facebook username email and password within 14 days of the date of this Order. Plaintiff shall not delete or otherwise erase any information on her Facebook account. After 35 days from the date of this Order, Plaintiff may change her Facebook login password to prevent further access by Defense counsel.
Pursuant to the requirements of Pa. R.C.P. 236 (a)(2), (b), (d), the Prothonotary shall immediately give written notice of the entry of this Order, including a copy of this Order, to each party’s attorney of record, or if unrepresented, to each party; and shall note in the docket the giving of such notice and the time and manner thereof.

By the Court,

[Signature]

The Prothonotary shall give notice to:
Christopher T. Moyer, Esq., Counsel for Plaintiffs
Donald L. Carmelite, Esq., Counsel for Defendant
Stephen J. Magley, Esq., Counsel for Additional Defendant
EEOC v. Simply Storage Mgmt., LLC, 270 F.R.D. 430
Order on Discovery Issues Raised During April 21 Conference

The parties appeared by counsel for a telephone discovery conference on April 21, 2010, and presented two issues: (1) whether two of the claimants must produce the internet social networking site (SNS) profiles and other communication from their Facebook and MySpace.com accounts, and (2) whether the EEOC must produce information about the claimants’ prior employment since 2003, including the names and addresses of the employers, dates of employment, positions held, and reasons for separation. After directing the parties to submit any pertinent decisions they wish the court to consider, the court took the matters under advisement.

Facts

On September 29, 2009, the EEOC filed a complaint on behalf of two named claimants and similarly situated individuals who allege the defendant businesses (collectively referred to in this Order as “Simply Storage”) are liable for sexual harassment by a supervisor. The EEOC

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1 The court interprets “profile” to mean any content – including postings, pictures, blogs, messages, personal information, lists of “friends” or causes joined – that the user has placed or created online by using her user account.
amended its complaint in November 2009 to sue different defendants, but the EEOC did not change its substantive allegations or the named claimants. See Dkt. 7.

On April 16, 2010, the EEOC requested a discovery conference because counsel for the parties disagree about the proper scope of discovery as it relates to the two issues identified above. These disputes affect both pending written discovery requests and the scope of upcoming depositions. The disputed requests for production of documents that seek SNS information are:

**REQUEST NO. 1:** All photographs or videos posted by Joanie Zupan or anyone on her behalf on Facebook or MySpace from April 23, 2007 to the present.

**REQUEST NO. 2:** Electronic copies of Joanie Zupan’s complete profile on Facebook and MySpace (including all updates, changes, or modifications to Zupan’s profile) and all status updates, messages, wall comments, causes joined, groups joined, activity streams, blog entries, details, blurbs, comments, and applications (including, but not limited to, “How well do you know me” and the “Naughty Application”) for the period from April 23, 2007 to the present. To the extent electronic copies are not available, please provide the documents in hard copy form.

**REQUEST NO. 3:** All photographs or videos posted by Tara Strahl or anyone on her behalf on Facebook or MySpace from October 11, 2007 to November 26, 2008.

**REQUEST NO. 4:** Electronic copies of Tara Strahl’s complete profile on Facebook and MySpace (including all updates, changes, or modifications to Strahl’s profile) and all status updates, messages, wall comments, causes joined, groups joined, activity streams, blog entries, details, blurbs, comments, and applications (including, but not limited to, “How well do you know me” and the “Naughty Application”) for the period from October 11, 2007 to November 26, 2008. To the extent electronic copies are not available, please provide these documents in hard copy form.

Dkt. 38 Ex. 1.

The disputed interrogatory that seeks information related to prior employment history is:
**INTERROGATORY NO. 2:** For Martin, Burkett, and all similarly situated individuals, identify each employer since January 1, 2003 to the present, including dates of employment, positions held, and reason for leaving.

*Id.*

The EEOC objects to production of all SNS content (and to similar deposition questioning) on the grounds that the requests are overbroad, not relevant, unduly burdensome because they improperly infringe on claimants’ privacy, and will harass and embarrass the claimants. See Dkt. 33. Simply Storage claims that discovery of these matters is proper because certain EEOC supplemental discovery responses place the emotional health of particular claimants at issue beyond that typically encountered with “garden variety emotional distress claims.” Dkt. 43-1. Simply Storage’s Interrogatory No. 4 asked for details about the EEOC’s damage calculation, and the EEOC responded in pertinent part:

[I]t is known that Bunny Baker, Marilou Burkett, and Ellen Martin sustained “garden variety” and non ongoing emotional distress in association with the sexual harassment they endured, which includes emotional pain and suffering, loss of enjoyment of life, anxiety, fear, bitterness, humiliation, embarrassment and inconvenience. They do not claim ongoing emotional harm. Defendants’ sexually hostile workplace increased Tara Strahl’s anxiety for which she sought medical treatment. As a result of the sexual harassment she experienced, Joanalle Zupan became depressed and suffers from post traumatic stress disorder.

