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"NEW WINE IN AN OLD BOTTLE": THE ADVENT OF SOCIAL MEDIA
DISCOVERY IN PENNSYLVANIA CIVIL LITIGATION MATTERS

DANIEL E. CUMMINS, ESQUIRE*

In the absence of appellate guidance to date, trial courts across the Commonwealth of Pennsylvania continue to be on their own as they attempt to craft appropriate remedies to an increasing number of discovery disputes in civil litigation matters over the issue of whether one litigant may gain access to the private portions of another litigant's social media profiles.¹

Most of the cases decided to date focus upon efforts to discover information and photographs from the private pages of an opposing party's Facebook profile. With the seemingly boundless willingness of people using the Internet to put more and more personal information on social networking sites, counsel on both sides of the bar have begun to utilize Google searches and cull social media sites in an effort to uncover useful information.

As the tangled and sticky worldwide web of social media continues to grow, these discovery requests, particularly in personal injury matters, will become routine—especially to Facebook—and will likely expand to include requests for production of information and photos posted by an opponent on other online sites such as Instagram, Twitter, and LinkedIn.

Requests for this type of discovery usually receive objections, giving rise to motions to compel. The party receiving the discovery demand, typically the plaintiff in personal injury cases, will often make an argument that the defense is on an impermissible fishing expedition and that postings on the private pages of such sites are protected by reasonable expectations of privacy.

The proponent of Facebook discovery, usually the defense in the personal injury context, will typically claim that such discovery should be allowed as such social media profiles were voluntarily made, with the full knowledge that

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The phrase in the main title was utilized by Lackawanna County Judge Terrence R. Nealon in his Facebook discovery decision, *Brogan v. Rosenn, Jenkins & Greenwald, LLP*, to emphasize that although the courts are faced with novel issues of discovery in the digital age, the same Rules of Civil Procedure pertaining to discovery are to be applied. See *Brogan v. Rosenn, Jenkins & Greenwald, LLP*, No. 08 CV 6048, 2013 WL 1742689, at *6 (Ct. Com. Pl. Lackawanna Cnty. Apr. 22, 2013); see also *infra* notes 60–70 and accompanying text.

1. There are also emerging issues regarding whether parties may explore the social media activity of non-party witnesses and even jurors. In an effort to keep this Article focused on the central issue of discovery of a party's social media information, those wider issues are not reviewed in this Article.

they may not necessarily be kept private. Moreover, the defense will usually argue that allowing such discovery would further the overriding goal of civil trials of searching for the truth of the claims and defenses presented.

I. DEFAULT SETTINGS: THE SEARCH FOR TRUTH THROUGH DISCOVERY

Taking a step back from the very specific discovery issue presented and looking at the big picture, it is well established under Pennsylvania jurisprudence that “the purpose of . . . civil trials is to discover *the truth* . . .”² Pennsylvania courts have repeatedly held that it therefore follows that “[t]he purpose and spirit of discovery proceedings is to avoid surprises at trial and to permit trials to be a truth-seeking devise [sic].”³ Stated otherwise, “[t]he purpose of the discovery rules is to prevent surprise and unfairness and to allow a fair trial on the merits.”⁴

Accordingly, the Pennsylvania Rules of Civil Procedure pertaining to discovery are fairly liberal. For example, under Rule 4003.1(a), a party is generally permitted to “obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action,” even if that discovery was done in preparation for litigation or trial.⁵

II. UNFRIEND: WHY CAN’T WE BE FRIENDS?

Under the framework of Facebook, a person may make a portion of their profile private and visible only to their “friends,” those who have been granted access to the private pages by the owner of the profile. Obviously, therefore, one way to gain access and discover the contents of a party’s private social media pages is to “friend,” or to connect with, that person.

Some litigating attorneys have considered whether it is ethically permissible to “friend”—or have an investigator “friend”—a party opponent or a witness as a means of gaining access to that party’s private pages: to friend, or not to friend, that is the question. Ethically, the answer is a resounding *no*. The Philadelphia Professional Guidance Committee of the Philadelphia Bar Association, applying the Pennsylvania Rules of Professional Conduct in its Advisory Opinion 2009-2, concluded that a lawyer could not ethically engage in such conduct.⁶

In its prescient Advisory Opinion 2009-2, the Committee opined that a lawyer’s intention to have a third party “friend” an unrepresented witness

2. Bailey v. Tucker, 621 A.2d 108, 113 (Pa. 1993).

3. Feld v. Merriam, No. 2619, 1980 WL 194225, (Ct. Com. Pl. Phila. Cnty. 1980), *aff’d as modified*, 461 A.2d 225 (Pa. Super. Ct. 1983), *rev’d on other grounds*, 485 A.2d 742 (Pa. 1984).

