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Social Networking and Workers' Compensation Law at the Crossroads

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Ed note: This is a continuation of excerpts from the above captioned article, which began in the December, 2010 *Lex and Verum*.

B. DISCOVERY FROM SITE OPERATORS

In addition to obtaining social networking profile information from the employee directly through the formal discovery process, attorneys can recover the employee's profile information from the social networking site operator under some circumstances.[63] In situations where an employee refuses to disclose social networking profile information, or where the defense attorney believes or knows the employee has deleted all or part of his or her account, or has failed to disclose all information, defense counsel should consider using a narrowly tailored subpoena to the social networking site operator, as the records custodian, to provide copies of relevant photographs, videos, postings, and discussions.[64] Defense attorneys may also request that information on a social networking site be preserved by sending a preservation order to the site operator.[65]

In circumstances where an employee deactivated or deleted her Facebook or other social networking account, the site operator may continue to have a record of the user's account information.[66] If that information exists, social networking websites' privacy policies, including those of Facebook and MySpace, specifically allow the social networking provider to disclose user information in response to subpoenas or court orders.[67]

Courts have upheld subpoenas to social networking site operators "when the discovery sought is relevant to the lawsuit.[68] Obtaining social networking information from the site operator, however, would likely be a very lengthy and costly process, contrary to workers' compensation's underlying goal of efficiency.[69] Therefore, obtaining such information from the site operator would rarely be worth the cost and time to defense counsel. This option, however, serves as a check on the employee's ability to destroy or hide social networking information in a workers' compensation case and provides for more honest disclosure by employees.

Two potential defenses that employees[70] and social networking site operators alike have to the production of employee information and communications by site operators are that (i) the employee information and communications are protected by the Stored Communications Act; and (ii) an employee has a privacy interest in her social networking information and communications that precludes disclosure by the site operator.[71] We analyze each of these defenses in turn.

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1. Stored Communications Act

Congress enacted the Stored Communications Act ("SCA")[72] in 1986, as part of the Electronic Communications Privacy Act,[73] to address voluntary and compelled disclosure of "stored wire and electronic communications and transactional records" by internet service providers. Congress did so negatively, defining first what was not allowed, with exceptions for what was, rather than defining what was permissible, with exceptions for what was not.[74] Congress also repeatedly distinguished between an "electronic communication service" ("ECS") provider and a "remote computing service" ("RCS") provider, delineating disclosure prohibitions for each type of service.[75] This distinction has given courts headaches, as they attempt to decide which category describes various electronic communications, with varying results.[76] Social networking sites provide a unique challenge, since they are neither purely e-mail-centered (like hotmail), nor purely community-based (like electronic bulletin boards).[77]

It appears that courts have reached a consensus that social networking sites, despite their variation in function, are ECS providers to the extent they provide private messaging and the messages have not been opened. Outlining the precedent it followed, one court remarked that, since an ECS provider is "any service which provides to users thereof the ability to send or receive wire or electronic communications," and "all three social networking] sites [(Facebook, MySpace, and Media Temple)] provide private messaging or email services, the court is compelled to . . . [hold] . . . that such services constitute ECS."[78] Once the private e-mails have been opened by the recipient, the social networking site operator is functioning as a "remote computer service provider."[79] Whether the social networking sites are operating as an ECS or RCS provider as to any particular message at any particular time, they cannot disclose an employee's communications without permission of the employee.[80]

The one court that has decided the precise issue of whether personal information and communications on social networking sites are protected by the SCA said that social networking sites are alternatively either an ECS or RCS with regard to posts on message or bulletin boards or a user's Facebook "wall" -- regardless of which of the social networking sites are in this particular circumstance, they cannot disclose posts to an employee's message board or "wall" in a workers' compensation case without permission of the employee.[81] However, if there are no privacy settings protecting the employee's social networking profile, such that her message board or "wall" is available to the public,[82] the SCA would not apply.[83]

Social networking site operators can disclose employee information or communications to defense counsel with permission of the employee.[84] The SCA allows site operators to "divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a)(1) or (a)(2)" with the customer's consent.[85] So, for example, if an employee has deleted her account but authorizes a social networking site operator to release her information and communications to defense counsel, the site operator can do so. Additionally, it might even be possible in the case of an employee's prosecution of a workers' compensation claim for the judge to compel the employee to sign a consent for the release of her account information and communications from a site operator, if relevant to the employee's claim.[86] It is more likely that a judge would not do so, however, and weigh the employee's failure to consent to the release of the information in his or her evaluation of the employee's claim.

2. Privacy

While an employee could argue that she has a privacy interest in her social networking profile information precluding disclosure, that argument is likely to fail in workers' compensation courts.[87] It is undisputed in the case law that an individual has no reasonable expectation of privacy in whether she has an account with a social networking site or internet service provider: "[A] person has no expectation of privacy in Internet subscriber information . . . . [This is consistent with] settled federal law that a person has no reasonable expectation of privacy in information exposed to third parties, like a telephone company or bank."[88] An employee likewise does not have a privacy interest in what she posts to her profile on a social networking site.[89] Even if the employee protects her information on a social networking site with privacy settings, she still does not have a privacy interest in what is posted or communicated to or through her account.[90]

III. PROFESSIONAL RESPONSIBILITY ISSUES IN DISCOVERY OF EMPLOYEE INFORMATIONFROM SOCIAL NETWORKING SITES

This Part explores issues of professional responsibility that arise for a plaintiff's attorney and defense counsel in connection with an employee maintaining and producing, and defense counsel discovering, information about an employee stored on a social networking site.

