

Using Social Media in Claims Investigation and Defense



#INTERNETRUNAMOK

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The World Wide Web



#MIND-BOGGLINGNUMBERS

Insane Numbers



- Current world population: 7.4 billion*
- Internet users, 4Q 2016: 3.5 billion
- Mobile phone users, 4Q 2016: 4.6 billion
- Average Google searches per DAY: 4 billion
- Hours of video uploaded to YouTube every MINUTE: 300 hours

✦ *per Statista.com



#TooManyToCount



- Number of Active Worldwide Internet Users as of 4Q 2016:
 - Facebook: 1.87 billion
 - ✦ Adds 500,000 users every day
 - Whatsapp (free messaging app): 1 billion
 - Instagram (photo sharing app): 600 million
 - ✦ 80 million photos uploaded every day
 - LinkedIn: 467 million
 - Twitter: 319 million
 - ✦ 500 million tweets sent each day
- ✦ *Per Statista.com

#MustStopFraud



- **Per National Insurance Crime Bureau:**
 - 10% of property/casualty insurance claims may be fraudulent
 - Insurance fraud is second-most costly white-collar crime behind tax evasion
 - Worker's compensation insurance fraud can cost insurers up to \$3-5 billion annually (about 10% of claims paid)

#BeOnTheFrontLine



- More publicity about insurance fraud has led to reforms, including legislation and industry practices like special investigation units
- But the sheer volume of information on the internet and social media postings should prompt the insurance industry to consider additional front-line measures to aid in claims investigation and defense

Privacy Concerns



#IsPrivacyADinosaur?

Once It's Posted, It's There Forever



Houston Rockets 
@HoustonRockets



Shhhhh. Just close your eyes. It
will all be over soon.

4/28/15, 10:44 PM

7,687 RETWEETS **5,022** FAVORITES



#NoThinkingBeforePosting



Jennifer.
@jennyn55



 Follow

Hate when people try and sugar code it 😞

[↩ Reply](#) [↻ Retweet](#) [★ Favorite](#) [⋮ More](#)

9:44 AM - 18 May 2014



 @niallmao



 Follow

I wanna visit the ifold tower in france one day

 Reply  Retweet  Favorite  More

RETWEET

1

FAVORITES

2



3:43 AM - 18 May 2014



- Both criminal and civil courts appear uniform in holding that persons who share information through online social media sites have no reasonable expectation of privacy in that info.
- In criminal cases, persons do have reasonable expectation of privacy in their personal cell phones, texts, etc. Must have warrant based on probable cause to get this.



- In civil cases, ability to get social media info depends more on relevance, less on privacy
 - TRE 401: If it has any tendency to make a fact more or less probable than it would be without the evidence, and fact is of consequence in determining the action.
- Florida 2015: photos posted on Facebook not protected by privacy, regardless of chosen privacy settings
- However, NY 2013: entire social networking account not relevant just because plaintiff seeks mental anguish damages

Suggestions for Using Social Media to Investigate





- Rely on publicly available information
- ACT FAST
- As soon as claim is reported, run basic social media searches, before claimant hires counsel or is told to hide or remove content
 - Google, Facebook, Twitter, LinkedIn, Instagram, Snapchat, YouTube
- Schedule periodic social media checks during claim investigation

You might at least get a few laughs



Shay
@laxative



 Follow

the seizure salad from mcdonalds is so good



 Reply  Retweet  Favorite  More

RETWEETS

6

FAVORITES

12





Chaise Taylor

@ChaSayyy



I think my grandma got die of beaties

[↩ Reply](#) [↻ Retweet](#) [★ Favorite](#) [⋮ More](#)

12:52 AM - 17 May 2014



Dad
@iAlexJr_



 Follow

I can't date a girl who is lack toe tolerance.
We couldn't even go out for ice cream!

 Reply  Retweet  Favorite  More

RETWEETS

2

FAVORITES

2





- **SAVE** relevant content you find
- **COPY** the URL link, photos, videos, etc. directly from the social media page to a Word document or into claims log
- **PRINT** the images with the “print screen” feature and save hard copy or scan
- Could come in handy later if claimant deletes content



- **BROADEN** your search to include family members and friends
 - Sometimes these groups not told to hide/delete content
 - Can find names on police or incident reports, recorded statements, claim file documents
- Search person's or business's own website for contrary statements
- Use <https://archive.org> (f/k/a Wayback Machine) to obtain older website postings

WayBackMachine



SIGN IN



Search



Internet Archive is a non-profit library of millions of free books, movies, software, music, websites, and more.