4. Dominick v. Hanson, 753 A.2d 824, 826 (Pa. Super. Ct. 2000) (alteration in original) (quoting Smith v. Grab, 705 A.2d 894, 902 (Pa. Super. Ct. 1997)).

5. PA. R. CIV. P. 4003.1(a); *see also* PA. R. CIV. P. 126; PA. R. CIV. P. 4003.3.

6. *See* PHILA. BAR ASS’N PROF’L GUIDANCE COMM., Op. 2009-02 (2009), *available at* http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf.

implicated Pennsylvania Rule of Professional Conduct 8.4(c) (which prohibits a lawyer from engaging in conduct involving “dishonesty, fraud, deceit or misrepresentation”), Rule 5.3(c)(1) (which holds a lawyer responsible for the conduct of a non-lawyer employed by the lawyer if the lawyer directs, or with knowledge ratifies, conduct that would violate the Rules if engaged in by the lawyer), and Rule 4.1 (which prohibits a lawyer from making a false statement of fact or law to a third person).⁷

More specifically, the Committee concluded that a third party representative of a litigating attorney “friending” a party opponent or witness would constitute deception in violation of Rules 8.4 and 4.1.⁸ Further, it would constitute a supervisory violation under Rule 5.3 because that third party would likely neglect to mention a material fact, i.e., that the third party would be seeking access to the witness’s social networking pages solely to obtain information for the lawyer to use in the pending lawsuit.⁹

On a related issue, the Committee issued Opinion 2014-5, concluding that it would be permissible for litigating attorneys to advise their clients to increase the privacy settings on their social media sites, so long as such information was preserved on private pages.¹⁰

More recently, the Pennsylvania Bar Association issued Formal Opinion 2014-300, which comprehensively addressed social media discovery topics and concurred with the findings of the Philadelphia Bar Association’s Opinions 2009-2 and 2014-5.¹¹ Nevertheless, the Pennsylvania Bar Association also confirmed that it is indeed permissible for an attorney, or the attorney’s representative, to research and view the *public* portions of the social media pages of a party or witness.¹²

In light of these ethical standards, litigants have resorted to utilizing discovery tools—such as interrogatories and requests for production of documents and things—in an effort to gain access to the private social media content of another party.¹³ This, in turn, has given rise to the emerging trend of trial court decisions on the permissible scope of such discovery.

7. *See id.* at 2–5.

8. *See id.* at 4.

9. *See id.* at 2–3.

10. *See* PHILA. BAR ASS’N PROF’L GUIDANCE COMM., Op. 2014-5, at 6 (2014), available at <http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion2014-5Final.pdf> (“A lawyer may advise a client about how to manage the content of the client’s social media account, including the account’s privacy settings. However, a lawyer may not advise a client to delete or destroy any information that has potential evidentiary value.”).

11. *See* PA. BAR ASS’N, Formal Op. 2014-300, at 6–9 (2014), available at http://www.aceds.org/wp-content/uploads/2014/11/PABarAssoc_EthicalObligationsAttorneysSocialMedia.pdf.

12. *See id.* at 9.

13. The use of subpoenas to the social media companies, such as Facebook, to produce a party’s private information has not caught on as a viable discovery tool. In addition to being a tedious process, questions arise as to whether such a subpoena will be enforced. *See, e.g.,* *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 974 (C.D. Cal. 2010) (finding that, under Stored Communications Act, owner of social networking profile had standing to quash subpoena seeking production of personal information protected by that Act).

III. TOP STORY: A CASE OF FIRST IMPRESSION

In the seminal Facebook discovery case in Pennsylvania, *McMillen v. Hummingbird Speedway, Inc.*,¹⁴ Judge John Foradora of Jefferson County anticipated a trend when he held that “[w]here 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.”¹⁵

The *McMillen* case involved a plaintiff who filed suit to recover damages for personal injuries allegedly caused during a motor vehicle accident.¹⁶ During discovery, the defendant inquired in its interrogatories if the plaintiff belonged to any social networking sites.¹⁷ The defendant also requested the names of the sites, the plaintiff’s user names, login names, and passwords.¹⁸

In response, the plaintiff disclosed “that he belonged to Facebook and MySpace but maintained that his user names and login information were confidential” and not subject to discovery.¹⁹ In its subsequent motion to compel, the defendant noted that a review of the public portion of the plaintiff’s Facebook page revealed comments evidencing that the plaintiff had gone on a fishing trip and had also attended the Daytona 500 in Florida.²⁰ Accordingly, the defendant’s motion sought to gain access to the confidential login information because the information had the potential of uncovering evidence that could undermine the plaintiff’s claim.²¹ Judge Foradora gamely tackled this issue as a case of first impression and without any Pennsylvania appellate guidance.

