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# **Insurance Litigation: Getting Social Media, Internet and Other Electronic Evidence Authenticated and Admitted at Trial**

Overcoming the Hurdles of Relevance, Reliability, Hearsay  
and Privacy, Balancing Ethical and Privacy Considerations

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TUESDAY, MARCH 15, 2016

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Andrew B. Downs, Shareholder, **Bullivant Houser Bailey**, San Francisco

Michael B. Rush, **Potter Anderson Corroon**, Wilmington, Del.

Erin L. Webb, **Blank Rome**, Washington, D.C.

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# Insurance Litigation: Admissibility of Social Media, Internet and Email Evidence

*Overcoming the Challenges of Authentication, Relevance and Hearsay to Get Evidence Admitted*

Michael B. Rush  
Potter Anderson & Corroon  
[mrush@potteranderson.com](mailto:mrush@potteranderson.com)  
March 15, 2016



# Introduction

- What is Social Media?

- “[f]orms of electronic communications ... through which users create online communities to share information, ideas, personal messages, and other content (as videos).” *Parker v. State*, 2014 WL 621289 (Del. Feb. 5, 2014)

- Examples?



# Social Media Evidence in Insurance Litigation

- Potential Uses for Insurers?
- Potential Uses for Policyholders?



# Issues Concerning Admissibility of Social Media Related Evidence

- Authentication?
- Relevancy?
- Hearsay?
- Ethical Issues?



# Authentication- Federal Rules

- Federal Rule of Evidence 901(a):
  - “To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”
- Federal Rule of Evidence 901(b)
  - Provides illustrative list of evidence that satisfies FRE 901(a)



# Authentication- Federal Rules (cont.)

- Most likely methods of authentication?
  - FRE 901(b)(1)- Testimony of witness with knowledge
  - FRE 901(b)(2)- Distinctive characteristics
  - FRE 901(b)(9)- Evidence about a process or system
- Federal Rule of Evidence 902
  - Self-Authentication?



# Can Social Media Evidence Be Trusted?

- Some courts have expressed concern that the internet is unreliable or untrustworthy
  - *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F.Supp.2d 773 (S.D. Tex. 1999)
    - “While some look to the Internet as a innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation.”
- While concerns still exist, most courts have relaxed their views about the internet's reliability



# Authentication- Approaches Used By Courts

- Two Main Approaches Taken By Courts:
  - First Approach- high bar for authentication
    - Social media evidence only admissible if the court definitively determines the evidence is authentic
    - Adopted by Maryland state courts
  - Second Approach- lower bar
    - Focus is on whether there is sufficient evidence for a reasonable juror to conclude the evidence is authentic



# First Approach

- *Griffin v. State*, 419 Md. 343 (Md. 2011)
  - “Snitches get stiches”- dispute about whether witness authored this myspace.com post
- *State v. Eleck*, 23 A.3d 818 (Conn. App. 2011)
  - Dispute about whether witness authored Facebook posts
- Is this standard more appropriate for criminal cases (especially where the posts are by the defendant?)



# First Approach – Ways to Authenticate

- Three Methods of Authentication Cited by *Griffin* Court
  - Testimony/Admissions from Purported Author
  - Evidence from Computer of Purported Author
  - Evidence from Social Networking Site



# Second Approach

- More lenient standard
- *Parker v. State*, 2014 WL 621289 (Del. 2014)
  - Social media evidence should be subject to same authentication requirements under Rule 901 as any other evidence
  - Under Rule 901:
    - Judge=Gatekeeper
    - Jury determines whether proffered evidence is what proponent claims it to be



## Second Approach (cont.)

- What is necessary to authenticate?
  - dates/web addresses on face of document- *Firehouse Restaurant Group, Inc. v. Scurmont*, 2011 WL 3555704 (D. S.C. Aug. 11, 2011)
  - Affidavit from person affiliated with website- *Masters v. UHS of Delaware*, 2008 WL 5600714 (E.D. Mo. Oct. 21, 2008)
    - *But see, McReynolds v. Lowe's Companies, Inc.*, 2008 WL 5234047 (D. Idaho Dec. 12, 2008)



# Self-Authentication?

- Official Publications- *Williams v. Long*, 585 F.Supp.2d 679 (D. Md. 2008)
  - See also, *EEOC v. DuPont*, 2004 WL 2347559 (E.D. La. Oct. 18, 2004)
- Newspapers and Periodicals?