284B



12M



3.2M



3.4M



1.4M



167K



1.4M



175K



252K

GO

[Advanced Search](#)

Announcements

Books Donated for MacArthur Foundation 100&Change Challenge from BookMooch Users

TV News highlights: NATO, Russian influence, coal miners, and more

TV news highlights with fact checks: proposed health care reform

[SEE MORE](#)



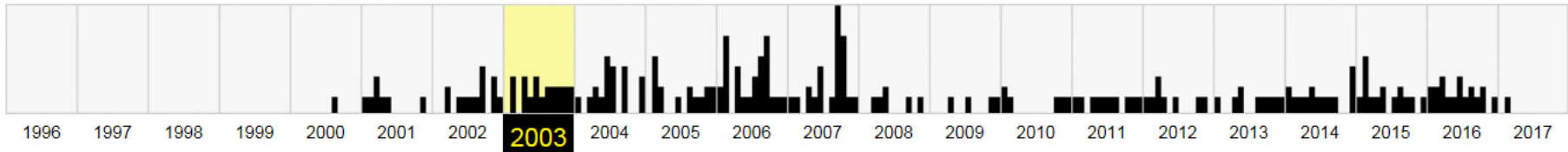
<http://www.cooperscully.com>

BROWSE HISTORY

<http://www.cooperscully.com>

Saved **238 times** between [August 31, 2000](#) and [February 10, 2017](#).

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JAN							FEB							MAR							APR						
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#MattersOfEthics



- Although a huge amount of information is in the public domain, be mindful of your ethical considerations in searching SM.
- Do not “friend” or “follow” claimant, especially if represented by counsel, to get info you could not otherwise access
- Unethical use of SM can taint the defense of the case
- But, you can find plenty in public domain:

-----Original Message-----

From: Kevin Colvin [mailto:kevin.colvin@hugoboss.com] |

Sent: Wednesday, October 31, 2007 3:55 PM

To: Jill Thompson (North America)

Cc: Paul Davis (North America)

Subject:

Paul/Jill -

I just wanted to let you know that I will not be able to come into work tomorrow. Something came up at home and I had to go to New York this morning for the next couple of days. I apologize for the delayed notice.

Kind regards,

Kevin

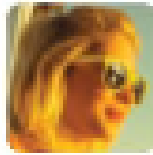


From: Paul Davis (North America)
Sent: Thursday, November 01, 2007 4:54 PM
To: Kevin Colvin; Jill Thompson (North America); Kevin Colvin (North America)
Subject: RE:

Kevin,

Thanks for letting us know--hope everything is ok in New York. (cool wand)

Cheers,
PCD



July 24 via iOS #

Keeping hydrated on my "sick day"... #YOLO

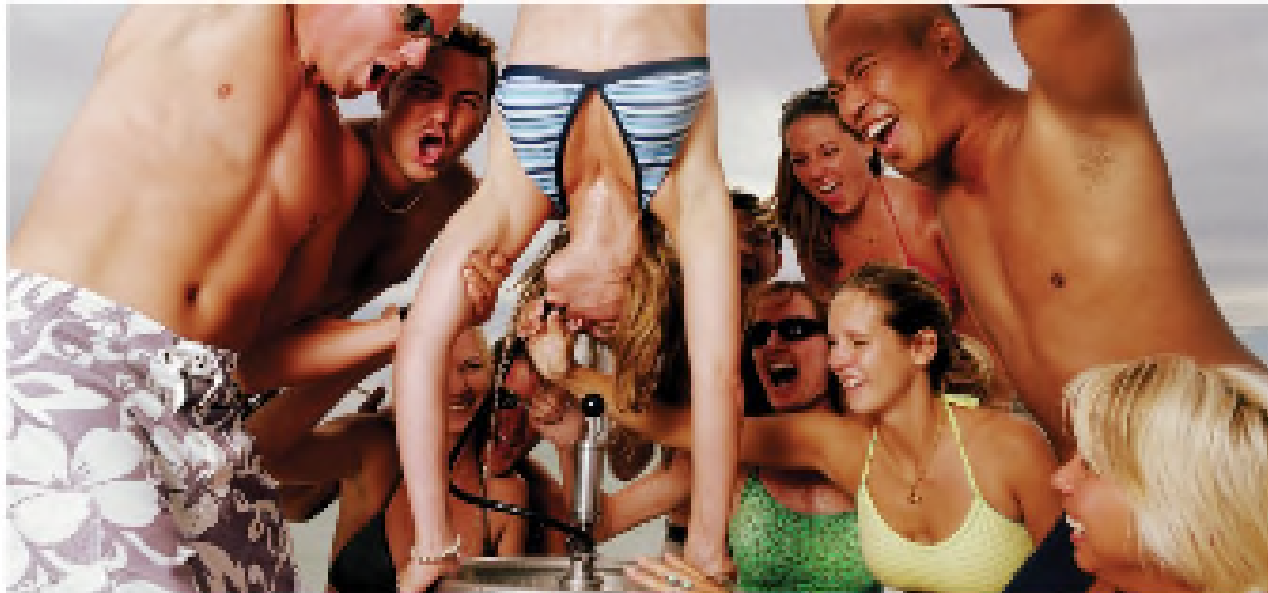


Photo illustration by MONEY. Luml Images-Alamy (head); Sean Murphy/Getty Images (main)