Citing to Pennsylvania Rule of Civil Procedure 4003.1, the trial court pointed to the general rule in Pennsylvania that a party may obtain discovery regarding any information that is relevant and not privileged.²² The plaintiff requested that the court find that “communications shared among one’s private friends on social networking computer sites as confidential and thus protected against disclosure.”²³ Judge Foradora noted that the plaintiff did not cite any binding or persuasive authority to support this request.²⁴

In his opinion, Judge Foradora wrote that “evidentiary privileges are not favored” under Pennsylvania law and are to be narrowly construed.²⁵ The court found that the plaintiff did not satisfy the requirements to support a

14. No. 113-2010 CD, 2010 WL 4403285 (Ct. Com. Pl. Jefferson Cnty. Sept. 9, 2010), available at <http://www.padisciplinaryboard.org/documents/McMillen-v-Hummingbird-Speedway.pdf>.

15. *Id.*

16. *See id.*

17. *See id.*

18. *See id.*

19. *Id.* (noting that plaintiff refused to provide confidential login information).

20. *See id.*

21. *See id.* (“Specifically, they wanted to be able ‘to determine whether or not plaintiff has made any other comments which impeach and contradict his disability and damages claims.’”).

22. *See id.*

23. *Id.*

24. *See id.*

25. *Id.* (quoting *Hutchison v. Luddy*, 606 A.2d 905, 908–09 (Pa. Super. Ct. 1992)).

finding of privilege in this matter.²⁶ The judge also emphasized that the social networking websites themselves expressly advised the users of the sites regarding the possibility of the disclosure of the information posted on the sites. Accordingly, the court found that a person using these sites could not reasonably expect that such social media communications would remain confidential.²⁷

Consequently, as the information contained in the plaintiff's profiles in the *McMillen* case was found to be relevant to proving the truth or falsity of the plaintiff's alleged injuries, the court found that the overriding goal of the search for truth in civil trials should prevail in favor of the disclosure of information that may not have otherwise been known.²⁸

In the end, Judge Foradora ordered the plaintiff to produce his Facebook and MySpace user names and passwords.²⁹ The plaintiff was further ordered not to delete or alter any of the information on the accounts in the meantime.³⁰ As noted in greater detail below, the trial court decisions that came down after *McMillen* largely followed the same analysis, with several courts tweaking the end result in terms of the scope of social media discovery allowed.

IV. HASHTAG: AN EMERGING TREND

Since the first Pennsylvania Facebook discovery decision was handed down in 2011 in *McMillen*, a number of other state and federal trial courts have rendered decisions with no appellate decisions to date.

For the sake of brevity, a concise recitation of the Pennsylvania trial court decisions issued to date is set forth below.³¹ The reader may access each of the decisions below by clicking on the case names to be taken by link to an online copy of the court's respective opinion and/or order.

A. *Like: Discovery Allowed*

1. *United States District Court for the Middle District of Pennsylvania*

Offenback v. L.M. Bowman, Inc.³² The court granted the requests of the

26. *See id.* (“[C]ourts sanction the application of privilege ‘only to the very limited extent that [it] has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.’” (second alteration in original) (quoting *Koken v. One Beacon Ins. Co.*, 911 A.2d 1021, 1027 (Pa. Commw. Ct. 2006))).

27. *See id.*

28. *See id.*

29. *See id.*

30. *See id.*

31. This compilation of cases is garnered from the “Facebook Discovery Scorecard,” written and updated by Daniel E. Cummins, Esquire. *See* Daniel E. Cummins, *Facebook Discovery Scorecard*, TORT TALK (Jan. 15, 2014), <http://www.torttalk.com/2012/01/facebook-discovery-scorecard.html>. While this Scorecard is thorough, it is not exhaustive on the topic. Readers are encouraged to supplement this list through their own additional research.

32. No. 1:10-CV-1789, 2011 WL 2491371 (M.D. Pa. June 22, 2011), *available at* <http://docs.justia.com/cases/federal/district-courts/pennsylvania/pamdce/1:2010cv01789/81980/25/>.

defendant and the plaintiff for *in camera* review of the plaintiff's private Facebook page, and the court selectively chose what would be disclosed.

