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# Social Media & The Courts

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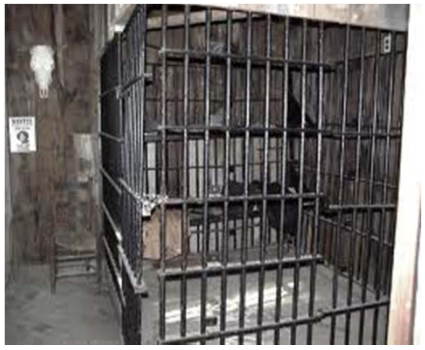
EXPAND YOUR EXPECTATIONS℠

# The Big Fight: Relevance vs. Privacy

- Social Media and other internet posts can be protected from public viewing in a number of different ways, none of which automatically invalidate a properly issued subpoena. When relevant material is subpoenaed, on what basis can a motion to quash prevail?
  - First Amendment concerns
  - Privacy concerns
  - Lack of statutory guidance
  - Shifting jurisprudence
  - Policies & work rules

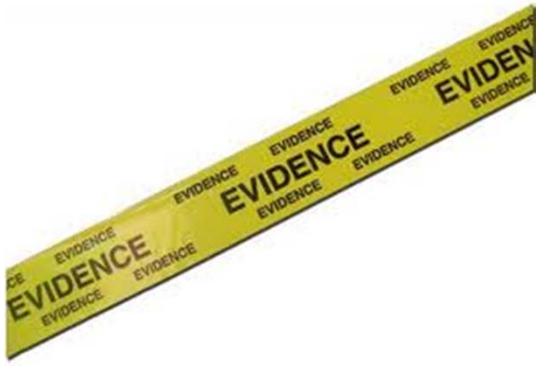
# Criminal Cases

- Chelsea W., while on probation for another crime, posted a picture on Facebook of her fanning out dozens of $20 and $50 bills. Posting was used to revoke her probation (she couldn't explain the source of the cash), and ultimately led to charge her with sex trafficking.
- In July 2011, trial of gang members, prosecutors relied on postings and pictures to establish existence of a gang and to elevate charges against defendants.
- A federal intimidation charge is pending against a Hells Angels member who threated a juror by "poking" her on Facebook.
  - Judge refused to revoke the defendant's bail.



# Criminal Cases (continued)

- Hours after her involvement in a fatal accident which killed a popular teacher, the defendant began posting on Facebook about the accident and professing her innocence. Friends responded by urging her to stop drinking.
  - Defendant now charged with DUI and vehicular homicide.
- "As long as there have been criminal trials, the best evidence has always been considered to be 'What did the defendant say in his own words,'" – William Hochul, U.S. Attorney for the Western District of New York.
- "The first thing I tell my clients is, 'Do you have a page? What's the password? I'm taking it down." - Criminal Defense Lawyer James Nobles.



# Relevance In Civil Cases

- *EEOC v. Simply Storage Management:* federal court upheld a subpoena of social media information issued in a sexual harassment suit. Court held that locking platform from public does not prevent discovery of information, and that ". . . any profiles, postings or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries. . ." were discoverable.

- *Crispin v. Chriustain Audigier, Inc.*: federal court held plaintiff had standing to quash subpoenas served on social media platforms because plaintiff had a "personal right in information in his or her profile and inbox on a social networking site . . . in the same way that an individual has a personal right in employment and bank records." Court relied on Stored Communications Act, holing that webmail and messaging were inherently private forms of communication.

# Relevance In Civil Cases (continued)

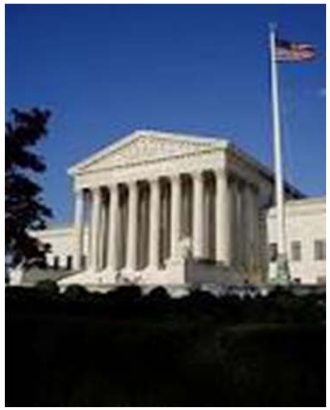
- *Largent v. Reed*: Chain reaction automobile accident case in which motion to compel social media information was granted. Court held:
  - Relevance & Discoverability: ". . .it is clear that material on social networking websites is discoverable in a civil case." Court held same discovery rules and principles should be applied.
  - Privacy: ". . .no general privacy privilege" protects postings or other social media information.
  - Stored Communications Act: Court (distinguishing *Crispin)* held subpoena issued to person and not entity changes analysis ("She [defendant] cannot claim the protection of the SCA, because that Act does not apply to her.")