- Some commentators suggest using a social media “release,” giving adjuster permission to search claimant’s social media sites over specified time period, or asking social media questions during recorded statement
- Disagree with this strategy, because it tips off the claimant that his/her social media activity is relevant, and it may trigger hiding/deleting negative content or even posting false content to support claim



- **BE AWARE** of signs of fake profiles, hijacking of pages:
 - Profile, but no “friends”
 - No photos, except profile photo
 - Old page layouts
 - A mostly blank “wall” or tons of “likes”
 - Oddball biographies
 - Untypical, suspicious-sounding posts
- **KEEP AN EYE OUT** for fake claim-related info popping up in relation to claim, lawsuit filing



Deanna Unruh ▶ **Target** ✓

51 |

FYI: we will be purchasing our bike equipment from Walmart because we think removing boys/girls distinctions is unnecessary makes a statement we do not agree with.



Like



Comment



Share

3 people like this.

Most Relevant ▾



Write a comment...



Ask ForHelp Well, Deanna. We're sorry to hear that. Good luck with your new relationship with walmart. Be careful, we hear they sell bikes without the seats on them.

Like · Reply · 7 · 43 mins · Edited



Deanna Unruh Wow. Nice customer service.

Like · 9 mins

Use of Social Media in Claims Defense



#DefensePlanning



- Pre-suit social media info searches should help defense counsel with discovery topics, trial strategy
- Mostly, social media content is used to expose claim fraud and to reduce damages
- Mostly, social media content is used at trial for impeachment

#DiscoveryDevices



- If you have a case where social media content has prominence, interrogatories can ask about screen names, social media accounts, relevant photos/videos/postings/ blogs
- RFP can seek hard copies of found social media content, and then compare to pre-suit investigation for any hiding/deleting of content
- RFA can be used to authenticate social media content (or not)



- Depositions: typically, defense counsel armed with social media content that claimant does not know about, can use the deposition to:
 - Pin down the claimant on the facts
 - Reveal any false claims (liability or damages)
 - Set up impeachment for trial

In an alternate reality

It's 4AM. Get off the internet and come to bed.

Okay, okay. Just one more stupid human video... they are hilarious!

Hold my beer.
I'm going to try something.





- To use as evidence, must be able to authenticate social media info/docs – provide evidence establishing they are what you say they are
- Just showing printout from user’s webpage probably not enough; need “corroborating” evidence that supports jury’s inference that content is what it purports to be
- Posts from government websites (*e.g.*, docket sheets showing other lawsuits) are self-authenticating

#DiscoveryRoadblocks



- Stored Communications Act, 18 USC 2701-2712, prevents “providers” of communication services from divulging private communications to certain entities and/or individuals (no civil subpoena exception)
- Requests for social media info must be “tailored” to the case by time, content, etc.
 - In re Christus Health, 399 S.W.3d 343 (Beaumont 2013)
 - In re Indeco Sales, 2014 WL 5490943 (Beaumont 2014)

Social Media Impacting the Trial



#JurorsandSocialMedia



- **Texas pattern jury instructions require courts to tell jury, after selection:**
 - Turn off all phones and other electronic devices. While you are in the courtroom and while you are deliberating, do not communicate with anyone through any electronic device. For example, do not communicate by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace. Do not post information about the case on the Internet before these court proceedings end and you are released from jury duty. Do not record or photograph any part of these court proceedings, because it is prohibited by law.



- **Pattern jury instructions then explain why:**
 - Judge tells jurors not to investigate case on their own, such as do not go to places involved in the case, do not look up things in books or public records, do not look up things on the Internet.
 - This is because the trial must be based only on evidence presented in open court. All the information must be presented in open court so the lawyers and witnesses can test it and object to it. Information from outside sources would not go through this important process, and such information “could be completely unreliable.”
 - Do not compromise the fairness to all parties or jeopardize the results of this trial.



- For deliberations, trial court instructs the jurors:
 - Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason.