2. *Pennsylvania Courts of Common Pleas*

a. Franklin County

Largent v. Reed³³: In its thorough opinion, the court outlined why Facebook discovery should be allowed, rejected the plaintiff's claim of privilege, and limited the defense's access to the plaintiff's Facebook page to 21 days, after which the plaintiff was permitted to change the password.³⁴

b. Indiana County

Simms v. Lewis³⁵: The court took the middle road and granted in part and denied in part the defendant's motion to compel access to the plaintiff's social networks in a motor vehicle accident case. The court granted discovery where there was a predicate showing that private social networking pages may generate relevant information, but the court denied discovery for other social media sites when the defendant did not make a predicate showing.

c. Jefferson County

McMillen v. Hummingbird Speedway, Inc.³⁶: This case appears to be the first Pennsylvania decision on the social media discovery issue. The court held, in a detailed decision, that Facebook postings were discoverable and ordered the plaintiff to provide his username and password to the defense.

d. Lancaster County

Perrone v. Lancaster Regional Medical Center³⁷: In this case, the court crafted a novel method for handling a Facebook discovery dispute in a civil litigation personal injury case by ordering the parties to hire a neutral forensic computer expert to determine whether the photos and video on the plaintiff's Facebook page were posted before or after the subject slip and fall incident, in order to determine whether such information was discoverable.

33. No. 2009-civ-1823, 2011 WL 5632688 (Ct. Com. Pl. Franklin Cnty. Nov. 8, 2011), available at <http://www.theemployerhandbook.com/Largent.pdf>.

34. *But see infra* notes 45–46 and accompanying text (discussing another case in Franklin County in which discovery was not allowed).

35. No. 11961 CD 2011, 2012 WL 6755098 (Ct. Com. Pl. Ind. Cnty. Oct. 10, 2012), available at <https://docs.google.com/file/d/0B83Pxa3TYcXMcGtnbVNzZnM1alU/edit>.

36. No. 113-2010 CD, 2010 WL 4403285 (Ct. Com. Pl. Jefferson Cnty. Sept. 9, 2010), available at <http://www.padisiplinaryboard.org/documents/McMillen-v-Hummingbird-Speedway.pdf>.

37. No. CI-11-14933 (Ct. Com. Pl. Lancaster Cnty. May 3, 2013), available at http://www.americanbar.org/content/dam/aba/publishing/litigation_news/top_stories/docs/Perrone.authcheckdam.pdf.

e. Monroe County

Mazzarella v. Mount Airy #1, LLC³⁸: The court granted the defendant's motion to compel the plaintiff to allow social media discovery in a premises liability slip and fall case.

f. Montgomery County

Gallagher v. Urbanovich³⁹: The court granted the plaintiff's motion to compel the defendant to produce his username and password for his Facebook page. The court's page-long order does not provide the background of the case, nor does it explain why such discovery was pursued by the plaintiff. While the court did grant the plaintiff access to the defendant's Facebook page and ordered the defendant not to delete any information from the Facebook profile, the defendant was granted permission to change his login name and password after seven days following his compliance with the court's order.

g. Northumberland County

Zimmerman v. Weis Markets, Inc.⁴⁰: The court granted the defense's motion to compel but, in a footnote, cautioned that Facebook discovery was not automatically allowed—the party seeking discovery must make a threshold showing that the private pages of the opposing party's Facebook page may have information relevant to the case.

h. Washington County

Prescott v. Willis⁴¹: The court granted the defendant's motion to compel the plaintiff to produce her Facebook username and password in a motor vehicle accident case. The court found that the defendant made the requisite predicate showing with pictures from the plaintiff's public Facebook profile. The defendant was granted seven days access after which the plaintiff was allowed to change her username and/or password.

B. *Dislike: Discovery Not Allowed (Or Limited)*

1. Allegheny County

Trail v. Lesko⁴²: In a detailed opinion, the court denied both the plaintiff's

38. No. 1798-Civ-2009, 2012 WL 600678 (Ct. Com. Pl. Monroe Cnty. Nov. 7, 2012), available at <https://docs.google.com/file/d/0B83Pxa3TYcXMbV9LNUk2VEN3OUE/edit>.

39. No. 2010-Civ-33418 (Ct. Com. Pl. Montgomery Cnty. Feb. 27, 2012), available at <https://docs.google.com/file/d/0B83Pxa3TYcXMTUlyQXdCUEIUZmV5Z29Za08wYzJCZw/edit?pli=1>.