# Checklist for Authentication?

- Know the rules of your jurisdiction
- Reach stipulation on authenticity of exhibits
- Use requests for admission
- Choose method of authentication under Rule 901(b) and ensure testimony is there to secure authentication



# Ethical Issues

- Model Rule 4.2- Contact with represented parties
  - Does Facebook “friend request” implicate this rule?
- Model Rule 4.1- Truthfulness in statements to others





# Discovery of Social Media and Internet Evidence in Insurance Litigation

Relevance and Ethical Issues

Erin L. Webb

[ewebb@blankrome.com](mailto:ewebb@blankrome.com)

# Relevance and Undue Prejudice

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- What Rules Apply
  - Rule 26
  - Rule 34
  - Rule 45
  - State equivalents

# Relevance and Undue Prejudice

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- What Does the Requesting Party Want?
  - “Documents”
    - Electronic
    - Hard Copy Printouts
    - Archives
  - “Noncontent” – Account Data, IP addresses
  - Access (Username/Password)
  - Devices or Computers

# Relevance and Undue Prejudice

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## ■ Sources

- Individual Social Media Account
  - “Private” Content
  - Direct Access
  - Hard Copy Printout
  - Download of Electronic Information
- Social Media Provider Subpoena

# Relevance and Undue Prejudice

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## ■ Sources

### – Social Media Provider Subpoena

- “when the content being sought is from a party's email or social media account, it usually can be obtained by requesting it from the party under Rule 34.”

Rule 45. Subpoena, 1 Federal Rules of Civil Procedure,  
Rules and Commentary Rule 45

# Relevance and Undue Prejudice

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- Overview
  - No reasonable expectation of privacy in many cases, even for “private” content
  - Thus, relevance is the threshold inquiry
  - Courts usually require some relevance showing before ordering disclosure of private information

# Relevance and Undue Prejudice

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- The “Old Economy” Case
  - Using photos or activity to undermine claims of injury
  - Social media format of evidence is incidental to issues in case

# Relevance and Undue Prejudice

- *T.B. v. Montana State Fund*, 2015 MTWCC 18, 2015 WL 5786539 (Mont. Work. Comp. Ct. Sept. 29, 2015)
  - Work-related injuries or occupational diseases claimed
  - Request was for Facebook “account data” from date petitioner opened Facebook account “relating in any fashion to the use of your hands whether it be driving or any activity, your current and past employment, your physical activities, work, or any other manner likely to lead to the discovery of relevant information relating to your claim.”

# Relevance and Undue Prejudice

- *T.B. v. Montana State Fund*
  - Reviewed *Giacchetto*, *Keller* and others
  - Conclusion: State Fund's discovery request was “reasonably calculated to lead to the discovery of admissible evidence” because it was tailored to “any Facebook posts relevant to the issues of whether [petitioner] can use her hands, engage in physical activity, and work” - questions of fact in the case.
    - “In addition, this Court agrees with State Fund that the very fact that Petitioner maintains a presence on Facebook might undermine her claim regarding her ability to type and use a computer, depending upon the extent of her presence.”
  - “[G]eneral, catch-all request for any information that is likely to lead to the discovery of relevant information” was overbroad and denied.

# Relevance and Undue Prejudice

- *T.B. v. Montana State Fund*
  - State fund did not ask for direct access to petitioner’s Facebook account
  - “Petitioner has a duty to review her Facebook page(s) and produce only those posts, photographs, and other information that are responsive to State Fund's request for production that are not privileged.”
  - Court distinguished criminal cases, saying analogy is different because “the standard for law enforcement to search through a person's private affairs is different than the standard applied to discovery in civil cases.”

# Relevance and Undue Prejudice

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- Wright v. Yankee Port Marina, Inc., Jurisdiction Claim No. VA02000012633, 2014 WL 199960 (Va. Workers' Compensation Commission Jan. 13, 2014)
  - Knee injury in the workplace
  - Claim for disability benefits and medical expenses
  - Commission not bound by formal rules of evidence

# Relevance and Undue Prejudice

- Wright v. Yankee Port Marina
- Employer defendant asked for:
  - 7. All photographs or videos posted by the claimant, “tagging” or depicting the claimant, or anyone on her behalf on Facebook, MySpace, or any other social networking site from the time period beginning September 1, 2010 to the present and continuing.
  - 8. A copy of your complete Facebook archive ...
  - 9. Electronic copies of the claimant's profile on Facebook, MySpace (including all updates, changes, or modifications to claimant's profile), and/or any other social networking site, including all status updates, messages, wall comments, causes joined, groups joined, activity streams, blog entries, details blurbs, comments, and all applications for the period from September 1, 2010 to the present and continuing. To the extent electronic copies are not available, please provide the documents in hard copy form.

