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**SOCIAL NETWORKS -
MINING FOR DIAMONDS IN THE ROUGH**

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Social Networks – Mining for Diamonds in the Rough

Whether summer flash mobs in Philadelphia and London or the Arab Spring in the Middle East, the dark and bright sides of social media have been splashed across the headlines of the world. Issues of law enforcement and constitutional rights are for another day, as we now look at the role of social networking in civil litigation, and in particular, discovery.

As millions post their every move of every waking moment to their “friends” on sites like *Facebook*, *MySpace*, *Twitter*, *LinkedIn*, and *YouTube*, these postings are being mined, largely by defense counsel, to call into question the type, severity, and duration of injuries alleged by plaintiffs in personal injury litigation.

For instance, consider all of the information a fully filled *Facebook* profile contains: name; birthday; educational and employment history; online and offline contact information; sex and sexual preferences and relationship status; political and religious views; favorite movies, books, music; and of course pictures.

Facebook is the largest photo-sharing app on the web with millions of photos being uploaded daily.

For professional fact-gatherers, which of course are lawyers, insurance adjusters, claims representatives, and private investigators, these sites may yield diamonds in the rough, or may pull you into quicksand, depending on your perspective.

If you think privacy settings, first name only postings, or fictitious handles will shield you, it is time to think again before making a post.

This type of discovery is gaining momentum in the trial courts. Counsel in civil suits are increasingly issuing interrogatories seeking to learn whether a party to a lawsuit belongs to any social networking computer sites, and if so, demanding that he/she provide the name of site(s); user name(s); login name(s); password(s); etc. In addition, instructions are issued that steps to be taken not to delete or alter existing information or posts, subject to a sanction for spoliation.

In Pennsylvania, Judge John Foradora, President Judge of the Jefferson County Court of Common Pleas, addressed these issues in an opinion issued in McMillen v. Hummingbird Speedway, Inc., 2010 Pa. Dist. & Cnty. Dec. LEXIS 270.

In that suit, plaintiff sought to recover damages for injuries sustained when the defendant rear-ended him during a cool down lap following a stock car race.

Plaintiff opposed defendant’s request for access to *Facebook* and *MySpace* sites claiming confidentiality or privilege recognized under the Pennsylvania Rules of Evidence.

The Court went on to note that evidentiary privileges are not favored and a goal of discovery is to ensure that a party has in its possession all relevant and admissible evidence before the start of trial.

After reviewing Pennsylvania appellate case law and statutes creating certain recognized privileges, i.e., attorney-client (See, *Gillard v. AIG Ins. Co.*, 15 A.3d 44 (Pa. 2011) physician-patient, 42 Pa.C.S. §5929; etc., the Court went on to review the test for the establishment of a new privilege as enunciated in Matter of Adoption of Embick, 506 A.2d 455 (Pa. Super. 1986).

The Court declined to recognize communications shared among one's private friends on social network computer sites as confidential.

Recognizing that there is some "modicum of privacy" available such as choosing what information and posts to make public and which ones to share with only those persons identified as friends, the Court went on to recite the portion of *Facebook's* Information Sharing Section, which cautions its users as follows:

Some of the content you share and the actions you take will show up on your friends' home pages and other pages they visit.

Even after you remove information from your profile or delete your account, copies of that information may remain viewable elsewhere to the extent it has been shared with others, it was otherwise distributed pursuant to your privacy settings, or it was copied or stored by other users. You understand that information might be reshared or copied by other users.

When you post information on another user's profile or comment on another user's post, that information will be subject to the other user's privacy settings.

Similarly, *MySpace* has issued certain cautions along the same lines with respect to content posted on that site.

Common to all, is the fact that operators of these sites may choose to monitor users' content and conduct giving them unfettered access to a member's communications.

In the case before him, Judge Foradora, noted that the plaintiff had alleged significant injuries, some of which were claimed to be permanent.

When the defendants accessed the public portion of plaintiff's *Facebook* page, posts were discovered which defendants contend show that plaintiff has exaggerated his injuries. The Court found that lack of injuries alleged would be relevant to the defense and went on to assume that the plaintiff may have made additional postings about activities in private posts not available to the defendants. Access to them would either help to prove the truth or falsity of plaintiff's alleged claims.

The Court went on to order plaintiff provide the defendants his *Facebook* and *MySpace* user names and passwords and further ordered the plaintiff not to take steps to delete or alter existing information and posts on his *MySpace* or *Facebook* accounts.

This discovery information was limited to the defendants' attorney's read-only access to these accounts and further ordered that the plaintiff's user names and passwords not be divulged to the defendants themselves without further order of the Court.

