



# The eDiscovery Survival Guide

Practical Risk and Cost Management Strategies for In-house Counsel



# Session Objectives

Practical panel presentation on how to tackle a typical e-discovery case

Module 1: Preservation

Module 2: Formulating an E-discovery Plan

Module 3: E-Discovery Review and Production

Module 4: Using Internal Controls To Reduce Costs and Risks

Approx. 12 minutes per Module

Focus on practical issues and strategies

Questions welcome at any time



# The Case

One of the company's Human Resource managers sends you a letter received from a small plaintiff-side employment law firm. In that letter, the attorney alleges that his client, a former employee of the company, was denied a promotion by her male manager. The attorney also states that he is going to file a Charge of Discrimination and seek redress in court if his client is not immediately paid \$50,000. This attorney has a reputation for trying to obtain e-discovery sanctions against his adversaries. His letter further demands that the company preserve evidence as follows:



# The Case

"Demand is hereby made that you immediately implement an **EVIDENCE PRESERVATION HOLD**,<sup>1</sup> instructing and requiring all necessary persons and entities to preserve all documents and information stored in or on your/their computer systems, removable electronic media, paper files, and other locations, which may be relevant to the claims or defenses and witnesses involved in this claim. This includes all evidence which may be stored in one or more of the following platforms: databases, networks, computer systems, including legacy systems (hardware and software), servers, archives, backup or disaster recovery systems, tapes, discs, drives, cartridges and other storage media, laptops, personal computers, internet data, personal digital assistants, handheld wireless devices, mobile telephones, paging devices, and audio systems, including voicemail, or any other system you may be utilizing. Compliance with these preservation obligations includes forwarding a copy of this letter to all individuals and organizations that are responsible for any of the items referred to in this letter.

Should you fail or refuse to comply with the evidence preservation demands set forth in this letter, please understand that my client may file additional claims and/or seek strict sanctions against you (and potentially others). Should you wish to discuss the contents of this letter for any reason, please contact us immediately."

What do we do?



# Step 1 Preservation

What should/must the company do in response to the plaintiff's attorneys' letter?

- Federal v. State Standards
- Preservation Notices
- Halting Automatic Deletion
- Custodian Interviews
- Backup tapes/drives
- Responding to spoliation/preservation demand letters



# Formulating an eDiscovery Plan

Efforts to resolve the case have failed and the case has gone to litigation in state court.

The Plaintiff has served broad discovery requests seeking “Any and all documents which refer or relate to the Plaintiff in any manner.”

The term “documents” is defined in the requests to include all types of electronic files, similar to the list of files contained in the spoliation letter submitted by the Plaintiff’s attorney prior to litigation.

What do you do?



# Formulating an eDiscovery Plan

- Determine goals and budget for e-discovery
- Request an e-discovery conference
  - Mutual information exchange to achieve efficiencies
  - Suggest reasonable limits
  - Explore phased discovery
  - Negotiate the search process
  - Cost shifting
- Early motions for protective order
- Risks of ignoring/not having e-discovery plan



## eDiscovery Review & Production

After some motion practice, the Court has ordered the parties to confer and create a joint e-discovery plan.

The parties are close to completing that process and it is time to make arrangements to review the electronic files that will be generated by the search.

What do you do?



# eDiscovery Review & Production

- Data collection
- Early Case Assessment Reports
- Data Reduction Tools
- Review Platform Options
- E-discovery Service Provider Cost Structures
- How to reduce service provider costs



## Using Internal Controls to Reduce Costs and Risks

The company successfully navigated this particular e-discovery case, but it took substantial time and oversight by the legal department.

How can the legal department streamline this process going forward and ensure consistency where appropriate?



## Using Internal Controls to Reduce Costs and Risks

- Implementation of company-wide legal hold policies/standard preservation protocols
- Creating standard IT systems summaries for outside counsel
- Identifying potential problem e-discovery cases early
- Requiring outside counsel to provide a summary of their e-discovery plan and budget early on
- Centralize e-discovery service provider relationships at the corporate level (not the law firm level)
- Utilizing outside e-discovery counsel



Thank You

Questions?



## Scott W. Atherton

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www.AthertonLG.com

### Prior Professional Experience

- Akerman Senterfitt
- Schwarzberg, Spector, Duke, Schulz & Rogers
- Judicial Clerk to the Honorable Robert M. Gross, Former Chief Judge of the Fourth District Court of Appeals

### Awards and Recognitions

- Nova Southeastern University, Shepard Broad Law Center, *2011 Adjunct Professor of the Year Award*
- Super Lawyers Magazine 2010-2012, Listed in Florida as a "*Rising Star*" for *Employment & Labor*

### Education

- J.D., Nova Southeastern University, Shepard Broad Law Center, 2004
- *Summa cum laude* (Top 1% of graduating class)
- Michael L. Richmond Award for Academic Excellence

### Practice Summary

Scott Atherton concentrates his practice in the areas of complex business litigation, employment law and electronic discovery. Scott's employment law practice includes litigating discrimination, retaliation, harassment, whistleblower and wage claims. Scott's commercial litigation practice includes representing clients in corporate, partnership, limited liability company disputes, executive compensation litigation, and the prosecution of fraud and deceptive trade practice claims. Scott also litigates a broad range of e-discovery disputes and represents organizational clients in creating and implementing legal hold and related technology policies.

### Areas of Practice

- Business Litigation
- Employment Claims
- Electronic Discovery
- Contract Disputes
- Whistleblower Claims
- Noncompete and Trade Secret Cases
- Unpaid Overtime and Wages
- Employment and Severance Agreements

### Representative Experience

**Business Litigation** - Defended bio tech company and its general counsel in claims arising from joint venture to promote new pharmaceutical products in which plaintiffs sought \$82 million in economic damages. *See American Silver LLC et al v. General Resonance LLC et al*, 1:2007cv02807 (D. Md. 2007). Case settled on the tenth day of the federal jury trial after the court pronounced that it

- Recipient of the Dean's Merit Scholarship
- Nova Law Review, Associate Editor
- Nova Southeastern University High Grade Awards for Employment Discrimination, Contracts, Civil Procedure, Evidence, Constitutional Law, and Wills, Trusts & Estates
- Fredrick J. Damski Memorial Book Award for Outstanding Achievement in Constitutional Law
- B.S., Florida Atlantic University, 2001; Management and Marketing, Dean's List, Minor: Advertising

### **Community Involvement**

- Chamber of Commerce of the Palm Beaches, Board Member
- Nova Southeastern University, Shepard Broad Law Center, M.S. in Employment Law Program, Adjunct Professor; Independent Research Consultant
- American Bar Association, Standing Committee of Lawyers' Professional Responsibility, Member
- Nova Southeastern University Law Alumni Association, Board Member and Past President of Palm Beach County Chapter

would exclude the plaintiffs' damages expert's testimony

**Employment Claims** - Represented international video game and entertainment company in defense of race discrimination claims asserted by the Civil Rights Division of a large municipality on behalf of patrons. The claims asserted involved, among other allegations, racial profiling, use of excessive force by security personnel, and racially biased dress code rules.

**Electronic Discovery** - Obtained an order striking a plaintiff's pleadings as a sanction for hacking into a co-defendants' email account during the course of discovery in a pending litigation. The plaintiff, who was seeking over \$1 billion in economic damages, argued that this sanction was too severe and would amount to the largest sanction ever imposed. Following a five day trial, the court determined that this sanction was not too severe, and dismissed the plaintiff's claims. *See Leor Exploration & Production, LLC v. Aguiar*, 2010 WL 3522053 (S.D. Fla. Sept. 8, 2010).