# Relevance In Civil Cases (continued)

- *Robinson v. Jones Lang Lasalle Americas, Inc.*: federal court in Oregon held emails, text messages, and social media content all discoverable, but focused on scope of discovery requests.
  - "As *Simply Storage* recognized, it is impossible for the court to define the limits of discovery in such cases with enough precision to satisfy the litigant who is called upon to make a responsive production."
  - "Nevertheless, the court expects counsel to determine what information falls within the scope of this court's order in good faith and consistent with their obligations as officers of the court."
- August 2012 Opinion.
- Seems to represent consensus approach.

# What's Next In Courts?

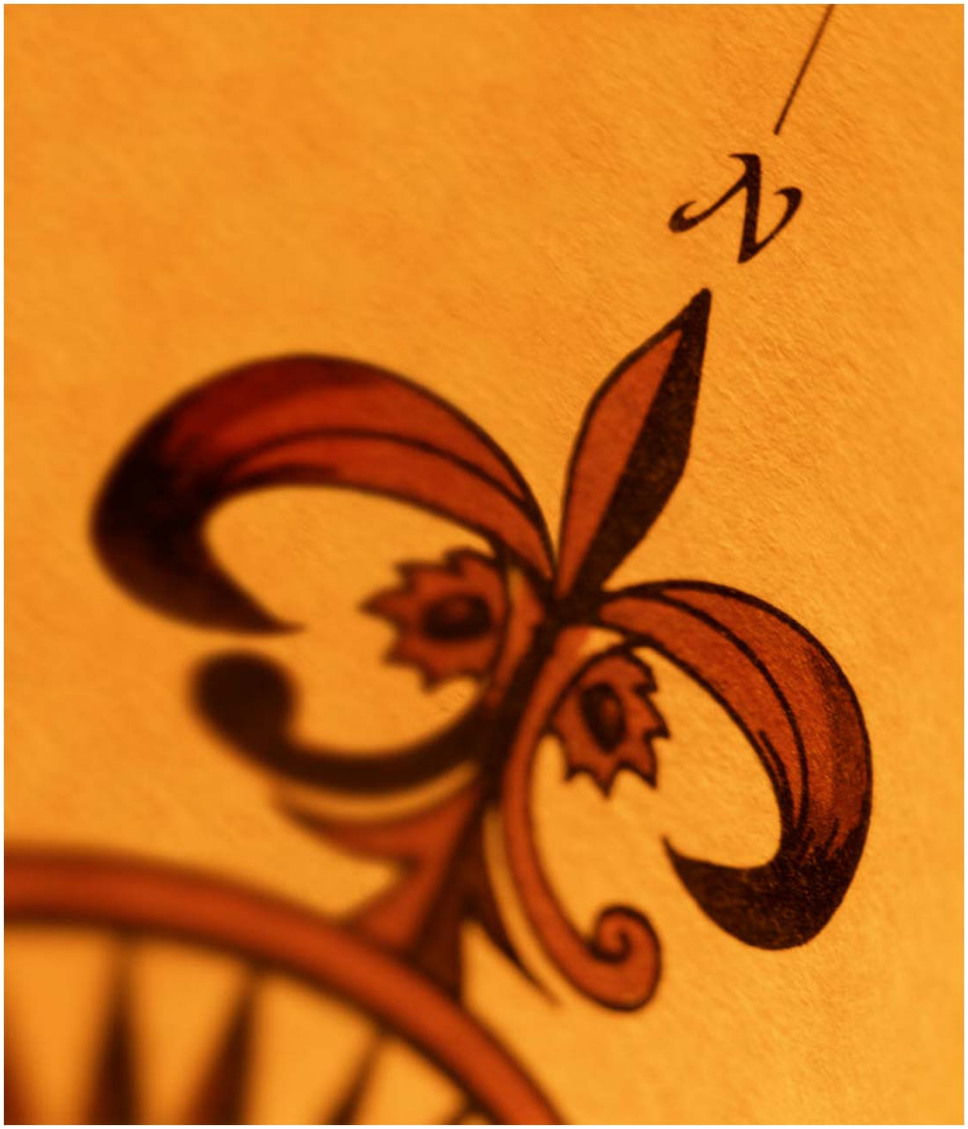
- Supreme Court declined this year to clarify on what grounds schools may punish students for off-campus online speech. The issue presented dealt with whether public schools may discipline students who, while off campus, use social networking sites to mock school officials.
  - Lower courts all over the map as they struggle with Vietnam War-era First Amendment precedent addressing on campus speech, which predates internet.
  - Is harmful student expression akin to yelling "fire" in a crowded theater? When is that the case, and when is it not?
  - Not like employment cases where NLRA's Section 7 has huge impact.