40. No. CV-09-1535, 2011 WL 2065410 (Ct. Com. Pl. Northumberland Cnty. May 19, 2011), available at <http://www.gtleblog.com/uploads/file/Zimmerman.pdf>.

41. No. 2012-Civil-2207 (Ct. Com. Pl. Wash. Cnty. Mar. 3, 2013), available at <https://drive.google.com/file/d/0B83Pxa3TYcXMc1FjSkpzbVAtbHc/view?usp=sharing>.

42. No. GD-10-017249, 2012 WL 2864004 (Ct. Com. Pl. Allegheny Cnty. July 5,

and the defendant's motions to compel access to the opposing party's Facebook pages. It found the requests were unreasonably intrusive under Pennsylvania Rule of Civil Procedure 4011 because "the intrusions that such discovery would cause were not offset by any showing that the discovery would assist the requesting party in presenting its case."⁴³

2. *Bucks County*

Piccolo v. Paterson⁴⁴: In a one-sentence order, the court denied the defense's motion to compel discovery of the plaintiff's Facebook pages in a facial scarring personal injury case. The defense had requested that the court order the plaintiff to accept a "friend request" from defense counsel. The defense wanted to secure other photos of the plaintiff from the Facebook pages; the plaintiff argued that the defense had already secured numerous pre-accident and post-accident photos of the plaintiff and that this motion to compel was essentially overkill on the issue.

3. *Franklin County*

Arcq v. Fields⁴⁵: The court denied the defense's motion to compel access to the plaintiff's private Facebook pages because the defendant did not first offer a threshold showing that the plaintiff even had a Facebook page or that the plaintiff's private Facebook pages may reveal evidence that information relevant to the plaintiff's claims of injury and disability would be discovered on the private pages.⁴⁶

4. *Indiana County*

Simms v. Lewis⁴⁷: The court took the middle road and granted in part and denied in part the defendant's motion to compel access to the plaintiff's social networking accounts in a motor vehicle accident case. The court granted discovery when there was a predicate showing that the private pages of one social networking site may generate relevant information, but the court denied discovery for the other social networking sites because defendant did not make predicate showings with respect to those sites.

2012), available at <https://docs.google.com/file/d/0B83Pxa3TYcXMMF96MHE1Y0tCVFE/edit>.

43. *Id.*

44. No. 2009-Civ-04979 (Ct. Com. Pl. Bucks Cnty. May 5, 2011), available at <http://www.theemployerhandbook.com/piccolo.PDF>.

45. No. 2008-Civ-2430 (Ct. Com. Pl. Franklin Cnty. Dec. 7, 2011), available at <http://volokh.com/wp/wp-content/uploads/2011/12/Arcq.pdf>.

46. *But see supra* notes 33-34 and accompanying text (discussing similar Franklin County case where discovery was allowed).

47. No. 11961 CD 2011, 2012 WL 6755098 (Ct. Com. Pl. Ind. Cnty. Oct. 10, 2012), available at <https://docs.google.com/file/d/0B83Pxa3TYcXMcGtnbVNzZnM1alU/edit>; *see also supra* note 35 and accompanying text.

5. *Lackawanna County*

Brogan v. Rosenn, Jenkins & Greenwald, LLP⁴⁸: The court denied the plaintiff's motion to compel disclosure of the other party's username and password because the plaintiff had not established that relevant information would be found on the private pages. The court also ruled that a demand to produce the usernames and passwords to a person's social media sites was not a discovery request tailored with reasonable particularity but was instead an impermissible fishing expedition.

Commonwealth v. Pal⁴⁹: The court utilized civil litigation Facebook discovery decisions to address issues raised with search warrants related to Facebook information.

6. *Luzerne County*

Kalinowski v. Kirschenheiter⁵⁰: The court denied the motion to compel discovery of private pages of the plaintiff's Facebook page. The plaintiff had argued (1) that the defense was only seeking to embarrass the plaintiff, (2) that the defense had ample access to information on public pages of the plaintiff's social media sites, and (3) that the information on the private pages related to the plaintiff's business was not relevant because no wage loss claim was being presented. The court denied the motion "without prejudice," apparently leaving the door open for the issue to be revisited later.

7. *Philadelphia County*

Martin v. Allstate Fire and Casualty Insurance Co.⁵¹: In a one-sentence order, the court denied a motion to compel access to the plaintiff's private Facebook pages because the defendant did not first show that the plaintiff's deposition testimony and/or public pages of the plaintiff's Facebook pages revealed evidence that information relevant to the plaintiff's claims of injury and disability would be discovered on the private pages.