**Contract Disputes** - Trial counsel for seller in a stock purchase dispute resulting in an \$867,854 damage award for seller (exclusive of attorneys' fees and costs). *See Petlev c. Monitor Outlet, Inc.*, Case No. 2007CA017348XXXXMBAG (Fla. 15th Jud. Cir. 2007).

**Whistleblower Claims** - Defended national pharmacy retailer in whistleblower action based upon employee's objections to violations of a federal consent decree. The underlying consent decree arose out of an EEOC enforcement action in which it was alleged that the pharmacy engaged in systematic race discrimination.

**Noncompete and Trade Secret Cases** - Trial counsel for international security company in a noncompete action against two former area managers resulting in the entry of a final injunction following a four day trial. Court also awarded security company client approximately \$240,000 in prevailing party attorneys' fees and costs. *See Wackenhut Corp. v. Schira*, Case No. 502008CA005466XXXXMBAA (Fla. 15th Jud. Cir. 2008).

### **Bar Admissions**

- Florida Bar
- Southern District of Florida
- Middle District of Florida

**Unpaid Overtime and Wages** - Represented national mortgage company executives in connection with collective action under the FLSA which involved potential individual liability against certain corporate decision-makers.

**Employment and Severance Agreements** - Represented news company executive in connection with a challenge to her parachute/change in control agreement with the company which was worth approximately \$900,000. That agreement was challenged by a shareholder in a derivative action which claimed that the agreement allegedly constituted corporate waste and should be set aside by the court.

### **Select Lectures and Publications**

Network of Trial Law Firms, Co-Author, "*Areas of Ethical Morass for In House Counsel*," August 2011

ALI-ABA Continuing Education Seminar, Co-Presenter, "*What You Say About Your Clients Can Come Back to Haunt You: Internal Firm Communications and the Limits of Attorney-Client Privilege*," July 2011

Nova Southeastern University M.S. in Employment Law Residential Institute Presentation, Speaker, "*Advanced Internal Investigation Tactics*," July 2011

Annual Labor & Employment Law Seminar, Presenter, "*Protect Your Assets: Non-Compete & Trade Secret Law*," April 2011

American Intellectual Property Law Association Mid-Winter Conference, Speaker, "*Managing the Risks of Law Firm Social Networking*," February 2011

Nova Southeastern University M.S. in Employment Law Residential Institute Presentation, Speaker, "*E-Discovery in Employment Litigation: Strategies for Implementing Sound Legal Hold Policies to Reduce Employers' Exposures*," July 2010

Continuing Education Seminar, Speaker, "*The Art of Employee Separation: How To Reduce Company Liability for Terminations, RIFs and Layoffs*," February 2010

Presented nine-part Continuing Legal Education course on all aspects of the electronic discovery process, including electronic file identification, preservation, collection, processing, review, production, and litigation strategies, January-August 2010

The Florida Bar Journal, Contributing Author, "*Employment Law for Law Firms: Do the Shoemaker's Children Need New Shoes, Part 2*," Volume 83, Nos. 7 and 9, October 2009



## Christopher B. Hopkins



### Shareholder

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### Practices

Litigation

### Education

J.D., Tulane University School  
of Law, 1997

M.T.S., Wesley Theological  
Seminary, 1994; *cum laude*

B.A., University of Richmond,  
1992

### Bar Admissions

Florida

Christopher B. Hopkins has extensive trial and appellate experience in state and federal courts throughout Florida. He divides his time among appellate, arbitration, and litigation matters. His practice includes professional malpractice, construction, probate, commercial, and personal injury litigation as well as general civil litigation and appeals. Christopher is a Florida Supreme Court certified civil circuit mediator and qualified arbitrator. He is also a frequent speaker and faculty member for continuing legal education.

### Areas of Experience

Appellate

Construction Litigation & Dispute Resolution

Healthcare Litigation

Hospitals & Health Systems

Insurance Litigation

Real Estate Litigation

Senior Living Facilities

Trusts, Estates, Guardianship & Other Fiduciary Litigation

### Awards & Recognition

- Certified Civil Circuit Mediator, Florida Supreme Court

- Qualified Arbitrator, Florida Supreme Court
- *Florida Trend's* Legal Elite 2012, Listed for Civil Trial
- *Florida Trend's* Legal Elite 2005-2009, Listed for Appellate Practice
- Florida Defense Lawyers Association 2008, James Lawless ADR Award
- Martindale-Hubbell, AV Rated

### Published Work & Lectures

- *Palm Beach County Bar Association Bulletin*, Author, "Will Twitter Ruin Your Legal Writing'," 2010
- *Palm Beach County Bar Association Bulletin*, Author, "Facebook Privacy Settings," 2010
- *Palm Beach County Bar Association Bulletin*, Author, "Lawyers Guide to Foursquare & Yelp," 2010
- *Palm Beach County Bar Association Bulletin*, Author, "Does Your Firm Have a Social Networking Policy'," 2009
- *Trial Advocate Quarterly*, Author, "Internet Social Networking Sites for Lawyers," 2009
- *Palm Beach County Bar Association Bulletin*, Author, "Why Lawyers Should Be @ Twitter," 2009
- *Palm Beach County Bar Association Bulletin*, Author, "Lawyers & Blogs," 2009
- *Trial Advocate Quarterly*, Author, "Building a Better Proposal for Settlement," 2008
- *Trial Advocate Quarterly*, Author, "Eyewitness Reliability: The JFK Assassination and Simmons v. State of Florida," 2007
- Andrew's Nursing Home Reporter, Author, "Guide to Enforcement of Arbitration," 2006
- *Trial Advocate Quarterly*, Author, "Emerging Trends and Conflicts in the Enforcement of Arbitration Clauses," 2006
- *Trial Advocate Quarterly*, Author, "The Perils of Enforcing 'Favored' Arbitration," 2005

### Court Admissions

- U.S. Court of Appeals, District of Columbia
- U.S. Court of Appeals, Eleventh Circuit
- U.S. District Court, Middle District of Florida
- U.S. District Court, Northern District of Florida
- U.S. District Court, Southern District of Florida
- U.S. Supreme Court

### Professional Memberships & Activities

- Palm Beach County Bar Association, Technology Committee, Chairman
- Florida Defense Lawyers Association, ADR Committee, Member
- The Florida Bar, Appellate Practice Committee, Member



## **Chris L. Johnson** Vice President of Sales

### PROFESSIONAL SUMMARY

Chris is responsible for the direction and execution of Credence's business development strategy, which includes providing consultative discovery management solutions to corporations and law firms throughout Florida and the Southeast.

With almost 10 years in the litigation support services industry, Chris' experience further solidifies Credence's position as the premier discovery management provider in the state of Florida.

### CERTIFICATION

Chris is a Certified Litigation Support Professional and speaks regularly on e-Discovery throughout the Southeast.

### SPECIALIZATION

Chris has held senior management roles in several of the largest litigation support services companies in the industry. He has successfully launched several new markets in the Carolinas and Florida for companies in the litigation support services industry to include two companies of his own. Chris started his sales career at Gartner, the world's largest IT Research and Advisory firm.

He also proudly served for four years in the United States Navy during several real world operations and is currently an Officer in the United States Navy Reserves.