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Social Networking, from P.2

A. PROFESSIONAL RESPONSIBILITIES OF THE PLAINTIFF'S ATTORNEY

Plaintiff's attorneys should advise their clients of the risks of posting photographs, and communicating through, social networking sites.[91] Employees should not post any information or photographs that they do not want the employer or insurance company's lawyer to know or see, such as descriptions or pictures of the employee engaging in physical activities[92] and not provide anyone who they do not know access to their profiles.[93]

Additionally, counsel should advise their clients not to post days and times of activities, as that could give investigators additional opportunities to conduct surveillance.[94] Of course, to the extent workers compensation claim is fraudulent and the lawyer knows so, the lawyer cannot represent the client in the prosecution of her claim.[95] But the mere fact than an employee's information or photographs on a social networking site contradict the plaintiff's claim does not mean an employee's claim is fraudulent, because often interpretation of what a person posts on a social networking site depends on its context.[96] A plaintiff's attorney also needs to keep in mind that although a lawyer "generally has no affirmative duty to inform opposing counsel of relevant facts,"[97] the employee's lawyer might have an obligation to provide relevant information or photographs to a defense attorney in response to an interrogatory, document request, or other form of discovery demand, if the plaintiff can still access what the defense attorney seeks.[98]

However, plaintiff's counsel cannot advise his or her client to delete information or photographs stored on a social networking site to the extent that what is stored on the site is potentially relevant to the employee's claim. According to Model Rule 3.4, "A lawyer shall not ['counsel or assist another person to']: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."[99] The Restatement (Third) of the Law Governing Lawyers counsels similarly: "A lawyer may not destroy or obstruct another party's access to documentary or other evidence when doing so would violate a court order or other legal requirements, or counsel or assist a client to do so."[100] Consequently, the employee's attorney should advise his or her client to proceed with caution in posting information to a social networking site, but should not advise the client to destroy information that already exists when the attorney assumes representation of the employee.

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Hon. Melodie Belcher

Judge Melodie Belcher is the Director and Chief Administrative Law Judge, State Board of Workers' Compensation in Georgia. In January 2011 she became the Secretary of the National Association of Workers' Compensation Judiciary. She began her career as a flight attendant for Eastern Airlines; after ten years, she concluded she needed a new career. She attended Georgia State University College of Law where she was an editor on the law review, graduating cum laude in 1992. She then worked as an associate for Swift Currie McGhee & Hiers. In 1999, she joined the State Board of Workers' Compensation as a mediator in the Columbus office. She was appointed administrative law judge in 2002, and in October of 2009, she became the chief judge, moving to the Atlanta office. Judge Belcher has two grown children, two cocker spaniels and lives in LaGrange, Georgia with her husband, Bill.

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B. PROFESSIONAL RESPONSIBILITIES OF DEFENSE COUNSEL

There could be a lot of information relevant to an employee's workers' compensation case publicly available on Facebook or another social networking site,[101] and defense counsel finds it because many potential plaintiff's in workers' compensation cases do not protect their profiles with increased privacy settings.[102] There is nothing unethical about a defense attorney or an agent of the attorney accessing an employee's information and photographs stored on a social networking site that are not protected with privacy settings that block public access.[103] The employee would have no privacy interest in the information and photographs she has posted.[104] Scouring the internet for publicly available information on a social networking site is no different than the video surveillance in a public place that defense counsel may authorize in a workers' compensation case,[105] and has actually replaced video surveillance as a popular form of investigation.[106] It should be routine for defense counsel (or, at minimum, the insurance company) to search the internet, at least in a popular search engine such as Yahoo! or Google, for information that is publicly available about an employee.[107]

But what about information or photographs on a social networking site regarding an employee that are not publicly available because the employee has them protected with security settings?[108] Can an attorney direct a third-party agent to "friend" the employee in hopes of gathering relevant evidence about the plaintiff?[109] A Philadelphia Bar Association opinion addressed a similar question.[110] The inquirer-attorney asked about the propriety of an agent "friending" an unrepresented non-party witness on Facebook and MySpace, whose testimony was adverse to the inquirer's client.[111] The inquirer stated that the agent would state only truthful information - e.g., she would use her real name, but would not state her affiliation with the attorney.[112] The inquirer wanted the agent to provide him with access to the witnesses' profile on MySpace and Facebook because "the inquirer believed that the pages maintained by the witness contained information relevant to the matter in which the witness was deposed, and could be used to impeach the witness's testimony should she testify at trial."[113]

First, the opinion states, under Pennsylvania Rule of Professional Conduct 5.3,[114] which is identical to Model Rule 5.3,[115] that an attorney is responsible for the conduct of a non-lawyer who "friends" the employee on the attorney's behalf. According to the opinion:

> But the inquirer plainly is procuring the conduct, and, if it were undertaken, would be ratifying it with full knowledge of its propriety or lack thereof, as evidenced by the fact that he wisely is seeking guidance from this Committee. Therefore, he is responsible for the conduct under the Rules even if he is not himself engaging in the actual conduct that may violate a rule.[116]

The bar association does not distinguish between the activities of an investigator or paralegal and the activities of a junior lawyer who the lawyer handling the case is supervising.[117] The lawyer is not responsible under Model Rule 5.3 for the actions of an investigator hired by the client who "friended" an employee as long as the investigator was not "employed, retained, or associated by the attorney.[118] Additionally, the communication between the investigator and the employee would be communication between parties, not between an attorney and an opposing party, and it would therefore not be prohibited by Model Rule 4.2.[119] Consequently, defense counsel in a workers' compensation case is not acting unethically if an investigator hired by the insurance company "friends" an employee on a social networking site, as long as the lawyer does not encourage the investigator to do so and is not associated with her, and defense counsel could potentially use the information or photographs that the investigator uncovers in defending the employee's claim.[120] It is not relevant to the lawyer's culpability whether the investigator used her real identity or not: what is critical is the lack of any relationship between the lawyer and the investigator.