8. *Schuylkill County*

Hoy v. Holmes⁵²: In an opinion involving a motor vehicle accident, the

48. No. 08 CV 6048, 2013 WL 1742689 (Ct. Com. Pl. Lackawanna Cnty. Apr. 22, 2013), available at <https://docs.google.com/file/d/0B83Pxa3TYcXMZHBCYUE3SDE2SGc/edit>.

49. No. 13 CR 2269, 2014 WL 1042276, at *27–34 (Ct. Com. Pl. Lackawanna Cnty. Mar. 14, 2014), available at <https://drive.google.com/file/d/0B83Pxa3TYcXMSnFVZnBPc3pWdEU/edit>.

50. No. 6779-Civ-2010 (Ct. Com. Pl. Luzerne Cnty. Nov. 18, 2011), available at <https://drive.google.com/file/d/0B83Pxa3TYcXMYzFjNWMxNmQtNzQyNS00NTFmLTliODgtODBiNDg5ZDAzNmM5/view>.

51. No. 110402438 (Ct. Com. Pl. Phila. Cnty. Dec. 13, 2011), available at <https://drive.google.com/file/d/0B83Pxa3TYcXMMWY4NmY4NjAtM2I3NS00MTNiLTk4M2YtZDA2MWVkZWViNDQw/view>.

52. No. S-57-12, 107 SCHUYLKILL LEGAL RECORD 19 (Ct. Com. Pl. Schuylkill Cnty.

court denied the defendant's motion to compel access to the plaintiff's social media sites, including Facebook, where no factual predicate showed that relevant information may be discovered on private pages.

9. York County

*Hunter v. PRRC, Inc.*⁵³: The court ruled that a defendant must meet a threshold showing of relevant information on a plaintiff's public social media pages before access to the private pages of the site would be allowed. There must be a showing of a reasonable probability that relevant information will also be found on the private pages of the site. In addition, the court noted that the plaintiff retained the right to request a protective order if the allowance of the discovery would cause unreasonable annoyance, embarrassment, etc., under Pennsylvania Rule of Civil Procedure 4012. The court denied the motion after finding that the defense did not make the required threshold showing.

V. NEWS FEED: A DOSE OF CLARITY

A review of the above cases reveals some common threads of thought on the issue of Facebook discovery, but the resolution of the issue is far from clear and will require a county-by-county analysis until appellate guidance is realized.

Allegheny County Court of Common Pleas Judge R. Stanton Wettick, a renowned expert on discovery issues, administered a dose of clarity on this important discovery issue when he handed down his July 3, 2012 decision denying Facebook discovery in the case of *Trail v. Lesko*.⁵⁴ In his 22-page opinion on the issue, Judge Wettick provided a background on Facebook itself along with a review of decisions from both Pennsylvania and outside jurisdictions.⁵⁵ Judge Wettick ultimately ruled that both the plaintiff's and the defendant's motions to compel access to the other party's Facebook pages would be denied in this motor vehicle accident litigation.⁵⁶

In *Trail*, the defendant initially denied being the driver of a vehicle involved in the motor vehicle accident at issue in the case. The plaintiff wanted access to the defendant's Facebook postings around the time of the accident to possibly discover information to confirm the defendant's whereabouts at the time of the accident or possibly to uncover witnesses who could shed light on that issue.⁵⁷

In response to the plaintiff's position, Judge Wettick noted that the

Feb. 14, 2013), available at <https://docs.google.com/file/d/0B83Pxa3TYcXmDvNpOTFVOGhnZW8/edit>.

53. No. 2010-SU-3400-71 (Ct. Com. Pl. York Cnty.), available at <https://docs.google.com/file/d/0B83Pxa3TYcXMTDhpbHRYQ2VmYkE/edit>.

54. See *Trail v. Lesko*, No. GD-10-017249, 2012 WL 2864004 (Ct. Com. Pl. Allegheny Cnty. July 3, 2012).

55. See *id.* at *2-8.

56. See *id.* at *8-10; see also *supra* notes 42-43 and accompanying text.

57. See *id.* at *8.

defendant had admitted in the filings of the case, more than once, that he was indeed the driver of the vehicle at the time of the accident. Accordingly, the court found that the plaintiff's request for access to the defendant's Facebook pages should be denied in this regard.

On the other side of the matter, the defense sought access to the plaintiff's Facebook pages in order to seek evidence related to the plaintiff's claims of injury and impairment. In support of its request, the defense provided the court with two photos from the plaintiff's public Facebook pages, one of which depicted the plaintiff at a bar socializing and the other showed the plaintiff drinking at a party.⁵⁸

Reviewing the defense's request, Judge Wettick noted that the plaintiff did not allege that he was bedridden and found that the photos produced were not inconsistent with the plaintiff's claims of injury in this matter. As such, Judge Wettick denied the defense's request for discovery of the private pages of the plaintiff's Facebook profile.