### EDUCATION

Attended the University of Georgia and Excelsior College, graduating with a Bachelor of Science



Scott Atherton

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December 6, 2011

**VIA U.S. MAIL AND E-MAIL**

Bernard Egozi, Esq.  
Egozi & Bennett, P.A.  
2999 NE 191st Street, Suite 407  
Aventura, Florida 33180

**Re: BGT Partners v. Bluegreen Corporation et al**

Dear Bernie:

I write in follow up to our prior discussions regarding e-discovery matters, including my request that the parties work together to agree upon a mutually acceptable protocol for the identification, processing, search, review and production of the voluminous electronic files which are the subject of various discovery requests in this case.

As I conveyed to you during our call, I believe both parties will benefit from engaging a joint e-discovery planning effort, so that we can attempt to reach agreement on the e-discovery process on the front end and promptly present any areas of disagreement to the Court for early resolution. Our goal is to reach a reasonable consensus with respect to how all parties can discharge their mutual obligations with respect to e-discovery in a manner that is both efficient and proportional to, among other things, a realistic evaluation of the amounts in dispute.

In that connection, I suggest that the parties engage in the following phased e-mail/e-document search protocol:

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NEW YORK ORLANDO PALM BEACH SALT LAKE CITY TALLAHASSEE TAMPA TYSONS CORNER WASHINGTON, D.C.  
WEST PALM BEACH

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1. Each party will identify its own custodians who are believed to have potentially responsive information;
2. Each party will classify its own custodians into the following categories:
  - a. Class A – The top 2 custodians who were the most likely to have the most potentially responsive information, and
  - b. Class B – Other custodians who were the most likely to have less or substantially less responsive information than those in Class A.
3. Each party will suggest reasonable search terms to be applied to its own Class A custodian's email files (those search terms will be based upon the requesting party's document requests with due consideration to how the Class A custodian's discuss the subjects being searched and both parties can reserve their respective rights to test search terms before agreeing to same);
4. The parties shall exchange proposed Class A custodian names and search terms and attempt to reach agreement with respect to same;
5. To the extent the parties agree, they will initiate the searches using the agreed upon custodians and terms;
6. To the extent the parties do not agree, they will file appropriate motions so that Court can resolve the parties' disputes;
7. Following application of the agreed upon and/or court-ordered search terms to the Class A custodians' emails, the producing party will review the results and produce responsive, non-privileged emails on a reasonable rolling basis to the requesting party;
8. Each rolling production shall include an brief update concerning the amount of files left to be searched/reviewed and the expected timing of the next rolling production (until the production process is completed); and
9. Each requesting party will reserve its right to request that additional custodians and/or search terms be included in the search as discovery continues, recognizing that each producing party will likewise reserve its right to object to any additional searches based upon burden, expense, proportionality, or any other grounds.

Our proposal is consistent with the principles set forth in The Sedona Conference Cooperation Proclamation, which has been endorsed by state and federal judges in Florida and across the country. We are, of course, open to any suggestions you may have with regard to how the parties can reasonably approach e-discovery in the context of this case.

Bernard Egozi, Esq.

December 6, 2011

Page 3

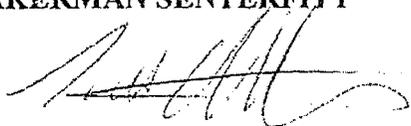
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As the e-discovery process, including identification, collection, processing, review and production of electronic files, can be time consuming, we hope to hear back from you soon. We are also still awaiting any comments you may have to the confidentiality order we previously proposed which will protect both sides' data and facilitate a more orderly production of documents in this case.

Should you have any questions or wish to discuss these matters further, please feel free to contact us.

Sincerely,

**AKERMAN SENTERFITT**

A handwritten signature in black ink, appearing to read "Scott Atherton", written over a horizontal line.

Scott Atherton

Akerman

Scott Atherton

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December 13, 2011

**VIA U.S. MAIL AND E-MAIL**Counsel of record  
(Addresses Stated In  
Attached Distribution List)RE: **State Farm vs. Kugler, et al.**  
Case No: 11-80051

Dear Counsel:

We write in follow up to our letter dated November 21, 2011. In that letter, we proposed a search protocol to certain non-party law firms who received subpoenas from State Farm pursuant to Magistrate Judge Hopkins's oral pronouncements during the hearing held in this matter on November 17, 2011. During that hearing, Magistrate Hopkins orally ordered the non-parties and State Farm to confer by November 29, 2011 as follows:

I want the E-discovery people to meet on that and fashion some kind of an efficient, cost-effective way of doing those searches. And if you are unable to come to a resolution, then, as I said earlier, I will resolve it. I'm not resolving it today, but I am going to ask you all to get together and give your *best efforts* to do that. And if you don't give your *best efforts*, then you suffer the possibility of me ruling with the other side. And so I'm going to be mindful of who devotes what resources to figuring out what's the most efficient way to do a search of relevant documents ... So you all need to, over the next week or so -- we've obviously got Thanksgiving coming up next week, and I am going to be unavailable until the 29th, but I will be in regular communication with my chambers through computers, of course, and so I will be monitoring this. But I'm going to give you that period of time to make your best efforts to meet and confer and come up with a reasonable plan under the parameters that I've discussed.

(11/17/11 Tr., pp. 52-53) (emphasis added).

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WEST PALM BEACH

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Pursuant to Magistrate Hopkin's oral pronouncements, we asked each of you in our November 21 letter to provide us with dates prior to November 29 to discuss the following potential search methods:

1. Your ability to speak directly with the attorneys and staff at your respective firms concerning whether they recall any cases involving any of the defendants or are otherwise aware of responsive documents;
2. Your ability to generate reports from your accounting records/programs (for example, Quickbooks) to identify instances in which any of the defendants paid money to, or received money from, your respective firms;
3. Your ability to search any case management software/case activity logs (for example, Client Profiles, TrialWorks, etc.) for responsive documents;
4. Your ability to search for email and other electronic files located on file servers, desktop computers, or laptop machines for responsive documents.

With respect to searches for electronically stored information ("ESI"), we further proposed the following general search protocol for discussion:

1. Each firm will identify the custodians (both attorney and staff) that it believes may have potentially responsive information;
2. Each firm will identify the manner in which the identified custodians communicated with regard to the subjects of State Farm's requests (for example, the defendants, discograms, PDDs, Arthrocare, and other key participants in the fraud scheme alleged in State Farm's Amended Complaint (DE 19));
3. Each firm will suggest reasonable search terms to be applied to those custodian's email files giving due consideration to how the custodians actually communicated about the relevant subjects in practice (for example, common misspellings, nicknames, acronyms, etc.);
4. To the extent we reach agreement with respect to ESI searches, each firm will initiate ESI searches using the agreed upon custodians and terms; and
5. To the extent we do not agree, State Farm will file appropriate motions so that Court can resolve the parties' disputes.

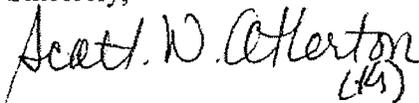
Despite Magistrate Hopkins's oral pronouncements during the hearing, and the requests in our November 21 letter, none of the non-party law firms scheduled a time to confer with us prior to November 29. Nor have any of the non-party law firms identified the custodians they

believe to have responsive information, disclosed the manner in which those custodians discussed the subject matter of the document requests, or proposed any search terms as State Farm requested. This falls far short providing "best efforts" in an attempt to resolve these matters as Magistrate Hopkins instructed.