Second, the Philadelphia Bar Association opinion states that the attorney's proposed conduct violates Pennsylvania Rule of Professional Conduct 8.4(c),[121] the same as Model Rule 8.4(c).[122] According to the opinion, it is deceptive for a non-lawyer working on defense counsel's behalf to attempt to access an employee's profile on a social networking site while omitting a material fact -- "that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness."[123] The fact that the witness might permit anyone to access her profile does not excuse deceit.[124] The Professional Guidance Committee distinguishes the inquiry before it from the ordinary surveillance context -- in the latter the videographer films, photographs, or observes the employee as she presents herself to the public and does not have to ask permission to gain access to a private area.[125] The inquirer of the Philadelphia Bar

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Association opinion proposed that his agent use a truthful identity;[126] one issue that arises is whether the lawyer's conduct runs more unquestionably afoul of Rule 8.4(c) if the lawyer instructs an agent to use a false identity in trying to "friend" an employee. While there is no authority on this latter point, it certainly appears that such conduct is "deceitful."

Last, the opinion states that a non-lawyer who friends an adverse witness at the direction of an attorney violates Pennsylvania Rules of Professional Conduct 4.1[127] and 8.4(a)[128] as well.[129] The opinion notes that states differ on whether lawyers and their agents can engage in deception in certain types of investigations.[130] Even in states such as Oregon, that have an exception for a lawyer to use deceit in investigations, the lawyer probably cannot use deceit when there is no violation of law, as is often the case with no-fault workers' compensation claims.[131] In some states, a situation where this Philadelphia Bar Association opinion might be applicable in the workers' compensation context, in addition to the case of a fraudulent claim, is where a non-lawyer "friends" an employee who has a profile on a social networking site that advertises a business to the public.[132]

Whatever the ethics rules in a particular state, workers' compensation judges would have some discretion in whether they find the efforts of defense counsel and their agents to gain access to an employee's restricted social networking profile deceitful.[133] However, evidence can be admissible in a workers' compensation case even if an attorney violates the rules of professional responsibility in obtaining it.[134] But in certain cases, a court might impose sanctions and not admit into evidence what a lawyer obtains in violation of the Model Rules.[135]

The witness whose social networking profiles the lawyer inquired about accessing in the Philadelphia Bar Association opinion was not represented by counsel; if an employee is represented by counsel, then there is risk of the lawyer, or a third party acting under the supervision of the lawyer, violating Mode Rule 4.2 in "friending" the employee. Model Rule 4.2 states, "In representing a client a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized do so by law or court order."[136] Pursuant to Model Rule 5.3, the lawyer cannot direct a non-lawyer to contact, or "friend," the employee on the lawyer's behalf.[137] This is no different than the physical surveillance context where an attorney who represents the employer and the insurance carrier potentially violates Model Rule 4.2 if an investigator, who is the attorney's agent, engages the employee in conversation during the course of the investigator's surveillance.[138]

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"Overheard in Court:"

Attorney: Objection! I mean they could have – there's no way they could not have known about them. Their witness supposedly – I mean we have been sandbagged. I have been made to look stupid in making my opening statement. That's not fair to make me look stupid.

http://overheardincourt.com/page/9/

Social Networking, from P.6

The same exceptions to the prohibitions in Rule 8.4 that apply in cases where deception is authorized in particular states would also likely apply here. But little in this area is certain, because as the technologies develop, so does the application of the ethics rules. What is certain, however, is that Rules 4.2 and 5.3, in addition to the Philadelphia Bar Association opinion, suggest, at minimum, that defense counsel should proceed with considerable caution before having an agent "friend" an employee.[139]

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Citations for Social Networking

[63] Federal Rule of Civil Procedure 37(a) permits a party to make a motion for an order to compel discovery from either a party or nonparty.
[64] *See*, Blank, supra note 19, at 504. The subpoena should be very specific, including the user's full name, birthday, e-mail addresses, and time period of the requested activity.
[65] See, Lori Paul, Paralegal Practice Top: How to Subpoena MySpace and Facebook Information, Paralegal BLAW BLAW BLAW (Oct. 10, 2009), http://lorijpaul.com/?tag=litigation. Although sending a preservation order allows the site operator to identify a user's account in order to preserve information, a site operator cannot provide this information to a defense attorney without a valid subpoena or permission of the user. *See id.* The preservation order, however, can ensure a site operator retains access to an employee's social networking profile information even after the employee deletes or loses access to his or her account. *See id.*
[66] *See, e.g.*, Privacy Policy: Deactivating or Deleting Your Account. FACEBOOK, http://www.facebook.com/policy.php (last visited Aug. 21, 2010). See Privacy: Deactivating, Deleting and Memorializing Accounts, Facebook, http://www.facebook.com/help/?page=842 (last visited Aug. 21.2010); Maria Aspan, *After Stumbling, Facebook Finds a Working Eraser,* N.Y. TIMES, Feb. 18, 2008, at C5, available at http://www.nytimes.com/2008/02/18/business/18facebook.html?_r=1; Jack Zemlicka, *Don't Forget Social Median in E-Discovery*, Wisc.L.J. Mar. 31, 2010), http://www.wislawjournal.com/article.cfm/2010/04/05/Dont-forget-social-media-in-ediscovery.
[67] *See*, Awsumb, *supra* note 4at 24.
[68] *See*, Blank, *supra* note 19, at 504-05. In *Ledbetter v. Wal-Mart Stores, Inc.*, an employment law case, the magistrate judge upheld a subpoena to Facebook and MySpace requiring them to produce user information because it was "reasonably calculated to lead to discovery of admissible evidence." No. 06-cv-01958-WYD-MJW, 2009 WL1067018, at *2 (D.Colo. Apr. 21, 2009).
[69] *See supra* note 6 and accompanying text.
[70] While generally a party in litigation does not have standing to object to a subpoena served on a non-party to the action, it appears that an employee has standing to object to a subpoena duces tecum that defense counsel serves on a third-party site operator to the extent that defense counsel seeks personal information or communications of the employee protected by the Stored Communications Act. *See, e.g., J.T. Shannon Lumber Co. v. Gilco Lumber Co.*, No. 2:07-CV-119, 2008 WL 3833216, at *1 (N.D. Aug. 14, 2008) (holding that employee has standing to seek to quash subpoena served on internet service provider for production of employee's personal information protected by the Stored Communications Act), *cited in, Crispin v. Christian Audigier, Inc.*, No. CV-09-09509 MMM (JEMx), 2010 WL 2293238, at *5 (C.D. Cal. May 26, 2010) (same).
[71] The employee could raise this second defense in response to a discovery request she receives from defense counsel to produce information and communications stored on a social networking site. See supra, Part II.A.3. But because, at least in the published case law, an employee has used that defense only when discovery has been sought from the site operator, we analyze it here.
[72] 18 U.S.C. §§ 2701Q2712 (2006).
[73] Pub. L. No. 99-508, 100 Stat. 1848 (1986).
[74] For example, subsection (a) of section 2702 states first, "Prohibitions. Except as provided in subsection (b) or (c) -- a person or entity providing an electronic communication service to the public shall not knowingly divulge . . . ." 18 U.S.C. § 2702(b).
[75] [T]he term "electronic communication service means any service which provides to users thereof the ability to send or receive wireless electronic communications, " 18 U.S.C. § 2510(5). "[T]he term remote computing service' means the provision of the public or computer storage or processing services by means of an electronic communications system." 18 U.S.C. § 2711(2)
[76] *See*, Crispin, 2010 WL 2293238, at *13Q15 (discussing cases with divergent holdings).
[77] *See id.* at *9; *see also id*. at *14; Blank, *supra*, note 19, at 488.