Wettick ultimately reasoned that, under Pennsylvania Rule of Civil Procedure 4011, such a request was "unreasonably intrusive" because, in this particular case, "the intrusions that such discovery would cause were not offset by any showing that the discovery would assist the requesting party in presenting its case."⁵⁹

Because Judge Wettick, a noted expert jurist on Pennsylvania discovery issues, was the one who issued the *Trail* decision, litigators have routinely referred to this decision as one of the leading analyses of the social media discovery question.

VI. TRENDING: ANOTHER DOSE OF CLARITY

Another important clarifying decision was issued by Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas, in the 2013 case of *Brogan v. Roseann, Jenkins & Greenwald, LLP*.⁶⁰ In *Brogan*, a legal malpractice case, the plaintiff was seeking the Facebook login username and password of a witness. Judge Nealon was the first judge to focus on the proper means of Facebook discovery as opposed to the end result. That is, he held that social media discovery requests themselves must be properly framed so that only relevant and non-privileged information is sought.⁶¹

The court in *Brogan* more specifically ruled that in order to obtain discovery of private information on social media sites, the seeker of such information must, at the very least, show that the information sought is relevant to the case at hand.⁶² According to the *Brogan* analysis, one way to meet this requirement is by showing that the publicly available information on the

58. *See id.*

59. *Id.* at *9.

60. No. 08 CV 6048, 2013 WL 1742689 (Ct. Com. Pl. Lackawanna Cnty. Apr. 22, 2013); *see also supra* note 48.

61. *See id.* at *7–8.

62. *See id.* at *6.

website at issue reveals information pertinent to the matter and arguably calls the claims or defenses at issue in the suit into question.⁶³

Applying this analysis to the record before the court in *Brogan*, Judge Nealon found that the plaintiffs had not met this burden.⁶⁴ Consequently, the demand for the disclosure of the Facebook username and password was found to be overly intrusive and would cause unreasonable embarrassment.⁶⁵ As such, the motion to compel access to the witness's private social media pages was denied.⁶⁶

Notably, the court in *Brogan* basically concluded that all new forms of digital technology—i.e., computer generated animations as demonstrative evidence, text messages, Facebook discovery, Twitter, etc.—should be evaluated under the same, long-standing Pennsylvania Rules of Civil Procedure (4001–09) that have always been applicable to more conventional forms of paper discovery and evidence.⁶⁷ As Judge Nealon noted with excellent imagery, “[t]o that extent, the resolution of social media discovery disputes pursuant to existing Rules of Procedure is simply new wine in an old bottle.”⁶⁸

Judge Nealon's analysis and ruling in *Brogan* differ from other Pennsylvania Facebook discovery decisions in that he held that a discovery request for production of the account holder's username and password for unfettered access to the user's private information—as opposed to a more specific request for the production of particular photos and/or information posted on a social networking site—is too broad, overly intrusive, and not stated with the “reasonable particularity” required by the Pennsylvania discovery rules.⁶⁹ In this regard, Judge Nealon utilized an analogy to a party having a right to demand production of a relevant photo, but not being entitled to inspect every photo album that someone may possess in the hopes of uncovering a relevant photo.

By requiring the social media discovery request to be submitted with reasonable particularity, the *Brogan* court was seeking to prevent “fishing expeditions” that are frowned upon by the discovery rules and decisions.⁷⁰

VII. ACTIVITY LOG: AUTHENTICATION

A related issue that will follow the Facebook discovery decisions involves securing the admissibility of the information garnered from a search of a party opponent's social media information at a personal injury trial.

To date, there have been no reported appellate court decisions on the admissibility of such information. However, in the recent criminal court

63. *See id.*

64. *See id.*

65. *See id.* at *8.

66. *See id.*

67. *See id.* at *6.

68. *Id.*

69. *Id.* at *8.

70. *See id.*

decision in *Commonwealth v. Koch*,⁷¹ described as a case of first impression, the Pennsylvania Superior Court ruled that text messages were not admissible in court unless they were properly authenticated, i.e., unless there is evidence presented that the messages did indeed come from the alleged sender.⁷² The Pennsylvania Supreme Court subsequently issued a split 3–3 decision on December 30, 2014.⁷³ The Supreme Court's split decision confirms that the Superior Court's analysis in applying the authentication law under Pennsylvania Rule of Evidence 901 applies to electronic evidence and that circumstantial evidence can be utilized to meet the test.⁷⁴ This decision could come to serve as guidance to the civil courts on the issue of the admissibility of digital evidence secured from online searches.