Courts have looked to the presence of a connection of social networking information to the claims presented in the litigation before the Court. If there does not appear to be any connection between the litigation in hand, and the social networking information sought, such discovery may be declined. See Rudolph v. Clifton Heights Police Department, 2008 U.S. Dist. LEXIS 52019 (E.D. Pa. 2008).

As far as introducing e-mails and text messages at trial, the Courts have addressed this issue of electronic messages, as they do with paper documents, which may have allegedly been forged or tampered with. They are to be evaluated on case-by-case basis as any other document to determine whether there has been an adequate foundation showing of the relevance and authenticity. See In Re F.P. 878 A.2d 91 (Pa. Super. 2005).

Again, complete fishing expeditions will not be permitted. In an effort to impeach a party, the information pulled from a website is held not to be admissible in the event that it fails to contradict a party's testimony in Court. See Wynn v. Rozum, 210 U.S. Dist. LEXIS 2449 (Western District, Pa. 2010)

Additional citations are provided to assist in reviewing whether social networking websites and e-mails are admissible at trial; United States v. Bansal, 2006 U.S. Dist. LEXIS 53475 (E.D. Pa. 2006); and Trust Established Under Deed of Kogen, 2007 Phila. Ct. Com. Pl. LEXIS 354 (2007).

Certainly, plaintiff's counsel may make similar requests of defendants. This may certainly include postings tending to highlight one's actions, statements, or activity tending to "admit" the actions complained of by a plaintiff which resulted in injury.

Some courts have quashed discovery requests and/or subpoenas seeking social networking information by utilizing provisions enacted in 1986 through the Stored Communications Act, 18 U.S.C. Section 2701, et seq. The SCA makes it an offense to intentionally access stored communications without authorization and was designed to protect the privacy of certain digital information. For more detailed discussions concerning the protections afforded the SCA as it relates to the two specific types of network service providers existing in 1986 i.e., electronic communication services and remote computing services, I refer you to the cases of Pietrylo v. Hillstone Restaurant Group, 2008 WL 6085437 (D.N.J. 2008), affirmed 2009 WL 3128420 (D.N.J. 2009) and the case of Crispin v. Christian Audigier, Inc. decided in the United States District Court for the Central District of California on May 26, 2010.

Finally, counsel is cautioned about surreptitiously obtaining information that is not publicly available to all, and outside the oversight of litigation and applicable rules of discovery. The Philadelphia Bar Association's Professional Guidance Committee issued an opinion in March, 2009, Opinion 2009-02 addressing whether or not it would be ethical for an attorney to ask a third person, such as a private investigator, to contact a witness (not a party to the suit) in an attempt to "friend" her to obtain access to information on those pages to obtain information relevant to a matter in which the witness was deposed so that it could be used to impeach the

witness's testimony should she testify at trial.

In a detailed opinion, the Committee concludes that such action would violate Professional Rule of Responsibility 4.1 which states that in the course of representing a client, a lawyer shall not knowingly "make a false statement of material fact or law to a third person"; and Rule 8.4 which states it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation".

When a new client is retained, or a defense assignment made, attorneys on both sides of the litigation "v" should "Google" their clients for the likelihood of the existence of a *Facebook* page or other social networking information that is "out there". Clients should be closely questioned on such matters. The existence of these facts should be brought to counsel's attention at the outset, and not at the end, or near the end of litigation. Accordingly, internet searches should be performed on one's own client, not just the opposing parties.

As *Facebook* pages are in a constant state of flux, when relevant material is likely to be discovered and/or modified, changed, or deleted, it needs to be preserved under the applicable rules of discovery and the ever-present specter of sanctions, or adverse inference instructions with respect to spoliation.

The goal of discovery, in our trial courts, is to prevent trial by ambush and discovery rules are liberally construed to fuel the search engine for truth. Counsel for both sides should assume that discovery of information which is relevant to the issues in dispute, and not privileged, will see the light of day.

These "diamonds in the rough" may prove to be a precious commodity impacting the outcome of your case.



Mark N. Cohen practices in the Environmental/Toxic Tort Department at Margolis Edelstein, representing litigants under the Comprehensive Environmental Response, Compensation and Liability Act; Resource Conservation and Recovery Act; Federal Insecticide, Fungicide and Rodenticide Act; Pennsylvania Hazardous Sites Cleanup Act; Underground Storage Tank Act; and Clean Streams Law.

Mr. Cohen also serves as National Coordinating Counsel for manufacturers, suppliers, and distributors in asbestos litigation. He defends landlords and property owners in lead paint and toxic mold litigation, and manufacturers, suppliers and landowners in a variety of chemical exposure and premises liability claims.