*Id.* Simply Storage’s Interrogatory No. 8 requested information about any medical or psychological counseling or treatment the claimants had sought related to their employment with Simply Storage and the EEOC responded in pertinent part:
Joanalle Zupan, beginning in August of 2009, has sought treatment for depression and post traumatic stress … and later counseling. … She is scheduled to see psychiatrist Maleakal Mathew, M.D. in May 2010. Ms. Strahl sought treatment from her physician Jackie Evans, M.D. for increased anxiety sometime in March of 2008.

Id.

As for information about the claimants’ prior employment, Simply Storage argues that these requests are commonplace. Pressed for an articulation of relevance, Simply Storage explains that training the claimants could have received from former employers about sexual harassment, including how to report it, may be pertinent to their allegations in this case.

Discussion

The Rule 26 standard is broad. Rule 26(b), entitled “Discovery Scope and Limits,” provides:

(1) … Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action…. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).


On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
(i) the discovery sought is unreasonably cumulative or
duplicative, or can be obtained from some other source that is
more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to
obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs
its likely benefit, considering the needs of the case, the
amount in controversy, the parties’ resources, the importance
of the issues at stake in the action, and the importance of the
discovery in resolving the issues.

**Discovery of Two Claimants’ Social Networking Sites**

**A. General Principles Applicable to Discovery of SNS**

The EEOC does not argue that Facebook and MySpace profiles contain no relevant
information. It insists, however, that production should be limited to content that directly
addresses or comments on matters alleged in the complaint. Simply Storage contends that the
nature of the injuries Ms. Zupan and Ms. Strahl have alleged implicates all their social
communications (i.e., *all* their Facebook and MySpace content).

Discovery of SNS requires the application of basic discovery principles in a novel
context. And despite the popularity of SNS and the frequency with which this issue might be
expected to arise, remarkably few published decisions provide guidance on the issues presented
here. At bottom, though, the main challenge in this case is not one unique to electronically
stored information generally or to social networking sites in particular. Rather, the challenge is
to define appropriately broad limits—but limits nevertheless—on the discoverability of social
communications in light of a subject as amorphous as emotional and mental health, and to do so
in a way that provides meaningful direction to the parties. The court will first outline the
principles it will apply in confronting this challenge.
1. **SNS content is not shielded from discovery simply because it is “locked” or “private.”**

   Although privacy concerns may be germane to the question of whether requested discovery is burdensome or oppressive and whether it has been sought for a proper purpose in the litigation, a person’s expectation and intent that her communications be maintained as private is not a legitimate basis for shielding those communications from discovery. Two decisions factually similar to this one have recognized this threshold point. *See Leduc v. Roman, 2009 CanLII 6838 (ON S.C.), and Murphy v. Perger, 2007 WL 5354848 (ON S.C.).* In these cases, the courts held that a requesting party is not entitled to access all non-relevant material on a site, but that merely locking a profile from public access does not prevent discovery either. *See also Mackelprang v. Fidelity Nat’l Title Agency of Nevada, Inc., 2007 WL 119149 (D. Nev. 2007).*

   As in other cases when privacy or confidentiality concerns have been raised, those interests can be addressed by an appropriate protective order, like the one already entered in this case.