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[78] Crispin, 2010 WL 2293238, at *9.
[79] *Id*, at *13.
[80] *See*, 18 U.S.C. § 2702(a).
[81] *See*, Crispin, 2010 WL 2293238, at *14-16.
[82] *Cf. Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432, 438 n.3 (Md. Ct. App. 2009).
[83] *See*, 18 U.S.C. §2511(2)(g)(1).
[84] *See, e.g., Barnes v. CUS Nashville, LLC*, No. 3:09-0764, 2010 WL 2196591, at *1 (M.D. Tenn. May 27, 2010); *Mackelprang v. Fidelity Nat'l Title Agency of Nev., Inc.*, No 2:06-cv-00788-JCM-.GWF, 2007 WL119149, at *2 (D. Nev. Jan 9, 2007).
[85] 18 U.S.C. § 2702(c).
[86] *See, e.g., Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1446 (2006); *see also* Bruce Nye, *More about Facebook; How to get Facebook Records in the Litigation Arena*, CAL BIZ LIT (Aug. 24, 2009, 6:00 AM), http://www.calbizlit.com/cal_biz_lit/2009/08/more-about-facebook-how-to-getfacebook-records-in-the-litigation-arena.html.
[87] *See*, Blank, *supra* note 19, at 510.
[88] *Courtright v. Madigan*, No. 09-cv-208-JPG, 2009 WL 3713654, at *2 (S.D. Ill. Nov. 4, 2009).
[89] *See, Moreno v. Hanford Sentinel, Inc*, 91 Cal. Rptr. 3d 858, 863Q64 (Ct. App. 2009).
[90] *See*, Blank, supra note 19, at 511.
[91] *See, e.g. Floridians with Workers' Compensation and Personal injury Cases Should be Cautious When Posting on Social Networking Sites like Facebook*, Johnson & Gilbert, P.A., http://www.mylegalneeds.com/library/facebook-posts-could-damage-your-florida-workerscomp-or-pi-case.cfm
[92] *See, supra* notes 27-29 and accompanying text.
[93] *See, e.g. supra* note 33.
[94] *See*, Ceniceros, *supra* note 29 ("It's common for claimant to load their social networking sites with dates, easing the way for investigators and their cameras to find them").
[95] *See*, MODEL RULES OF PROF'L CONDUCT R. 12(d)(2009).
[96] *See* Jodi Ginsberg, *How Facebook Can Undermine Your Workers' Compensation Case*, GA WORKERS COMPENSATION BLOG (July 11, 2009), http://www.georgiaworkerscompblog.com/2009/07/11/how-facebook-can-undermine-yourworkers-compensation-case/.
[97] MODEL RULES OF PROF_L CONDUCT R. 4.1 cmt. 1.
[98] *See, supra* notes 37-39 and accompanying text.
[99] MODEL RULES OF PROF_L CONDUCT R. 3.4(a); *see id.* R 3.4 cmt. 2.
[100] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 118(2) (2000).
[101] *See, supra* notes 27-29 and accompanying text.
[102] *See*, John Browning, *What Lawyers Need to Know About Social Networking Sites*, DALLAS BAR ASS'N NEWS (Feb. 1, 2009), http://www.dallasbar.org/about/news-archives.asp?ID=240
[103] *See, Moreno v. Hanford Sentinel, Inc.*, 91 Cal.Reptr. 3d. 858, 862 (Ct. App. 2009).
[104] *See, id.*
[105] *See*, Mara E. Zazzali-Hogan & Jennifer Marino Thibodaux, *Friend or Foe: Ethical Issues for Lawyers to Consider When 'Friending' Adverse Witnesses Online*, 197 N.J.L.J. 726, 726 (2009).
[106] *See*, Ceniceros, *supra* note 29.
[107] *Cf.* MODEL RULES OF PROF'L CONDUCT R. 1.1
[108] *See*, Denise Howell & Ernie Svenson, *Ins and Outs of Social Networking for Lawyers: How Tough Is It to Cast Your Profile Into Infinity?*, L. PRAC. MAG., Jan. 2008, at 47, 48.
[109] "Dissembling" or "pretexting," whatever the medium, is the practice of a lawyer or the lawyer's subordinate either pretending to be someone he or she is not, lying, or being deceitful about his or her intentions, all for the purpose of obtaining information from an adverse party or witness. *See*, Eric Cooperstein, *Facebook Ethics: It's Not About Facebook*, LAWYERIST.COM (June 23, 2009), http://lawyerist.com/facebook-ethics-it%E2%80%99s-not-about-facebook/.
[110] Op. 2009-02, *supra* note 105, at 1.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] Rule 5.3 of the Pennsylvania Rules of Professional Conduct.
[115] *See*, MODEL RULES OF PROF'L CONDUCT R. 5.3 (2009).
[116] Op. 2009-02, *supra* note 105, at 2.
[117] *See*, Op. 2009-02, *supra* note 105, at 3,
[118] *See*, State Bar of Mich., MI Ethics Op. RI-153 (1993)
[119] *See, id.* (Citing MODEL RULES OF PROF'L CONDUCT R. 4.2).
[120] *See, infra* Part IV.
[121] Rule 8.4 of the Pennsylvania Rules of Professional Conduct.