Although State Farm is unable to provide a complete list of proposed search terms (because, among other reasons, it has not obtained necessary information from the non-party law firms), enclosed is a list of initial search terms necessary for the non-party law firms to respond to State Farm's subpoenas. Consistent with State Farm's letter dated November 21, this list includes (among other terms) the names of the Defendants, names of the disputed procedures, and other key participants in the fraud scheme alleged in State Farm's Amended Complaint. State Farm again asks that you immediately run the requested searches in your clients' email and other files and contact us to discuss both the results of those initial searches and whether any additional searches may be necessary.

As always, should you wish to further discuss these matters, feel free to contact us.

Sincerely,

A handwritten signature in black ink that reads "Scott W. Atherton" with a small mark below the name.

Scott Atherton

Enclosure as Stated

cc: Ross Silverman, Esq.  
Charles Chejfec, Esq.  
David I. Spector, Esq.

Non-Party Search Terms Proposed By State Farm on:

Responding Non-Party:

Term Numbers	Proposed Terms	Relation to Defendants/Case	Custodians Searched (i.e., list of computer/email users whose data was searched)	Search Term(s) Used (i.e., exact text entered into search platform)	Other Search Limitations (e.g., types of files searched, date ranges searched, document families searched, etc.)	Number of Results for Email Files	Number of Results for Non-Email Files	Does Non-Party Agree to Review Search Results? (Yes or No)
1	Kugler*	Defendant Name						
2	JL.K.physician@aol.com (Kugler's email)	Defendant Email Address						
3	kuglermd.com (Kugler practice website)	Defendant Website Address						
4	3618 (Kugler practice address)	Defendant Physical Address						
5	Bistline*	Defendant Name						
6	samsara911@aol.com (Bistline's email)	Defendant Email Address						
7	Gomez*	Defendant Name						
8	Weinberger* (Eric Weinberger, Gomez's practice manager)	Defendant's Practice Manager						
9	edweinberger@aol.com (Weinberger's email)	Defendant Email Address						
10	"North Palm Neurosurgery" (Gomez's medical practice)	Defendant Name						
11	"North Palm Neuro" (Gomez's medical practice)	Defendant Name						
12	mpgonow@aol.com (Gomez medical practice email)	Defendant Email Address						
13	lokeefe@bellsouth.net (Gomez medical practice email)	Defendant Email Address						
14	lisaokseefe@aol.net (Gomez medical practice email)	Defendant Email Address						
15	"National Orthopedics"	Defendant Name						
16	"National Ortho"	Defendant Name						
17	"Palm Beach Lakes Partners"	Defendant Name						
18	"Palm Beach Lakes Surgery Center"	Defendant Name						
19	PBLSC	Defendant Name						
20	2047 (address for PBLSC)	Defendant Physical Address						
21	Walker* (Jackie Walker, National Orthopedics/PBLSC Office Manager)	Defendants' Office Manager						
22	walkerjacquelin@yahoo.com (Jackie Walker's email)	Defendants' Office Manager's Email						

Term Numbers	Proposed Terms	Relation to Defendants/Case	Custodians Searched (i.e., list of computer/email users whose data was searched)	Search Term(s) Used (i.e., exact text entered into search platform)	Other Search Limitations (e.g., types of files searched, date ranges searched, document families searched, etc.)	Number of Results for Email Files	Number of Results for Non-Email Files	Does Non-Party Agree to Review Search Results? (Yes or No)
23	Cutler*	Defendant Name						
24	discocare1@aol.com (Cutler's email)	Defendant Email Address						
25	cutlfeet@aol.com (Cutler's email)	Defendant Email Address						
26	aworley@wefoot.com (Cutler's email)	Defendant Email Address						
27	"Palm Beach Practise Management"	Defendant Name						
28	PBPM*	Defendant Name						
29	Carroll*	Defendant Name						
30	garycarroll1996@bellsouth.net (Carroll's email)	Defendant Email Address						
31	palmbeachpaiman@aol.com (Carroll's email)	Defendant Email Address						
32	Izydore*	Defendant Name						
33	"Mark I"	Defendant Name						
34	markizy@msn.com (Izydore's email)	Defendant Email Address						
35	Nathanson* (Mark Nathanson's email)	Defendant's Assistant						
36	"Mark N"	Defendant's Assistant						
37	"percutaneous siseectomy"	Name of Disputed Procedure						
38	"disc decompression"	Name of Disputed Procedure						
39	"perc disc"	Name of Disputed Procedure						
40	decompress*	Name of Disputed Procedure						
41	PD*	Name of Disputed Procedure						
42	PDD*	Name of Disputed Procedure						
43	discogram*	Name of Disputed Procedure						
44	"spine wand"	Name of Disputed Medical Device						
45	spinewand*	Name of Disputed Medical Device						
46	wand*	Name of Disputed Medical Device						
47	Discocare*	Name of Disputed Medical Device Marketer/Distributor						
48	Disco	Name of Disputed Medical Device Marketer/Distributor						
49	discocare1@aol.com (Cutler/Discocare email)	Email for Disputed Medical Device Marketer/Distributor						
50	discocare.net	Email for Disputed Medical Device Marketer/Distributor						
51	Denker* (Michael Denker, Lead Discocare Model Marketing Representative)	Key Discocare Representative Who Communicated with Defendants and Law Firms						





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January 3, 2012

**VIA U.S. MAIL, FASCIMILE AND E-MAIL**

Counsel of Record (including  
counsel for non-party law firms  
as stated in attached distribution list)

RE: **State Farm vs. Kugler, et al.**  
Case No: 11-80051

Dear Counsel:

We write in follow up to the December 23, 2011 discovery hearing in this case. During that hearing, Magistrate Judge Hopkins set forth a process and schedule with respect to how certain non-party law firms are required to begin responding to State Farm's subpoenas. With respect to the document search protocol, Magistrate Judge Hopkins ordered the following:

- (1) Within 14 calendar days of the hearing (*i.e.*, by Friday, January 6, 2012), all of the non-party law firms are required to hold staff meetings to obtain certain information (discussed further below) to begin responding to State Farm's subpoenas;
- (2) Within 7 calendar days from the staff meeting deadline (*i.e.*, by Friday, January 13, 2012), all of the non-party law firms are required to make their Information Technology ("IT") representatives available for a conference with State Farm to discuss the law firms computer systems, search capabilities, and potential strategies for making electronic searches as efficient as possible;
- (3) Within 7 calendar days from the IT conference deadline (*i.e.*, by Friday, January 20, 2012), the parties shall complete a list of agreed upon and/or disputed search terms for testing; and

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WEST PALM BEACH

{22819569;6}

- (4) Counsel for the parties and non-parties shall appear before Magistrate Judge Hopkins for a status conference on Thursday, February 2, 2012 at 12:30 p.m. to discuss the status of the subpoena response process.

At the close of the hearing, we offered to help facilitate the staff meetings referenced in item (1) above. As discussed during the hearing, the primary goal of those staff meetings are as follows:

- (1) Determine the universe of documents/files which are potentially responsive to State Farm's subpoenas;
- (2) Identify the individuals at each firm who were involved in creating/exchanging/maintaining such documents (the "Potential Custodians");
- (3) Determine extent of the Potential Custodians' involvement in creating/exchanging/maintaining such documents to facilitate a discussion concerning which of the Potential Custodians are the most likely to have the most responsive documents/files;
- (4) Determine the manner in which the Potential Custodians generated the potentially responsive documents/files, including the media they used (e.g., email, facsimile, letter correspondence, etc.) and the words/terms they commonly used (e.g., nicknames, acronyms, common misspellings); and
- (5) Whether the Potential Custodians can readily identify any potentially responsive documents/files.