#JurorsDoNotListen



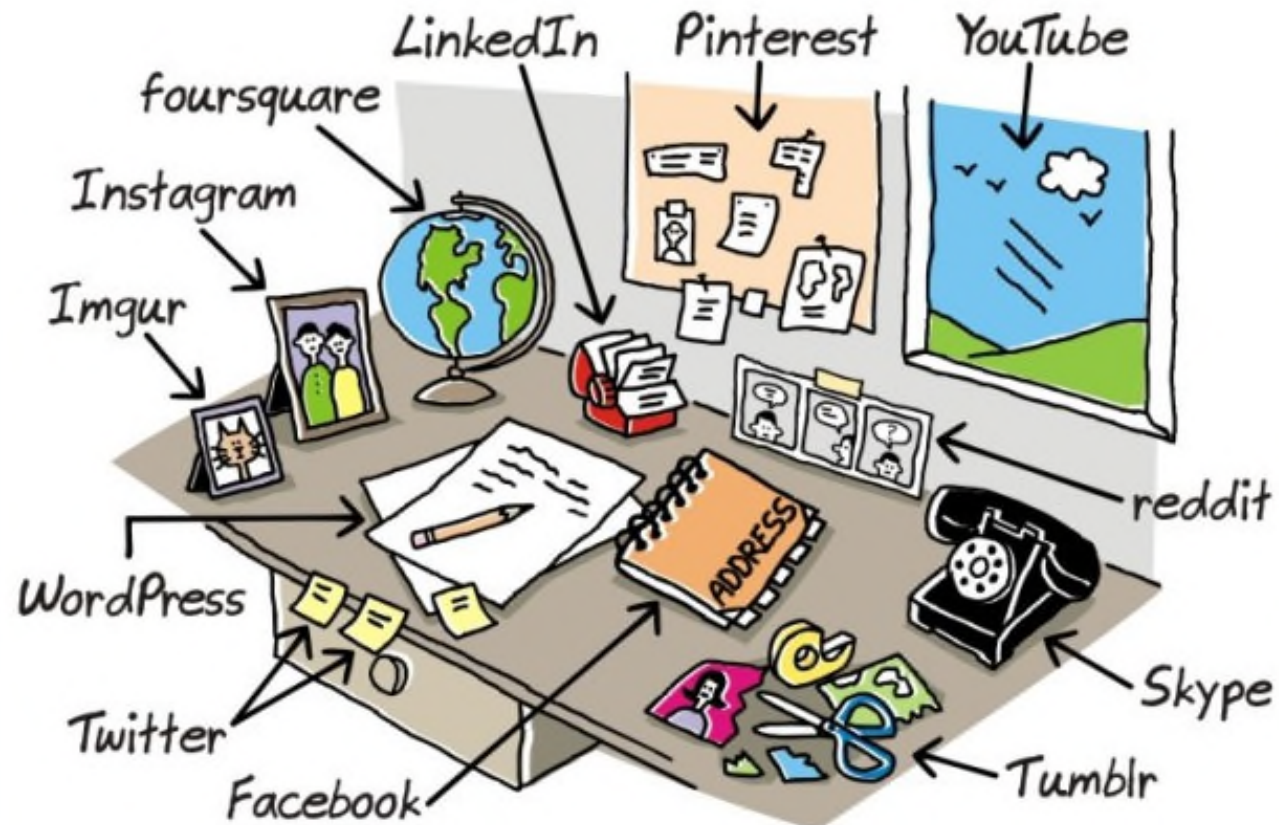
- Still, jurors do outside research and discuss it with jurors during deliberations
- Usually taints the process and can cause reversal for a new trial.
 - *McQuarrie v. State*, 380 S.W.3d 145 (Tex. CCA 2012): Juror’s internet research about effects of date rape drug, discussed during jury deliberations, constituted improper “outside influence.” Trial court was required to consider it in ruling on whether juror misconduct was sufficient to warrant new trial.
 - *Thompson v. Krantz*, 137 P.3d 693 (Okla CA 2016): same as to juror’s internet research about medical procedure, effects of medication, and expert’s medical testimony; improper “outside influence”; reversed for new trial.

#OtherTrialEvidenceIssues



- Timely disclosure: Plan to use actual FB page to question Pltf at trial backfired when Pltf deactivated FB page one week before trial; Def tried producing hard copies but TC excluded because not timely disclosed and also disallowed use for impeachment
- Spoliation: not much in Texas; but, Virginia court sanctioned Pltf and counsel for \$750,000 for lawyer telling Pltf to “clean up” FB page and delete photos, plus gave spoliation instruction

vintage social networking



<http://wronghands1.wordpress.com>

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The End



THANK YOU!!