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www.nawcj.org/EdArtsandPubs.htm

Florida Workers' Compensation Institute
www.fwciweb.org

WorkCompCentral.com
www.workcompcentral.com

Managed Care Matters
http://www.joepaduda.com/

The Pennsylvania Bar Association Workers' Compensation Section Newsletter
http://www.pabar.org/public/sections/workco/pubs/newsletters/wcdec2010.pdf

The Florida Bar Association Workers' Compensation Section Newsletter
http://www.flworkerscomp.org/News440.aspx

The California Bar Association Workers' Compensation Section Newsletter
http://workerscomp.calbar.ca.gov/Publications/Quarterly.aspx

Social Networking, from P.8

[122] *See*, MODEL RULES OF PROF'L CONDUCT R. 8.4(c).
[123] Op. 2009-02, *supra* note 105, at 3.
[124] *Id.*
[125] *See, id.*
[126] Op. 2009-02, *supra* note 105, at 2
[127] PA. RULES OF PROF'L CONDUCT R. 4.1(a)(2009).
[128] PA. RULES OF PROF'L CONDUCT R. 8.4(a).
[129] Op. 2009-02, *supra* note 105, at 4.
[130] *See, id* at 4-6. .*Compare* OR. RULES OF PROF'L CONDUCT R. 8.4(b)(2009).
[131] Or. State Bar, Or. Ethics Op. 2005-173 (2005), *available at* 2005 WL 5679600.
[132] *Cf. Baumann v. Joyner Silver & Electroplating*, 1992 MN Wrk. Comp. LEXIS 622, at *15 n.3.
[133] *Cf., e.g., Rhoades v. Nabisco, Inc.*, 1985 WL 47399, at *3 (Minn. W.C.C.A. May 14, 1985).
[134] *See Keiser v. Dick Lind Heating Co.*, 1996 WL 705445, at *4 (Minn. W.C.C.A. Nov. 22, 1996).
[135] *See, e.g., Midwest Motor Sports v. Arctic Sales, Inc.*, 347 F.3d 693, 699Q70 (8th Cir. 2003).
[136] MODEL RULES OF PROF_L CONDUCT R. 4.2 (2009).
[137] *See supra* notes 114-15 and accompanying text.

NCCI Obesity Study Released:

How Obesity Increases the Risk of Disabling Workplace Injuries:

The incidence of obesity is growing globally. In the United States, the incidence of obesity is the highest of all reporting countries and the trend continues unabated. Intuitively, the implications of this trend for workers compensation are disturbing. Recent research confirms anecdotal data—work-related injuries are far more costly if the injured worker is obese. The dramatically higher medical costs suggest that the types and nature of injuries sustained by obese workers, especially the "morbidly obese," are more likely to result in permanent disabilities.

This study advances previous research by analyzing the differences in outcomes between workplace injuries with "obese" and "non-obese" claims. The paper reports on differences in injury types and treatment patterns between a sample of more than 7,000 claims with "obesity" as a secondary diagnosis and another 20,000 claims with virtually identical characteristics—primary diagnosis, gender, industry group, year of injury, state, and approximate age—but no obesity diagnosis.

Key Findings

The study concludes that there are systematic differences in the outcomes for obese and non-obese claimants with comparable demographic characteristics. The study also concludes that there is greater risk that injuries will create permanent disabilities if the injured worker is obese. Case studies examined in the appendix indicate that, in general, even when both the obese claim and non-obese claim are the same injury type, the range of medical treatments and costs, as well as duration, typically is greater for obese claimants. These examples, however, also indicate that there is considerable variation at the individual claim level and that in some cases the non-obese claim may be more costly. For the case studies examined, treatment categories that tended to be the primary cost drivers included physical therapy, complex surgery, and drugs and supplies.

https://www.ncci.com/documents/obesity_research_brief.pdf

In Keeping with our mission to facilitate and encourage education, collegiality and interaction for those who adjudicate workers' compensation disputes, the National Association of Workers' Compensation Judiciary is pleased to provide the following information on an upcoming program jointly sponsored by the Tort, Trial and Insurance Section and the Labor and Employment Law Section of the American Bar Association.

American Bar Association
2011 Workers' Compensation
Midwinter Seminar and Conference
Boston, MA
Intercontinental Hotel
April 7 – April 9, 2011

Tentative Topics:

Thursday, April 7, 2011

Health Care in the Obama age: a lightning strike look at health care topics affecting workers' compensation, including an update on 24 hour coverage, genetic testing under GINA, and the ABA's Taskforce on the American Medical Association's 6th Edition Guides for the Rating of Permanent Impairment.

The Business of Workers' Compensation: If you've ever wondered if you could learn anything from your competition, here's your chance to get an insider's look at the business of law, and specifically how to be more efficient and improve your performance and results, from each perspective. Topics will include the latest in law office technology that actually makes life easier. This will be presented from Claimant's, Defense, and Judicial perspectives.