# Relevance and Undue Prejudice

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- *Wright v. Yankee Port Marina*
- Result:
  - “Before compelling access to a claimant's private social media site, the defendants should provide credible information to show that the content of the site is of sufficient materiality to overcome the claimant's reasonable expectation of privacy.”

# Relevance and Undue Prejudice

- *Keller v. Nat'l Farmers Union Prop. & Cas. Co.*, CV 12-72-M-DLC-JCL, 2013 WL 27731 (D. Mont. Jan. 2, 2013)
  - Policyholders sought coverage under an auto policy for injuries arising out of an automobile accident.
  - Insurer sought “a full printout of all of [both policyholders’] social media website pages and all photographs posted thereon including, but not limited to, Facebook, Myspace, Twitter, LinkedIn, LiveJournal, Tagged, Meetup, myLife, Instagram and MeetMe . . . .”

# Relevance and Undue Prejudice

- *Keller v. Nat'l Farmers Union*

- Insurer argued that because the injured policyholder had alleged “a host of physical and emotional injuries,” information found on her social networking websites ‘may very well undermine or contradict’ those allegations.”
- Policyholders resisted the discovery on the grounds that it was “overly burdensome” and “meant to harass” them.

# Relevance and Undue Prejudice

- *Keller v. Nat'l Farmers Union*

- Result: Court denied the insurer's motion to compel the discovery.
- The “content of social networking sites is not protected from discovery merely because a party deems the content ‘private.’”
- But, parties should not be given “a generalized right to rummage at will through information that [opposing parties have] limited from public view.”

# Relevance and Undue Prejudice

- *Keller v. Nat'l Farmers Union*

- The insurer had failed to make the required showing because it had “not come forward with any evidence that the content of either of the Plaintiff’s public postings in any way undermines their claims in this case.”
- Without this showing, the insurer was “not entitled to delve carte blanche into the nonpublic sections of Plaintiffs’ social networking accounts.”

# Relevance and Undue Prejudice

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- *Davenport v. State Farm Mut. Auto. Ins. Co.*, 3:11-CV-632-J-JBT, 2012 WL 555759 (M.D. Fla. Feb. 21, 2012)
  - Court held that plaintiff’s physical condition was at issue in case seeking coverage for injuries
  - Thus, plaintiff required to produce “any photographs depicting her, taken since the date of the subject accident, and posted to a [social networking site] regardless of who posted them.”

# Relevance and Undue Prejudice

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- *Davenport v. State Farm*
  - Conducting a straightforward relevance analysis, the court held that “the potential relevancy of such photographs outweighs any burden of production or privacy interest therein.”
  - The court did not require any showing from the insurer based on publicly available materials to prove that the plaintiff’s private social media postings would be relevant.

# Relevance and Undue Prejudice

- *McCann v. Harleystville Ins. Co. of New York*, 78 A.D.3d 1524, 910 N.Y.S.2d 614, 615 (4th Dep't 2010)
  - Upheld denial of auto insurer's request for access to plaintiff's Facebook account
  - Insurer "failed to establish a factual predicate with respect to the relevancy of the evidence" – No "fishing expedition" allowed
  - But court also reversed grant of plaintiff's motion for protective order
  - Insurer free to go back and tailor/ lay foundation for requests appropriately

# Relevance and Undue Prejudice

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- The “New Economy” Case
  - Coverage case involves underlying event that revolves around Internet or social media
  - Privacy is less of a concern
  - Social media or Internet format is central to issues in case

# Relevance and Undue Prejudice

- *St. Luke's Cataract & Laser Inst., P.A. v. Zurich Am. Ins. Co.*, 506 F. App'x 970, 979 (11th Cir. 2013)
  - Insured oculoplastic surgeon was sued by former hospital employer for allegedly using content and domain name from hospital's former website
  - Surgeon sought coverage under CGL policy
  - 11th Circuit reversed grant of summary judgment for insurers
  - Clear that evidence about policyholder's website was before the court: "Indeed, his website did not even mention St. Luke's."