As discussed during the hearing, the information obtained as a result of these staff meetings can be used to craft more efficient document searches and expedite the production of readily identifiable responsive documents/files to State Farm.

Although the process of conducting these staff meetings may differ for certain firms based upon their size and other circumstances, following is a framework we propose to facilitate the staff meeting process:

- (1) **Circulation of Subpoena by Internal Email** – First, we suggest sending a copy of the subpoena received from State Farm to all of the Potential Custodians by email, including a copy of the subpoena as an attachment. We think this is a practically feasible request in light of, among of factors, the relatively small number of requests contained in the subpoenas. The email accompanying the attached subpoena can indicate that:

- (a) the firm is in the process of attempting to identify documents responsive to the subpoena;
- (b) the subpoena requests both documents that are likely contained in certain client files and documents which may not be contained in client files; and
- (c) if any individual is aware of documents/files responsive to the subpoena, or knows of any other individuals in the firm who may have responsive documents/files, they should notify the attorney at the firm who is responsible for responding to the subpoena.

To the extent Potential Custodians are identified as a result of this process, they can be included in the staff meetings described in item (3) below. To the extent Potential Custodians locate or identify responsive documents in response to this email, State Farm asks that such documents be immediately produced or placed on a privilege log pursuant to the Magistrate Judge Hopkin's prior rulings.

- (2) **Identification of Potential Custodians Involved in the Index Cases** – Second, we suggest that each non-party law firm identify the attorneys and staff who were involved in the "index cases" identified in Exhibit A to State Farm's Amended Complaint. The Potential Custodians identified can also be included in the staff meetings described in item (3) below.
- (3) **Focusing Staff Meetings on Potential Custodians Identified From Items (1) and (2) Above** – Third, we suggest focusing the staff meeting on those individuals who were identified as either having potentially responsive documents/files in response to item (1) above or who were involved in the index cases as set forth in item (2) above. Once those individuals are identified and convened, we suggest going through the actual subpoena with them, asking them if they are aware of any documents/files responsive to any of the subpoena requests, and using the 5 item list on page 2 of this letter (which sets forth the goals of these staff meetings) as a basic outline/checklist for obtaining additional information from these individuals during the staff meetings. The information obtained as a result of these staff meetings can then be used in connection with finalizing a search protocol for the firms' responses to the subpoenas pursuant to the deadlines set forth in the schedule Magistrate Judge Hopkin established.

We trust the foregoing will help facilitate your clients' respective responses to State Farm's subpoenas.

Should you wish to discuss how State Farm can further assist with this process, feel free to contact us.

Sincerely,



Scott Atherton

cc: Ross Silverman, Esq.  
Charles Chejfec, Esq.  
David I. Spector, Esq.



Scott Atherton

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scott.atherton@akerman.com

January 3, 2012

**VIA U.S. MAIL, FASCIMILE AND E-MAIL**

Counsel of Record (including  
counsel for non-party law firms  
as stated in attached distribution list)

RE: **State Farm vs. Kugler, et al.**  
Case No: 11-80051

Dear Counsel:

We write in follow up to the December 23, 2011 discovery hearing in this case. During that hearing, Magistrate Judge Hopkins set forth a process and schedule with respect to how certain non-party law firms are required to begin responding to State Farm's subpoenas. With respect to the document search protocol, Magistrate Judge Hopkins ordered the following:

- (1) Within 14 calendar days of the hearing (*i.e.*, by Friday, January 6, 2012), all of the non-party law firms are required to hold staff meetings to obtain certain information (discussed further below) to begin responding to State Farm's subpoenas;
- (2) Within 7 calendar days from the staff meeting deadline (*i.e.*, by Friday, January 13, 2012), all of the non-party law firms are required to make their Information Technology ("IT") representatives available for a conference with State Farm to discuss the law firms computer systems, search capabilities, and potential strategies for making electronic searches as efficient as possible;
- (3) Within 7 calendar days from the IT conference deadline (*i.e.*, by Friday, January 20, 2012), the parties shall complete a list of agreed upon and/or disputed search terms for testing; and

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WEST PALM BEACH

{22819569;6}

- (4) Counsel for the parties and non-parties shall appear before Magistrate Judge Hopkins for a status conference on Thursday, February 2, 2012 at 12:30 p.m. to discuss the status of the subpoena response process.

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- (2) Identify the individuals at each firm who were involved in creating/exchanging/maintaining such documents (the "Potential Custodians");
- (3) Determine extent of the Potential Custodians' involvement in creating/exchanging/maintaining such documents to facilitate a discussion concerning which of the Potential Custodians are the most likely to have the most responsive documents/files;
- (4) Determine the manner in which the Potential Custodians generated the potentially responsive documents/files, including the media they used (e.g., email, facsimile, letter correspondence, etc.) and the words/terms they commonly used (e.g., nicknames, acronyms, common misspellings); and
- (5) Whether the Potential Custodians can readily identify any potentially responsive documents/files.

As discussed during the hearing, the information obtained as a result of these staff meetings can be used to craft more efficient document searches and expedite the production of readily identifiable responsive documents/files to State Farm.

Although the process of conducting these staff meetings may differ for certain firms based upon their size and other circumstances, following is a framework we propose to facilitate the staff meeting process:

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- (a) the firm is in the process of attempting to identify documents responsive to the subpoena;
- (b) the subpoena requests both documents that are likely contained in certain client files and documents which may not be contained in client files; and
- (c) if any individual is aware of documents/files responsive to the subpoena, or knows of any other individuals in the firm who may have responsive documents/files, they should notify the attorney at the firm who is responsible for responding to the subpoena.

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- (2) **Identification of Potential Custodians Involved in the Index Cases** – Second, we suggest that each non-party law firm identify the attorneys and staff who were involved in the "index cases" identified in Exhibit A to State Farm's Amended Complaint. The Potential Custodians identified can also be included in the staff meetings described in item (3) below.
- (3) **Focusing Staff Meetings on Potential Custodians Identified From Items (1) and (2) Above** – Third, we suggest focusing the staff meeting on those individuals who were identified as either having potentially responsive documents/files in response to item (1) above or who were involved in the index cases as set forth in item (2) above. Once those individuals are identified and convened, we suggest going through the actual subpoena with them, asking them if they are aware of any documents/files responsive to any of the subpoena requests, and using the 5 item list on page 2 of this letter (which sets forth the goals of these staff meetings) as a basic outline/checklist for obtaining additional information from these individuals during the staff meetings. The information obtained as a result of these staff meetings can then be used in connection with finalizing a search protocol for the firms' responses to the subpoenas pursuant to the deadlines set forth in the schedule Magistrate Judge Hopkin established.

We trust the foregoing will help facilitate your clients' respective responses to State Farm's subpoenas.

Should you wish to discuss how State Farm can further assist with this process, feel free to contact us.

Sincerely,



Scott Atherton

cc: Ross Silverman, Esq.  
Charles Chejfec, Esq.  
David I. Spector, Esq.

IN THE CIRCUIT COURT FOR THE  
17TH JUDICIAL CIRCUIT IN AND FOR  
BROWARD COUNTY, FLORIDA

CASE NO: 07-020592 CACE (03)

SHELLY BESWICK and CHRIS  
BESWICK, individually and as parents and  
natural guardians of KACIE BESWICK,  
their minor daughter,  
Plaintiffs,

vs.