Historical reflections on the origins, development and future of workers' compensation in the 21st century.

Friday, April 8, 2011

Employment Extravaganza: Update and practice tips on ADA, AADA, FMLA, Fitness for Duty Exams; Georgia's Mohawk case involving legal workers suit against their employer for allegedly using undocumented workers to reduce wages of legal workers; what employment lawyers wish that workers' compensation lawyers knew about employment law, and what workers' compensation lawyers wish employment lawyers knew about workers' compensation.

Medicare Set Asides: A dialogue about proposed solutions, what's being done to solve the problems surrounding MSAs? The latest developments and ideas, including proposed legislative remedies.

Mass Disasters: how workers' compensation responds.

Saturday, April 9, 2011

Cutting Edge Case Law Updates.

Immigration.

Judges' Panel: "Ethics and Professionalism in the Litigation and Adjudication of Workers' Compensation Matters."

Docs Performing Fusions Tied to Implant Manufacturers

[12/21/10]

Hospitals that collect the most money from Medicare for performing spinal fusions also employ doctors with economic ties to the manufacturers of the devices used in the procedure, the Wall Street Journal reported Monday -- providing the latest bad press for a procedure that has long been under fire by workers' compensation cost-control advocates.

Critics who claim spinal surgery is overused say physicians have a financial incentive to perform these procedures, the paper reports. But physicians and device manufacturer Medtronic say the payments cover royalties for products the physicians helped design, or cover research and development, training and education or other advisory services.

The Journal looked at Medicare payments and a physician registry on Medtronic's website that documents the payments it has made to surgeons. Between 2004 and 2008, Norton Hospital in Louisville, Ky., performed the third-most spinal fusions on Medicare patients in the country, collecting $48 million from the federal government. Medtronic paid more than $7 million over the first three quarters of 2010 to five physicians at the hospital: Mitchell Campbell, John Dimar, Steven Glassman, John Johnson and Rolando M. Puno. What's more, 24% of the spinal fusions performed at Norton were on patients with aging disks, according to the Journal.

Dr. Glassman told the Wall Street Journal that he and his colleagues do not overuse fusions and that the diagnostic codes the paper was using for its analysis "do not convey indication for spinal fusion with the specificity that you are attributing to this data." Some surgeons think fusions should be used conservatively, in cases of spinal instability, spinal fractures or scoliosis. That is because spinal fusion can have negative side effects and leave patients worse off than if they left their condition untreated.

Studies are showing similar results for injured workers. Researchers at the University of Cincinnati said during a conference in June that only 26% of patients who underwent lumbar spinal fusion for back pain returned to work two years later, compared to 67% of the patients in a control group who did not undergo a lumbar spinal fusion. Permanent disability rates were 11% for surgical patients and 2% for patients who did not undergo surgery, according to the researchers, Dr. Trang Nguyen, Ph.D, and Dr. David C. Randolph. Nguyen and Randolph also reported earlier this year that a review of magnetic resonance imaging scans from 725 people who had a fusion showed all but eight individuals had "perfectly normal" spines before the procedure, suggesting surgery was not necessary according to the Wall Street Journal article.

The Work Loss Data Institute found similar results with a study of the factors that extend return-to-work times. Spinal fusion results in an average return-to-work time that is 100 times as long as the return-to-work time for simple exercise, according to the institute's president Phil Denniston. "With lumbar fusion, the differences are dramatic," he told WorkCompCentral in November. "You can take somebody whose disability duration should be about 20 days and make it into a permanent disability case." Work Loss Data Institute does not recommend fusions within the first six months of a claim of back pain except in situations that involve fracture or dislocation.

Similarly, occupational physicians told WorkCompCentral that many cases of back pain that aren't directly linked to an accident are indistinguishable from conditions like stomachache or headache and do not require surgery. They said there is rarely a work connection, and several advocated writing this condition out of workers' compensation systems altogether.

There is also a lot of money involved in fusions because of billing structures with Medicare and state systems that allow physicians to "pass through" the costs of implanted devices to employers and carriers. Currently, California hospitals are paid a flat fee for implants, but they are also allowed to add to their bill 100% of the costs of implantable hardware as well as handling fees. Rules proposed last week by the California Division of Workers' Compensation

Continued, Page 12

Fusion, from Page 11

would allow hospitals to choose either a 10% add-on to documented paid costs, which are fully reimbursed, or standard Medicare Severity Diagnostic Related Group rates, plus an allowance for 14 complex spinal surgery groups. *(See "ASCs Continue to Resist Fee Reduction Plan" in today's report.)*

The expenses add up quickly, according to Charles Rosen, a spine surgeon at the University of California, Irvine School of Medicine. With screws that sell for up to $2,000 a piece and bone growth protein packs that sell for $5,000, Rosen told the Journal that it's easy to put $30,000 worth of equipment into a patient during a fusion. The Journal article questioned whether the large amounts of money might influence surgeons to perform unnecessary procedures for the purpose of using more products from a specific manufacturer. Alexander Vaccaro, a spine surgeon at Thomas Jefferson University Hospital in Philadelphia, said that isn't the case. Vaccaro received royalty payments of between $415,000 and $2 million from six different manufacturers in 2009 and at the same time collected consulting fees from nine manufacturers between $165,000 and $666,000, according to the Journal. Medtronic's website shows it gave Vaccaro $1.28 million in royalties in the first three quarters of 2010.

He agreed that it "looks crazy" to see a doctor accept large amounts of money from the manufacturer of medical devices they use in their practice, but he told the Wall Street Journal that he has no say in the implantable products available at his hospital. Medtronic said there is no incentive for physicians to overuse the procedure to collect more in royalties. Physicians do not get paid when they implant devices they helped design, research, test, or otherwise worked on, or when those devices are used by another surgeon at the hospital where they work, according to the Journal.