Koch involved an appeal by the defendant from a Cumberland County conviction for drug offenses. The police had seized defendant's cellphone using a search warrant, and the drug-related text messages discovered on the phone were transcribed and later offered at trial by the prosecutor.⁷⁵ The trial court allowed the introduction of this evidence over the defendant's objections as to hearsay and authentication.

The defendant asserted that there was no evidence to establish that she had sent any of the drug-related texts. She also asserted that it had not been established that the drug-related texts received on the phone were directed to her attention. The defense pointed to evidence supporting the allegation that someone other than the defendant was using the defendant's cell phone at the time.

On appeal, the Superior Court found that the text messages were not properly authenticated and, therefore, should not have been admitted. The criminal conviction was overturned. In support of its ruling, the court pointed to the prior prescient Pennsylvania Superior Court decision in *In re F.P.*,⁷⁶ in which that court dealt with the authentication of instant messages.⁷⁷

In the case of *In re F.P.*, the Superior Court rejected the argument that electronic messages are inherently unreliable because of their relative anonymity and the difficulties attendant with connecting a message with its author.⁷⁸

The *In re F.P.* court emphasized that the issues presented by electronic messages were no different from the issues of letters or other documents that could potentially be forged or denied by the alleged writer. The court asserted that electronic messages could be properly authenticated within the framework set forth under Pennsylvania Rule of Evidence 901, pertaining to "Authenticating or Identifying Evidence," on a case-by-case basis to determine

71. 39 A.3d 996 (Pa. Super. Ct. 2011), *aff'd by equally divided court*, No. 45 MAP 2012, 2014 WL 7392238 (Pa. 2014).

72. *See id.* at 1002.

73. No. 45 MAP 2012, 2014 WL 7392238 (Pa. 2014).

74. *See id.*

75. *See Koch*, 39 A.3d at 1000.

76. 878 A.2d 91 (Pa. Super. Ct. 2005).

77. *See Koch*, 39 A.3d at 1003.

78. *See id.* (citing *In re F.P.*, 878 A.2d at 95).

if there has been an adequate foundation laid as to the document's relevance and authenticity.⁷⁹ In *Koch*, the court also noted that "electronic writings typically show their source, so they can be authenticated by contents in the same way that a communication by postal mail can be authenticated."⁸⁰

The *Koch* court also emphasized that, while text messages and emails can almost always be electronically traced back to their source cellphone or computer, the sender of such messages is not always thereby automatically identified.⁸¹ Particular cell phones and computers can arguably be utilized by anyone at any time. As such, the Superior Court additionally held that there must also be "[c]ircumstantial evidence, which tends to corroborate the identity of the sender" as well, before an electronic message may be authenticated and admitted.⁸²

This emerging evidentiary issue could obviously also come into play in civil litigation matters with respect to authenticating not only text messages but also tweets and emails, along with commentary and photos on social media sites such as Facebook, MySpace, LinkedIn, and Google Plus. The trend being established by the cases discussed above confirms that the admissibility of electronic evidence should be determined under the same long-standing Rules of Evidence that apply to paper evidence.

VIII. CONCLUSION: STATUS UPDATE

Currently, written discovery requests and deposition questions pertaining to a party's social networking activities are becoming the norm in Pennsylvania civil litigation matters. It can be expected that more and more trial court decisions will be generated on this topic to further clarify the parameters of this type of discovery. As can be seen above, the current trend is in favor of not only the discovery of such information, but also the admissibility of this information in an effort to establish the truth or falsity of the claims and defenses presented at trial.

Another increasingly used litigation strategy in this regard, involves counsel securing a "litigation hold" court order against an opposing party in a lawsuit in order to prevent that other party from deleting any postings that post-date the subject accident from his or her Facebook page during the pendency of a litigation. Moreover, if it is ascertained that a party has deleted or changed information on a social networking site after the institution of a lawsuit, spoliation of evidence arguments may arise to the detriment of that party's case. More specifically, the party seeking the deleted information may be entitled to an adverse inference jury instruction at trial.

These and other social media discovery issues are anticipated to keep litigants and trial courts busy in the coming years. The hope remains that these discovery issues will climb up the appellate ladder sooner rather than later in

79. *See id.*

80. *Id.*

81. *See id.*

82. *Id.* at 1005.

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order that concrete and uniform guidance may be secured to clarify the issues even further.