HON. MILY RODRIGUEZ POWELL.

NORTHWEST MEDICAL CENTER, INC.,  
d/b/a NORTHWEST MEDICAL CENTER, a  
Foreign corporations; DEBRA ALLEN, R.N.,  
LYNETTE M O'TOOLE, R.N.; FERN  
TAISENCHOY-BENT, M.D. and FERN  
TAISENCHOY-BENT, M.D., P.A.,  
Defendant.

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**ORDER ON DEFENDANTS' MOTION TO COMPEL PLAINTIFFS' AMENDED  
ANSWERS TO SOCIAL MEDIA INTERROGATORIES NUMBERS 1 AND 2 AND TO  
COMPEL EXECUTION OF AUTHORIZATION FOR RELEASE OF RECORDS FROM  
FACEBOOK**

THIS CAUSE came before the Court on Defendants' Motion to Compel Plaintiffs' Amended Answers to Social Media Interrogatories Numbers 1 and 2 and to Compel Execution of Authorization for Release of Records from Facebook. The Court having considered same, having heard arguments of counsel and being otherwise duly advised in the premises, finds and decides as follows:

Plaintiffs commenced the current suit alleging, *inter alia*, medical negligence. Plaintiffs allege that the Defendants' committed medical negligence during and after the delivery of their minor daughter, Kacie Beswick ("Kacie"). More specifically, Plaintiffs allege that the Defendants' negligence caused Kacie permanent brain injuries. Plaintiffs seek, *inter alia*, noneconomic damages, including 1) mental pain and suffering; and 2) loss of Kacie's companionship, society, love, affection, and solace.

During discovery in this matter, Defendants have sought to discover the basis for such noneconomic damages claims by seeking information Plaintiff has shared on social networking websites, including, but not limited to, Facebook. Defendants have propounded to Plaintiffs sets of interrogatories concerning discovery of information contained on social networking websites. The two interrogatories at issue are:

1. For each Plaintiff, please identify any internet social media websites which you have used and/or maintain an account in the last five (5) years. "Internet social media websites" includes but is not limited to Facebook, Twitter, LinkedIn, XboxLive, Foursquare, Gowalla, MySpace, and Windows Live Spaces.
2. For each Plaintiff who has Internet social media website account(s), please provide your username and password, or, alternatively, under Rule 1.340(c), please provide a copy of all non-privileged content/data shared on the account in the last five (5) years. In the event that you contend there is a privilege to assert, please provide a privilege log.

Defendants' seek an Order 1) compelling Plaintiffs to respond to the above quoted interrogatories; and (2) compelling Shelly Beswick ("Shelly") to execute an authorization to obtain social media information from social media websites and permit service of the subpoena on Facebook.

Plaintiffs concede that Shelly has a Facebook account. However, Plaintiffs object to the discovery of her Facebook account on the grounds that such request is overbroad, burdensome, not reasonably related to the discovery of admissible evidence, and is otherwise violative of her privacy rights.

"Discovery in civil cases must be relevant to the subject matter of the case and must be admissible or reasonably calculated to lead to admissible evidence." *Allstate Ins. Comp. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995). *See also Fla. R. Civ. P. 1.280 (b)* ("Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party.").

In the current matter, Defendants seek to discover content shared by Plaintiff on social media websites in order to properly defend against Plaintiffs noneconomic damages claims. Such information is clearly relevant to the subject matter of the current litigation and is reasonably calculated to lead to admissible evidence. Moreover, the interrogatories are not overbroad as they specifically delineate the information sought. Furthermore, the interrogatories are narrow in scope, as they include a time limitation of five years.

Plaintiffs further object to the Defendants' interrogatories on the basis that such discovery is violative of their privacy rights. "Court orders compelling discovery constitute state action that *may* impinge on constitutional rights, including the constitutional right of privacy." *Berkeley v. Eisen*, 699 So. 2d 789, 790 (Fla. 4th DCA 1997) (emphasis added).

Plaintiffs have not provided any case law to support their position that allowing access to their Facebook records violates their privacy rights. Moreover, the Court finds Plaintiffs' privacy argument to lack merit. Facebook allows individuals to "share information about their personal lives, including posting photographs and sharing information about what they are doing or thinking." *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650, 653 (N.Y. Sup. Ct. 2010). Although Facebook allows its user to control with whom they share their information,

To permit a party claiming very substantial damages . . . to hide behind self-set privacy controls on a web-site, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial.

*Id.* at 655 (internal quotations omitted) (citation omitted).

As such, information that an individual shares through social networking web-sites like Facebook may be copied and disseminated by another, rendering any expectation of privacy meaningless. *See id.* ("[A]s neither Facebook nor MySpace guarantee complete privacy, Plaintiff has no legitimate reasonable expectation of privacy."). *See also Moreno v. Hanford*

*Sentinel. Inc.*, 91 Cal. Rptr. 3d 858, 862-63 (Cal. Ct. App. 5th Dist.) (finding no reasonable expectation of privacy where an individual posted information on MySpace).

The information sought by Defendants is clearly relevant based upon the nature of the asserted claims set forth in Plaintiffs' Amended Complaint. Moreover, such information is reasonably calculated to lead to admissible evidence. Furthermore, the Court does not find Defendants' discovery requests to be burdensome, overly broad, or violative of Plaintiffs' privacy rights. Therefore, Defendants' Motion to Compel must be granted.

Additionally, the Court notes that it has authority to require a party to execute an authorization for the release of records. *Rojas v. Ryder Truck Rental Inc.*, 641 So. 2d 855 (Fla. 1994). Therefore, Defendants' Motion to Compel Authorization for Release of Records From Facebook is also granted.

Accordingly, it is

ORDERED AND ADJUDGED that Plaintiffs Motion to Compel Plaintiffs' Amended Answers to Social Media Interrogatories Numbers 1 and 2 is hereby GRANTED.

IT IS FURTHER ORDERED AND ADJUDGED that, within 30 days from the date of this Order Plaintiff shall deliver to Counsel for Defendants a properly executed consent and authorization as may be required by the operators of Facebook, permitting the Defendants to gain access to Plaintiffs' Facebook records.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 3 day of November, 2011.

  
MILY RODRIGUEZ POWELL  
CIRCUIT COURT JUDGE

Copies to:

Christopher Hopkins, Esquire  
Allison S. Bernstein, Esquire  
Melissa S. Zinkil, Esquire  
Kenneth J. Miller, Esquire

MILY RODRIGUEZ POWELL

NOV 3 - 2011

A TRUE COPY

Eugene K. Pettis, Esquire  
Isabel d. Castillo, Esquire  
Samantha A. Flax  
Rosalyn S. Baker-Barnes, Esquire

# DISCOVERY OF FACEBOOK CONTENT IN FLORIDA CASES

By Christopher B. Hopkins and Tracy T. Segal

The constant expansion of social networking websites means that defense practitioners will increasingly have to confront issues of how and when to seek information from these sites during discovery. This article explains how to seek information from Facebook, and describes some recent court orders illustrating the scope of available discovery. Copies of the order in *Beswick v. Northwest Medical Center*, along with other unpublished Florida decisions addressing social media discovery, can be found on the "Members Only" section of the FDLA website, [www.fdma.org](http://www.fdma.org).