Whistleblowers have alleged that the royalty payments are thinly veiled kickbacks for using Medtronic devices. A former counsel at the company's spine division filed a suit in 2002 that Medtronic ultimately settled for $40 million in 2006 after the Justice Department joined the suit. Medtronic denied any wrongdoing. The terms of the settlement have not been disclosed, but the Wall Street Journal said the five surgeons at the hospital in Louisville became Medtronic's largest spinal implant clients after signing consulting and royalty deals in 2001. Glassman told the paper that royalty payments were for legitimate purposes. Medtronic started posting information about the payments it makes to doctors in June, after Sen. Charles Grassley, R-Iowa, started scrutinizing the company. Grassley serves on the Senate Finance Committee, which oversees Medicare.

The Medtronic physician registry can be viewed by scrolling to the bottom of this page:
http://www.medtronic.com/about-medtronic/physician-collaboration/physican-registry/index.htm.
The Wall Street Journal article is here:
http://online.wsj.com/article/SB10001424052748703395204576024023361023138.html?mod.

The Foregoing was reprinted with the permission of WorkCompCentral.com. The NAWCJ thanks WorkCompCentral for their consistent support of this newsletter and the Association's ideal of promoting professionalism and collegiality among the nation's workers' compensation adjudicators.

Ky. DWC Commish Tells ALJs to Unfriend Workers' Compensation Attorneys

August 2010

At a recent ALJ training conference, Kentucky DWC Commissioner Dwight Lovan announced a prohibition against ALJs socially networking (i.e. Facebook) with attorneys who practice workers compensation law in the state. Workers' compensation attorneys across the Commonwealth will soon experience a mass unfriending.

The Kentucky Judicial Ethics Commission recently confronted this very issue and determined via Judicial Ethics Opinion JE-119 that , in short, provided judges conduct themselves within social networking sites as they would with any other public relationship (i.e. so as not to avoid violations of the Code of Judicial Conduct) they could participate in social networking sites. Extreme caution was advised though. This issue was addressed in a previous post of OUCH!

Ouch! Workers' Compensation News & Issues is a website maintained by Roland Legal PLLC.
http://rolandlegal.wordpress.com/2010/08/31/ky-dwc-commish-tells-aljs-to-unfriend-workers-compensation-attorneys/

What Is a Pill Mill, and What Can Be Done About Them?

Per Curium

What will affect workers' compensation in 2011? Legislative action in various states in 2011 is likely, and broad reforms are mentioned in a few states. In one focused area, legislative action seems certain. There will be attempts this year directed at the often mentioned but rarely defined "pill mill," suspected by many as a fundamental problem for medical care delivery in America, within workers' compensation and without. 2010 ends with continued headlines regarding human and financial cost associated with "Pill Mills."

The December 31, 2010 Miami Herald[1] reported that customers from 30 states patronized a clinic in Tampa, Florida. Reportedly, First Medical Group dispensed over two million doses of Oxycodone (which can be a "compound" drug) and other narcotics. Allegedly, the human cost of this particular operation included five overdose deaths. Last April, a team of Houston, Texas physicians pled guilty to conspiracy and health care fraud. They were accused of fraudulently billing Medicare, Medicaid and various insurance carriers for procedures that were never performed. They also allegedly prescribed controlled substances to virtually every patient, and forcing at least some to acknowledge receiving narcotics that were not received. According to WorkCompCentral.com, the two doctors forfeited $44 million in assets as part of the plea agreement.[2] In August, an Ohio Grand Jury made news handing down a 29 count indictment on charges of conspiracy, money laundering, and drug trafficking against four related defendants. The allegations included falsifying records, and reselling pharmaceuticals to drug dealers.

The 2010 legislative efforts around the country included attempts to control the medication dispensing. In Florida, the legislature passed legislation limiting prescriptions of controlled substances. That measure was vetoed. Multiple bills vetoed in 2010 were raised in a post-election special session, but the narcotic regulation was not among them. A California legislative effort to regulate both the use and price of "compound drugs"[3] failed in the waning days of 2010; legislators vow to raise the issue again in 2011.[4] The price regulation in the 2010 effort would have tied prices to the "Medi-Cal' fee schedule. A Texas Senator introduced three "pill mill" legislative proposals last year. As a result, physicians operating "pain clinics" were registering with the state early last fall. Louisiana passed "pill mill" regulation three years ago and already claims some successes.[5]

Defining a "pill mill" is not easy. According to CBS News[6]

> "Pill mill" clinics come in 'all shapes and sizes' but investigators say more and more are being disguised as independent pain-management centers. They tend to open and shut down quickly in order to evade law enforcement. Although the problem is nationwide with recent arrests in New York, Ohio, and Chicago, Drug Enforcement Administration officials believe the highest concentration of pill mills are in Florida and Texas.

The CBS News analysis lists some reasonably clear indicators that may suggest a clinic is a "pill mill." These include:

The clinic accepts cash only
No physical exam is given
No medical records or x-rays are needed
You get to pick your own medicine, no questions asked
You are directed to "their" pharmacy
They treat pain with pills only
You get a set number of pills and they tell you a specific date to come back for more
They have security guards
There may be huge crowds of people waiting to see the doctor

The anecdotal evidence supports that there is some problem with narcotic dispensing and distribution. As 2011 begins, it is likely that some of last year's unsuccessful legislative efforts will be heard again and possible that new efforts will be proposed.

[1] http://www.miamiherald.com/2010/12/31/1994956/tampa-police-say-they-busted-large.html
[2] https://www.workcompcentral.com/members/index.php?fa=news&token=F7F09FBB79BF5
[3] http://en.wikipedia.org/wiki/Oxycodone
[4] https://www.workcompcentral.com/1/news/news_print2.htm?what=news&id=7286e5385f2
[5] http://www.chron.com/disp/story.mpl/metropolitan/7184377.html
[6] http://www.cbsnews.com/8301-501263_162-2872835-501263.html

"Second Fridays Seminars"

The National Association of Workers' Compensation Judiciary continues its program of monthly educational seminars, presented on the second Friday of each month at lunchtime program.