# Relevance and Undue Prejudice

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- Discovery of Social Media and Internet Evidence Against Insurers
  - *Brogan v. Rosenn, Jenkins & Greenwald, LLP*, No. 08 CV 6048 , 2013 WL 1742689 (Court of Common Pleas of Pennsylvania, Lackawanna County, April 22, 2013)

# Relevance and Undue Prejudice

- *Brogan v. Rosenn, Jenkins & Greenwald*
  - Plaintiffs sought Facebook username, password, and log-in information for a paralegal in the claims department of a defendant title insurance company, claiming that she had discussed a subpoena and anticipated deposition testimony on Facebook with a former insurance company employee.
  - Court held that plaintiffs' request was overly broad, overly invasive, and failed to make the necessary showing of relevance, and declined to compel the password production.

# Ethical Concerns

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- Litigation Holds and Preservation of Social Media and Internet evidence
  - Glazer v. Fireman's Fund Ins. Co., 11 CIV. 4374 PGG FM, 2012 WL 1197167 (S.D.N.Y. Apr. 5, 2012)
    - Plaintiff in discrimination employment lawsuit ordered to produce records of online psychic sessions
    - Though she had deleted her account, she was required to reinstate it and produce “chat logs” with online psychics where she had discussed work issues

# Ethical Concerns

- Litigation Holds and Preservation of Social Media and Internet evidence
  - *Gatto v. United Air Lines, Inc.*, 10-CV-1090-ES-SCM, 2013 WL 1285285 (D.N.J. Mar. 25, 2013)
    - Magistrate judge ordered injured plaintiff to change account password on Facebook to allow for production in discovery
    - Dispute whether parties agreed to allow defendant to access Facebook account directly.
    - Plaintiff stated he believed his account had had unauthorized access and allowed Facebook to delete his account before discovery complete.
    - “As a result, Defendants are prejudiced because they have lost access to evidence that is potentially relevant to Plaintiff's damages and credibility. In light of all of the above, a spoliation inference is appropriate.”

# The Bottom Line

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- Privacy settings still afford some protections, but are not an absolute
- Most courts require some showing of relevance before allowing discovery of evidence designated “private”
- Tailored requests are more likely to succeed
- Social media and Internet evidence can be central to “new economy” cases, but is often corporate/public and relevance questions are rare
- Remember that litigation holds can apply to personal accounts

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# Hearsay and Social Media

*Andrew B. Downs*

*[andy.downs@bullivant.com](mailto:andy.downs@bullivant.com)*

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## Why Hearsay Matters

- By definition, all social media speech is “out of court”
- Often it is offered to prove, directly or by inference, the truth of the matter asserted
- Photographic evidence as out of court statements.



# Peculiar Features

- Peculiar features of social media in application of the Hearsay Rule
  - Too many lawyers freeze in panic when faced with social media evidence offered by the adverse party.
    - String of unpublished appellate cases holding attorneys failed to preserve objections.
  - It is frequently offered to prove the truth of the matter stated:
    - Declarant was at a particular place at a particular time (4square, photos, facebook or Twitter statements).
    - Declarant is describing content of some other person, whose conduct is relevant (“Had drinks with Joe last night; we got hammered.”)



## Hearsay Review

- FRE 802: Hearsay isn't admissible
- FRE 801: In federal court, party admissions and a declarant witness's prior statement are not hearsay.



## Role of the Declarant Matters

- If the declarant is a party, the party admission rules may make the statement non-hearsay (federal ct.) or within an exception (some state courts).
- If the declarant is not a party, the statement may be hearsay, but may be admissible to impeach.
- Watch out for multiple hearsay – party’s friends making statements on social media re statements/intentions of the party.



## Possible Hearsay Exceptions

- Contemporaneous observation/statement – need to prove when the statement made.
- Excited utterance – will an “OMG” be sufficient?
- For individuals, usually not a business record unless the account is used for business promotion. Corporate Facebook, Twitter and LinkedIn accounts are different.



## Workarounds

- Call the declarant as a witness
  - Use to impeach
  - Refresh recollection
  - Past recollection recorded
- Call someone else as a witness who has personal knowledge.
- Use the photos, if authenticated.
- (Sometimes) Hire an expert.



# Gone viral?

- You Tube videos
- Twitter – real vs. parody accounts – really an authentication issue – Justine Sacco





## Takeaways

- It's not rocket science – the rules of evidence still apply:
  - Offering party needs to prove relevance, authentication, and non-hearsay/hearsay exception.
  - Opposing party needs to remember to object, and to object on the proper grounds.
- Don't let the form of the evidence distract you from the basics.