"Facebook helps you connect and share with the people in your life," proclaims the Facebook homepage. As of December 2011, 152.5 million people in the United States were posting monthly on their Facebook accounts.<sup>1</sup> Based on these figures, it is likely that a personal injury plaintiff may have an active Facebook account. But how can you access that information in litigation? Courts around the country, including at least one Florida Circuit Court, have compelled discovery of Facebook and other social networking sites,<sup>2</sup> so long as parties meet the minimum showing that the information sought is relevant. This article will explain the steps to obtain Facebook content in discovery.

Facebook can provide a treasure trove of information in litigation. The American Academy of Matrimonial Lawyers says that 81% of its members have used or defended against evidence from social networking sites.<sup>3</sup> In specific cases, Facebook content revealed that some personal injury plaintiffs may have exaggerated their injuries. For example, a plaintiff whose leg was injured in a forklift accident claimed continued disability and testified at deposition that he never wore shorts because he was embarrassed of scars on his leg; meanwhile, photos on his Facebook page showing him riding a motorcycle

and wearing shorts.<sup>4</sup> Similarly, a plaintiff who alleged she was in constant physical pain and needed a cane to walk posted photographs that showed her enjoying life with her family and wrote a status update about visiting the gym.<sup>5</sup> Another plaintiff, who claimed to be largely confined to her home and bed, posted pictures on Facebook and MySpace which revealed she had traveled from up and down the East Coast and enjoyed an active lifestyle.<sup>6</sup> In each of these cases, the courts allowed the defendants access to the plaintiffs' social networking accounts.

At the beginning of a case, counsel should search the internet for plaintiffs' names to determine whether they have accounts with Facebook or other social media websites. The information that the public can view on an individual's Facebook page will vary depending on the privacy settings that he or she has chosen. A person's name, profile pictures, and user ID are always publicly available.<sup>7</sup> Our experience is that most public Facebook profiles reveal some photos, number of friends, and minimal personal content. Print the public profile and ensure you note the date. As your case progresses, it is a good idea to revisit and re-print the person's profile. That public content, and any changes, may be important in persuading a court to permit access to the Facebook account and you should consider attaching these as exhibits to a Motion to Compel.

Discovery requests for social networking information need not be

## ABOUT THE AUTHORS...



**CHRISTOPHER B. HOPKINS** is a shareholder at Akerman Senterfitt (West Palm Beach office). Mr. Hopkins is the chair of the Palm Beach County Bar Technology Committee and is on the editorial board of the Trial Advocate Quarterly. His email is [Christopher.Hopkins@akerman.com](mailto:Christopher.Hopkins@akerman.com).



**TRACY T. SEGAL** is of counsel at Akerman Senterfitt. She concentrates her practice on civil appeals and complex commercial litigation. Ms. Segal can be reached at [tracy.segal@akerman.com](mailto:tracy.segal@akerman.com).

complex. The authors of this article have successfully used the following interrogatories:<sup>8</sup>

\* Please identify any internet social media websites which Plaintiff has used and/or maintained an account in the last five (5) years. "Internet social media websites" includes but is not limited to Facebook, Twitter, LinkedIn, XboxLive, Foursquare, Gowalla, MySpace, and Windows Live Spaces.

\* If Plaintiff has Internet social media website account(s), please provide her username and password or, alternatively, under Florida Rules of Civil Procedure Rule 1.340(c), please provide a copy of all non-privileged content/data shared on the account in the last five (5) years.

The authors' request for production seeking "copies of any document (including online material) which you received or accessed in order to answer Social Media Interrogatories" has also been enforced by a Florida court. To overcome objections that downloading or printing Facebook content is cumbersome, include in your discovery request a reference to Facebook's (simple) instructions for downloading all account content.<sup>9</sup> Finally, as a general practice, the authors request that plaintiffs execute a consent and authorization permitting them to obtain account content directly from the social medial website (this may lead to evidence of alteration or deletion).

Plaintiffs generally object to social media discovery on the basis of relevance, privilege, and the Stored Communications Act. Under Florida rules, "Parties may obtain discovery regarding any matter, not privileged, that is

relevant to the subject matter of the pending action..."<sup>10</sup> "Discovery in civil cases must be relevant to the subject matter of the case and must be admissible or reasonably calculated to lead to admissible evidence."<sup>11</sup> Courts across the county have generally found that Facebook and other social media website postings are relevant to actions where a party's physical condition is at issue.<sup>12</sup> Social media accounts have also been found relevant to jurisdictional issues.<sup>13</sup>

In one Florida case, where parents claimed noneconomic damages arising from injuries to their daughter, the court found that social media discovery was clearly relevant to the subject matter of the litigation.<sup>14</sup> A limited number of non-Florida courts have focused on the information publically available on Facebook pages in deciding whether to require that non-public portions be produced in discovery.<sup>15</sup> Only a handful of courts have limited discovery where the public portions of a plaintiff's Facebook page did not provide a basis to expect a review of the entire account it to lead to relevant information.<sup>16</sup> Another court limited production to posts that "concern [Plaintiff's] health, mental or physical ..." because the Plaintiff had put her health at issue in the lawsuit, but presumably not her entire life.<sup>17</sup> Thus a practitioner may need to be prepared to support discovery requests with evidence and argument from publically available Facebook information (and any changes thereto).

There is some risk that litigants may delete posts or close their accounts to avoid discovery.<sup>18</sup> For this reason, the authors include in their discovery requests an interrogatory asking: "For any accounts identified in Answer to the Interrogatories above, please describe any changes you have made to your privacy or other account settings, and describe any content which you have deleted or erased after [a relevant date]." Likewise, as stated above, a signed authorization permits defense

counsel to request the social media site to produce documentation of account activity. Of course, courts will sanction spoliation if it can be shown.<sup>19</sup> If a plaintiff's public Facebook information is not revealing but you suspect that they are sharing information with their approved "friends," questions in depositions of both the plaintiff and family members about the nature of the plaintiff's posts may be helpful to laying a foundation to compel production.<sup>20</sup> For example, testimony that a plaintiff posts regularly about her activities may provide a basis to require disclosure, whereas evidence that she only plays games or reads others' posts would be less persuasive.

Objections based on privacy, confidentiality or privilege are another common line of attack on social media discovery, but these objections have been uniformly rejected by courts addressing the issue. Long standing principles governing the right to privacy support this conclusion. In the pre-internet era of 1967, the United States Supreme Court noted that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth Amendment protection."<sup>21</sup> Posting information on the internet makes the information "available to any person with a computer and thus open[s] it to the public eye. Under these circumstances, no reasonable person would [have] an expectation of privacy regarding the published material."<sup>22</sup> As a Pennsylvania court wrote in rejecting a privilege claim for Facebook postings, "No court has recognized such privilege, and neither will we. By definition, there can be little privacy on a *social* networking website. ... Only the uninitiated or foolish could believe that Facebook is an online lockbox of secrets."<sup>23</sup> One court went so far as to order the production of Facebook and MySpace entries made by minor children who had been denied health care benefits for their eating disorders because

the minors themselves "chose to disclose the information."<sup>24</sup> The only Florida court known to the authors to have considered the issue rejected a privacy claim for Facebook postings.<sup>25</sup>