This year, the NAWCJ and Florida Office of Judges of Compensation Claims is joined by the Florida Workers' Compensation Institute (FWCI) to present a diverse and interesting 2010-11 program. The schedule for 2010-11 will include the programs listed below. Plan now to join us for these exceptional programs, at no charge to NAWCJ members.

January 14, 2011

The Anatomy of The Injury
Bruce M. Berkowitz, M.D.
Orthopaedic Center of South Florida, Plantation, FL
Tim G. Joganich, M.S., CHFP, ARCCA Inc.
Penns Park, PA

February 11, 2011

What is Cultural Diversity in Healthcare? Increase Your Understanding for Improved Patient Outcomes
Adam Scott Middleman,
Vice President of Sales and Marketing, Black Diamond Services, Pompano Beach, FL

March 11, 2011

Tendinitis, Compressive Neuropathy and Trigger Finger in the Workplace
Tosca Kinchelow, MD, Miami International Hand Surgical Services, North Miami Beach, FL

April 8, 2011

Economic Advantages of Timely Orthopedic Subspecialty Care: Hand Surgery and Beyond
Alejandro Badia, MD, Badia Hand to Shoulder Center OrthoNOW, Miami, FL

May 13, 2011

Rotator Cuff Tear in the Injured Worker
Avi Kumar, MD, Coastal Orthopedics & Pain Management, Bradenton, FL

June 10, 2011

Kneecaps - Therapy First: Treatments for Patellofemoral Joint Injury and Pain Syndrome
Theodore Evans, MD
South Dade Orthopaedic Associates
Miami, FL

A Look Back at Judicial College 2010

Only 222 Days Until Judicial College 2011!

Montana May Address Compensation for Illegal Aliens in 2011

A bill (HB71) introduced in the Montana House of Representatives would relieve employers from workers' compensation liability for injuries to illegal aliens that they have employed.

If the bill passes, Montana would join Wyoming. The text of the Montana bill is not available, however, and so whether the Montana bill uses the same process to this end is not known at this time.

The Wyoming Supreme Court has concluded "an alien who is not authorized to work in the United States is not an "employee" under Wyo. Stat. Ann. § 27-14-102(a)(vii), and is not covered by Wyoming's workers' compensation." Felix v. State ex rel. Safety & Compensation Div., 986 P.2d 161 (Wyo. 1999). The Court's concluded that Wyo. Stat. Ann. § 27-14-102(a)(vii)(Michie Cum Supp. 1996) is unambiguous in its definition of "employee." The statute provides:

> "Employee" means any person engaged in any extrahazardous employment under any appointment, contract of hire or apprenticeship, express or implied, oral or written, and includes legally employed minors and aliens authorized to work by the United States department of justice, immigration and naturalization service. "Employee" does not include: (13 specific exclusions are listed, and unauthorized aliens are not included among the exclusions).

The Wyoming statute thereby distinguishes aliens that are authorized to work by the United States government, and those who are not authorized to work. There have been similar results regarding the rights of aliens, see, Hoffman Plastic Compounds v. NLRB, 535 U.S. 137 (U.S. 2002).

In the social contract that is workers' compensation, it would appear likely that the converse would also hold, that is employers of such aliens would not be protected from tort liability by the exclusive remedy provisions of workers' compensation.

Another article addressing various perspectives on the compensation for aliens subject:

http://montana.watchdog.org/2010/12/21/montana-could-be-first-state-to-deny-workers%e2%80%99-comp-to-illegals/

Hold the DATES!

NAWCJ Judicial College 2011

August 21through 24, 2011

The easiest thing to be in the world is you. The most difficult thing to be is what other people want you to be. Don't let them put you in that position.

Leo Buscaglia

People usually survive their illnesses, but the paper work eventually does them in. Filing a claim for insurance is terminal.

Erma Bombeck

It is a thousand times better to have common sense without education than to have education without common sense.

Robert Green Ingersoll

"Don't wait for extraordinary opportunities. Seize common occasions and make them great. Weak men wait for opportunities; strong men make them."

Orison Swett Marden

WE NEED ***YOU***, YOUR ***WRITINGS***, YOUR ***IDEAS***

Do you write about topics that would be of interest to our members? Have you entered a decision in which Judges around the country would be interested? The NAWCJ communicates monthly with approximately 1,000 workers' compensation adjudicators and appellate review officials across the country. If you have ideas for articles or would like to submit a case note or article, contact Hon. John Lazzara at JJL@NAWCJ.org

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY
APPLICATION FOR MEMBERSHIP

THE NAWCJ MEMBERSHIP YEAR IS A FOR 12 MONTHS FROM YOUR APPLICATION MONTH. MEMBERSHIP DUES ARE $75 PER YEAR OR $195 FOR 3 YEARS. IF 5 OR MORE APPLICANTS FROM THE SAME ORGANIZATION, AGENCY OR TRIBUNAL JOIN AT THE SAME TIME, ANNUAL DUES ARE REDUCED TO $60 PER YEAR PER APPLICANT.

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DESCRIPTION OF JOB DUTIES / QUALIFICATIONS FOR MEMBERSHIP:

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IN WHAT WAY WOULD YOU BE MOST INTERESTED IN SERVING THE NAWCJ:

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Mail your application and check to:

Kathy Shelton
P.O. Box 200
Tallahassee, FL 32302
850.425.8156
Email: kathy@fwciweb.org

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY
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Email: kathy@fwciweb.org

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

There are opportunities for sponsorship of the 2011 NAWCJ Judicial College August 21 through 24, 2011, in Orlando, Florida. If you are interested in sponsoring any of the following:

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