



**VWC**  
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CONFERENCE



# Use of Social Media in Workers' Comp Cases

In this session...

Commission leaders will discuss the use of information found from social media websites, such as Facebook, Twitter, and Instagram, as evidence in cases before the Commission.

**SOCIAL MEDIA IS  
SIMPLY SURVEILLANCE  
DELIVERED TO YOU ON  
A SILVER PLATTER**

# Larry Eustachy—Basketball Coach



# Larry Eustachy—Party Boy



# Social Media from A to Z

- Social media encompasses more than just Facebook, Twitter, and Instagram. Wikipedia lists over 200 in alphabetical order—from Academia.edu to Zooppa.
- Not all are general interest sites and not all are available to the Western world, with some limited to China, Norway, and Russia.
- But, any discovery designed to uncover a person's social media presence should keep this range of sites in mind.

# An Ever Evolving Landscape

- Remember **MySpace**?
- 43Things in 2005 won a Webby award for best social networking site—and shut down in 2015
- Will Facebook, Twitter, and Instagram still be around in 10 years?
- Consider “outside the box” thinking in regards to discovering social media sites—for instance, could dating sites, such as Match.com or eHarmony lead to the discovery of admissible evidence?

# Social Media—Initial Investigation by Claimant’s Counsel

- As a claimant’s attorney, you should ask in the initial interview about your client’s social media presence, *including whether the employer or coworkers have been added as friends/contacts.*
- **Request permission to review your client’s social media sites.**
- Advise your client to exercise restraint regarding postings during the pendency of proceedings, especially in regards to matters regarding the employer, the comp claim, or physical/mental state.

# Social Media—Initial Investigation by Defense Counsel

- As a defense attorney, you should also ask in the initial interview about your client's social media presence *and especially whether the claimant is a friend/contact or if the employer is aware of any other employees who might be a friend/contact.*
- Request permission to review the employer's social media sites.
- Advise the employer to exercise restraint regarding postings about the claimant, the claim, or opinions regarding workers' compensation.

# Admissibility in Virginia Courts

- Allied Concrete Co. v. Lester, 285 Va. 295, 736 S.E.2d (2013):
- In a personal injury trial by a husband for the death of his wife in a vehicular crash, the judge admitted evidence from the husband's Facebook account, including a photo of him dated after the accident, holding a beer and wearing a t-shirt that read "I  hot moms!"

# Ethical Minefield for Lawyers

- After becoming aware of this and other photographs potentially damaging to the husband's wrongful death claim, his attorney advised him "to 'clean up' his **Facebook** page because '[w]e do NOT want blow ups of other pics at trial so please, please clean up your **facebook** and myspace!'"
- Upon learning of these actions, the trial judge imposed sanctions upon the attorney, including requiring him to reimburse the defendants for \$542,000 in costs required to hire experts to confirm the timing of the deletions.

# Ethical Minefield for Lawyers

- The attorney also agreed to a five-year suspension of his license to practice law.

# Principles Governing Use in Comp Cases

- Admissible *under certain circumstances* so long as relevant to the issues at hand.
- Discoverable directly from the party but a subpoena duces tecum will not be enforced against the social media site.
- Under the right circumstances, it would appear that the discovery and relevancy of this evidence could be compelled from either the claimant or the employer.

# There Is No Magic Bullet

- Evidence from social media is one piece of evidence a fact finder can use in determining compensability, causation, extent of disability, marketing, and post-injury earnings.
- As to be expected, some Deputies will give this evidence more weight than others.
- The majority of cases generally do not turn on such evidence, however.



# Useful References

- [https://en.wikipedia.org/wiki/List\\_of\\_social\\_networking\\_websites](https://en.wikipedia.org/wiki/List_of_social_networking_websites)
- Allied Concrete Co. v. Lester, 285 Va. 295, 736 S.E.2d (2013)
- Fellers and Ellis, “Using Social Media as an Investigative Tool for Voir Dire,” Virginia Lawyer, June 2016, pp. 47, 49.