Finally, plaintiffs may raise objections to social media discovery based on the Stored Communications Act ("SCA"), 18 U.S.C. § 2701. Part of the Electronic Communications Privacy Act, the SCA adds some Fourth Amendment protections to digital and electronic communications by limiting the government's ability to compel Internet Service Providers ("ISPs") to disclose information about their users, and from restrictions on ISPs voluntary disclosure of customer and subscriber information to the government.<sup>26</sup> Applying the SCA to Facebook and other social media is complicated because the Act uses 1986 computer terminology which fits current technology imperfectly.<sup>27</sup> Nevertheless, at least one court has found that records cannot be subpoenaed directly from Facebook under the SCA.<sup>28</sup>

That said, the SCA is not an impediment to discovery from an individual plaintiff. The SCA does not apply to individuals, only to internet service providers and services which store electronic communications.<sup>29</sup> An individual producing his account information to opposing counsel or printouts of his a social medial account does not implicated the SCA. In addition, Florida courts have authority to compel a party to provide an authorization for release of records.<sup>30</sup> Without triggering the SCA, a court may require a plaintiff to execute a consent and authorization that may be served on Facebook (or another social medial site) to obtain all account information, including any altered or deleted content that may be retrievable.<sup>31</sup>

Although no Florida appellate court decisions have granted or limited discovery of social medial sites as of the date of this article, the trial court opinions are

coalescing around three principles: (1) discovery must be relevant and reasonably likely to lead to admissible evidence; (2) there is no privilege or confidentiality for Facebook postings; and (3) the SCA does not apply to individuals providing information about their own social media accounts. The key to unlocking social media information in discovery is establishing the likelihood it will lead to admissible evidence.

<sup>1</sup> Facebook, Inc.'s Form S-1 Registration Statement filed February 1, 2012 for Facebook's Initial Public Offering, available at <http://www.sec.gov/Archives/edgar/data/1326801/000119312512034517/d287954ds1.htm>

<sup>2</sup> Although the focus of this article is on obtaining information from Facebook, the same considerations should apply to Twitter, MySpace, photo sharing sites such as Snapfish and Flickr, and any other blog or social networking sites.

<sup>3</sup> "Divorce lawyers: Facebook Tops in Online Evidence in Court," USA Today, June 29, 2010. See [http://www.usatoday.com/tech/news/2010-06-29-facebook-divorce\\_N.htm](http://www.usatoday.com/tech/news/2010-06-29-facebook-divorce_N.htm). As this article notes, in family law cases, spouses may have continued access to each other's Facebook postings because they have not been "de-friended," know the password, or have friends in common with their spouse who are willing to provide information. Thus, the evidence is often available without the use of formal discovery.

<sup>4</sup> *Zimmerman v. Weis Markets, Inc.*, 2011 WL 2065410 (Pa. C.P. Northumberland May 19, 2011).

<sup>5</sup> *Largent v. Reid*, No. 2009-1823, slip. op. (Pa. C.P. Franklin Nov. 8, 2011).

<sup>6</sup> *Romano v. Steelcase, Inc.*, 30 Misc. 3d 426 (N.Y. Sup Ct. 2010).

<sup>7</sup> Facebook Date Use Policy – Sharing and finding you on Facebook, <https://www.facebook.com/about/privacy/your-info-on-fb#controlpost>.

<sup>8</sup> The authors propound additional interrogatories regarding "internet photo, still image or video sharing websites which you have used and/or maintained an account" and "any blog or internet message board, chat room or public forum in which you have participated" tracking this language.

<sup>9</sup> [www.on.fb.me/downloadfbcontent](http://www.on.fb.me/downloadfbcontent).

<sup>10</sup> Fla. R. Civ. P. 1.280(b).

<sup>11</sup> *Allstate Inc. Comp. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995).

<sup>12</sup> See, e.g., *Zimmerman v. Weis Markets*, 2011 WL 2065410; *Largent v. Reid*, supra n.5; *Romano v. Steelcase*, 30 Misc. 3d 426.

<sup>13</sup> *In re: Air Crash Near Clarence Center, New York, On February 12, 2009*, 09-md-2085 (W.D. N.Y. 2011) (order dated December 17, 2011).

<sup>14</sup> *Beswick v. Northwest Medical Center et. al.*, No. 07-020592 (17th Judicial Circuit,

Broward Cty, FL, Nov. 3, 2011), available at [www.bit.ly/beswickorder](http://www.bit.ly/beswickorder).

<sup>15</sup> See e.g., *Romano v. Steelcase, Inc.*, 30 Misc. 3d at 430.

<sup>16</sup> *Piccolo v. Paterson*, No. 2009-4979 (Pa. C.P. Bucks May 6, 2011) (denying requests to see photographs on plaintiff's Facebook page where defendant had already taken many post-accident pictures of Plaintiff's post-accident scars).

<sup>17</sup> *Largent v. Reid*, supra n.5, at 13.

<sup>18</sup> "Can Your Facebook Account Be Used Against You in Your Personal Injury Lawsuit?", John Cord Law, LLC, posted January 12, 2012, <http://www.charmcitylawyer.com/can-your-facebook-account-be-used-against-you-in-your-personal-injury-lawsuit/>; "Social Networking Warning Letter Form for Clients," Karen Koehler, posted May 18, 2011, <http://www.karenkoehlerblog.com/2011/05/social-networking-warning-letter-form-for-clients/>.

<sup>19</sup> *Lester v. Allied Concrete Co.*, Nos. CL08-150, CL09-223 (Va. Cir. Ct. Sept. 1, 2011); *Lester v. Allied Concrete Co.*, Nos. CL08-15, CL09-223 (Va. Cir. Ct. Oct. 21, 2011) (sanctioning Plaintiff \$180,000 and his counsel \$542,000 because counsel urged Plaintiff to "clean-up" photos from his Facebook account after discovery had been served. One deleted picture showed Plaintiff drinking with his arm around a young woman, months after the traffic death of Plaintiff's young wife, which was the subject of the lawsuit.)

<sup>20</sup> Counsel are cautioned against sending a "friend request" to the plaintiff or asking someone else to do so, to avoid ethics issues. See Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02, available at [http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServer-Resources/CMSResources/Opinion 2009-2.pdf](http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServer-Resources/CMSResources/Opinion%202009-2.pdf).

<sup>21</sup> *Katz v. United States*, 389 U.S. 347, 351 (1967) (finding the expectation of privacy applies to phone calls made from a public telephone booth).

<sup>22</sup> *Moreno v. Hanford Sentinel, Inc.*, 172 Cal. App. 4th 1125, 1130 (Cal. 5th Dist. 2009) (dismissing invasion of privacy claim where a MySpace post was republished in the newspaper).

<sup>23</sup> *Largent v. Reid*, supra n.5, at 10.

<sup>24</sup> *Beye v. Horizon Blue Cross Blue Shield of New Jersey*, 2007 WL 7393489 \*2 (D.N.J. 2007), rev'd in part and aff'd in relevant part 2008 WL 3064757 (D.N.J. 2008).

<sup>25</sup> *Beswick v. Northwest Medical Ctr.*, supra n.14.

<sup>26</sup> Pub. L. No. 99-508, 100 Stat. 1848 (1986).

<sup>27</sup> See *Largent v. Reid*, supra n.5, at 10.

<sup>28</sup> *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965 (C.D. Cal. 2010).

<sup>29</sup> *Largent v. Reid*, supra n.5, at 11.

<sup>30</sup> *Rojas v. Ryder Truck Rental, Inc.*, 641 So. 2d. 855, 857 (Fla. 1994).

<sup>31</sup> *Beswick v. Northwest Medical Ctr.*, supra n. 14, at 4.