2. **SNS content must be produced when it is relevant to a claim or defense in the case.**

   Simply Storage argues that all the content of Ms. Zupan’s and Ms. Strahl’s social networking sites is relevant, must be produced, and can be the subject of questioning during their depositions. Although, as noted above, the contours of social communications relevant to a claimant’s mental and emotional health are difficult to define, that does not mean that everything must be disclosed. Simply Storage has cited one decision in which the court did require production of the plaintiff’s entire SNS profile, but that case is distinguishable in a number of ways. *In Bass v. Miss Porter’s School, 2009 WL 3724968, *1 (D.Conn. 2009), the defendant

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2 SNS profiles typically have privacy options that allow SNS users to determine who may view their profile. “Locking” a profile from public view means that the SNS user has decided that only other SNS users who have obtained permission may view the profile.
had served discovery requests much narrower than those Simply Storage has served. The
defendant in Bass had not asked for complete Facebook and MySpace profiles but for documents
related to the plaintiff’s alleged “teasing and taunting” and those representing or relating to
communications between the plaintiff and anyone else “related to the allegations in [the]
Amended Complaint.” Id. at *1. The court’s in camera review demonstrated that the plaintiff’s
choice of documents responsive to the defendants’ requests was vastly underinclusive. It
therefore overruled her “undifferentiated objection” and provided the complete Facebook profile
to the defendant. The discovery issue in this case is substantively and procedurally different.
Here, the parties have sought the court’s ruling on the EEOC’s objections before the production;
there is no contention that the EEOC’s production is deficient. The procedure employed in Bass
could be appropriate should a further dispute arise regarding the EEOC’s compliance with this
order, but the result in Bass does not convince the court that production of the claimants’
complete SNS content should be required in the first instance.

Moreover, the simple fact that a claimant has had social communications is not
necessarily probative of the particular mental and emotional health matters at issue in the case.
Rather, it must be the substance of the communication that determines relevance. See Rozell v
Ross-Holst, 2006 WL 163143 (S.D.N.Y. Jan. 20, 2006). As the Rozell court put it,

To be sure, anything that a person says or does might in some
theoretical sense be reflective of her emotional state. But that is hardly
justification for requiring the production of every thought she may
have reduced to writing or, indeed, the deposition of everyone she may
have talked to.

Id. at *3-4.

For example, if a claimant sent a message to a friend saying she always looks forward to
going to work, the person to whom she sent the message and the substance of the message are
what should be considered to determine whether the message is relevant. (And that message would be relevant in this case.) But the mere fact that the claimant has made a communication is not relevant because it is not probative of a claim or defense in this litigation. The *Rozell* decision also notes, however, that the defendant may argue the *absence* of relevant communications casts doubt on the plaintiff’s claims. *See id. at* *3.

3. **Allegations of depression, stress disorders, and like injuries do not automatically render all SNS communications relevant, but the scope of relevant communications is broader than that urged by the EEOC.**

In *Mackelprang*, 2007 WL 119149, the defendants had obtained the plaintiff’s public MySpace profile after she had alleged sexual harassment claims against them. The court held that the defendants could discover private messages exchanged with third parties that contain information regarding her sexual harassment allegations or her alleged emotional distress. *Id. at* *8*. The court expressly ruled, however, that emails consisting of sexually explicit communications between the plaintiff and third persons and that did not relate to her employment with the defendants were not discoverable. *Id.*

A similar situation was presented in *Rozell*, 2006 WL 163143, at *3*, where the court rejected the defendants’ claim that the plaintiff who had alleged sexual harassment should produce all of her email communications. When the plaintiff had complained about the supervisor, the supervisor retaliated by hacking into her emails. The defendants had requested the disclosure of all emails in the plaintiff’s account, but the court required production of only the intercepted emails. *Id.* The court reasoned the contents of those emails were relevant to assess plaintiff’s claimed damages. *Id.*

It is reasonable to expect severe emotional or mental injury to manifest itself in some SNS 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. See Doe v. Smith, 470 F.3d 331, 341 (7th Cir. 2006). Thus, the court determines that some SNS discovery is appropriate here. The next question is the permissible scope of that discovery.

The EEOC’s view that the claimants should be required to produce only communications that directly reference the matters alleged in the complaint is too restrictive. This standard likely would not encompass clearly relevant communications and in fact would tend only to yield production of communications supportive of the claimants’ allegations. It might not, for example, yield information inconsistent with the claimants’ allegations of injury or about other potential causes of the injury. And although some employees may note occurrences of harassment on their profiles, not many employees would routinely note non-events on their profiles, such as, “My supervisor didn’t sexually harass me today.” A definition of relevant SNS content broader than that urged by the EEOC is therefore necessary.

B. The Scope of SNS Discovery to Be Permitted in this Case

1. The Claimants’ Verbal Communications

With these considerations in mind, the court determines that the appropriate scope of relevance is any profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and SNS applications for claimants Zupan and Strahl for the period from April 23, 2007, through the present that reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state.
2. **Third-party Communications**

Third-party communications to Ms. Zupan and Ms. Strahl must be produced if they place these claimants’ own communications in context.

3. **Photographs and Videos**

The parties have also raised the production of photographs depicting each of the claimants or the pictures posted on their profiles in which they do not appear as an issue distinct from the disclosure of communications. The same test set forth above can be used to determine whether particular pictures should be produced. For example, pictures of the claimant taken during the relevant time period and posted on a claimant’s profile will generally be discoverable because the context of the picture and the claimant’s appearance may reveal the claimant’s emotional or mental status. On the other hand, a picture posted on a third party’s profile in which a claimant is merely “tagged,”\(^3\) is less likely to be relevant. In general, a picture or video depicting someone other than the claimant is unlikely to fall within the definition set out above. These are general guidelines provided for the parties’ reference and not final determinations of what pictures must be produced consistent with the guidelines above.

**C. Further Considerations**

1. **Carrying Out this Order**

The court’s determination of relevant material is crafted to capture all arguably relevant materials, in accord with the liberal discovery standard of Rule 26. In carrying out this Order, the EEOC should err in favor of production.

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\(^3\) “Tagging” is the process by which a third party posts a picture and links people in the picture to their profiles so that the picture will appear in the profiles of the person who “tagged” the people in the picture, as well as on the profiles of the people who were identified in the picture.
The court acknowledges that it has not drawn these lines with the precision litigants and their counsel typically seek. But the difficulty of drawing sharp lines of relevance is not a difficulty unique to the subject matter of this litigation or to social networking communications. Lawyers are frequently called upon to make judgment calls—in good faith and consistent with their obligations as officers of the court—about what information is responsive to another party’s discovery requests. Discovery is intended to be a self-regulating process that depends on the reasonableness and cooperation of counsel. Fed.R.Civ.P. 37(a)(1). Here, in the first instance, the EEOC’s counsel will make those determinations based on the guidelines the court has provided. As with discovery generally, Simply Storage can further inquire of counsel and the claimants (in their depositions) about what has and has not been produced and can challenge the production if it believes the production falls short of the requirements of this order. Nothing in this Order is intended to foreclose such follow-up procedures. Moreover, this Order does not prevent Simply Storage from seeking additional materials should discovery suggest they are probative of a claim or defense.

2. **Limitations of this Order**

This Order is directed toward two claimants who have alleged severe emotional distress, including post-traumatic stress disorder; it does not address the proper scope of discovery for “garden variety emotional distress claims.” Production of the information required by this Order also obviously does not preclude objections to admissibility at a later stage or requests for return of produced materials if the litigation develops in a direction that casts doubt on its relevance.
3. Privacy Concerns

The court agrees with the EEOC that broad discovery of the claimants’ SNS could reveal private information that may embarrass them. Other courts have observed, however, that this is the inevitable result of alleging these sorts of injuries. Further, the court finds that this concern is outweighed by the fact that the production here would be of information that the claimants have already shared with at least one other person through private messages or a larger number of people through postings. As one judge observed, “Facebook is not used as a means by which account holders carry on monologues with themselves.” Leduc, 2009 CanLII 6838, at ¶ 31. The court has entered an agreed protective order that limits disclosure of certain discovery materials, and counsel should confer about whether that protection is appropriate here.

Information about Prior Employment

Although the parties’ first dispute concerning SNS communication production is novel, the second dispute is straightforward, as is its resolution. This court has already determined that defendants must demonstrate why past work history information is relevant to the particular claims and defenses in that case to receive production of this information. See Woods v. Fresenius Med. Care Group of N. Amer., 2008 WL 151836 (S.D. Ind. Jan. 16, 2008). Simply Storage’s assertion that it needs this information to determine the extent of the claimants’ prior training on sexual harassment issues is not plausible. Its particular requests—dates of employment, positions held, and reason for leaving—are not directed at that issue at all. Simply Storage has not shown how the requested employment information is relevant to its defenses in this case. Absent that showing, the EEOC is not required to produce the requested information about the claimants’ prior employment.
Conclusion

The EEOC must produce relevant SNS communications for Ms. Zupan and Ms. Strahl consistent with the guidelines explained above. It is not required to produce the requested information about the claimants’ prior employment, without a further showing of relevance.

So ORDERED.

Date: 05/11/2010

Debra McVicker Lynch
United States Magistrate Judge
Southern District of Indiana