# Predictions

- Look for a continuing increase in the use of social media evidence in courts. This trend is likely to become the norm, much like e-discovery rules.
- Expect increased statutory guidance on extent of privacy rights. But, will this be governed by states or will rules of civil procedure be amended to standardize approach? What about federal legislation?
- Look for an increase in cases focusing on students' rights and defining general First Amendment law governing internet postings.
- Expect same result with discovery rules and precedent that accompanied email communications (i.e., if it would be discoverable as a paper document, it will be held discoverable on internet).
- How will these developments impact NLRB's position on Section 7 rights and employers' use of social media as basis for discipline?

# What Guidance, if Any, Do We Have Already?

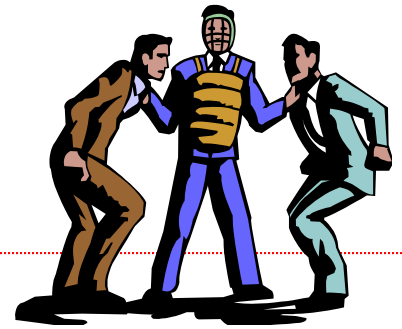


## What do we know?

- Social media can be an excellent research tool for attorneys handling contested matters. Reviewing sites like Facebook, LinkedIn or YouTube can uncover valuable (and embarrassing) information about the other side and its witnesses.

- However, lawyers who use social media sites for research must be wary of **potential legal ethics traps**. ABA Model Rule 4.2 forbids communication with a person represented by another attorney, and this sometimes prohibits access to social media posts. If a social media post is publicly available—like a blog or an ordinary webpage—an opposing attorney can access the post, according to the reasoning of the Oregon State Bar Association in Opinion No. 2005-164 (August 2005).

# Friending the Enemy!



- If an attorney (or attorney's agent) must interact with a represented party to gain access to the party's social media post the situation is different. Suppose, for instance, a lawyer seeks to friend an opponent represented by counsel to access that opponent's Facebook page. This communication between the lawyer and the opposing party would violate Model Rule 4.2, according to Oregon State Bar Opinion No. 2001-164 (January 2001).

- To what extent can an attorney use subterfuge to convince an individual to grant access to his otherwise private social media posts?
  - Model Rule 4.1(a) forbids a lawyer from making "a false statement of material fact or law to a third person," and Rule 8.4(c) forbids a lawyer from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation." Both of these rules are violated when an attorney friends an individual under false pretenses, according to ethics opinions from the New York City Bar Association and the Philadelphia Bar Association.

# Ethics of Using Social Media During Case Investigation and Discovery

State bar associations are beginning to tackle the ethical dilemmas arising from the discovery of “statuses,” names, photos, comments, and “friends.” Among the many model rules that may be violated when an attorney uses social media during case investigation and discovery, the most common include:

- Rule 1.6 Confidentiality of Information
- Rule 4.1 Truthfulness in Statements to Others
- Rule 5.3 Responsibility Regarding Nonlawyer Assistant
- Rule 8.4 Misconduct

- As a general rule, attorneys may access and review the public portions of a party's social-networking pages without facing ethical repercussions. This rule was applied in *State ex. Rel. State Farm Fire & Cas. Co. v. Madden* where the Supreme Court of West Virginia held that lawfully observing a represented party's activities that occur in full view of the general public is not an ethical violation.

- It is ethical for a client to provide his or her attorney with the client's login and password to let the attorney research using social media as long as the attorney is passively browsing and not directly communicating with other members. This behavior is deemed ethical because the attorney is only accessing information already available to the client and is acting as the client's agent. 28 Santa Clara Computer & High Tech. L.J. 31, 64–65 (2011). (However, attorneys should be cognizant of possible violations of the social-networking website's terms of use.)

# Reliable Guidance is…still all Over the Map.

- An even more difficult question is whether an attorney may contact a non-client to gain access to the non-client's private social media. (This process is often done by "friending" the non-client on Facebook). Two notable authorities—the New York City Bar Committee on Professional Ethics and the Philadelphia Bar Association Guidance Committee—are in disagreement.

# What about jurors?

- More than half the state and federal courts now have jury instructions that at least make a passing mention of the internet when advising jurors or prospective jurors on the prohibition of performing outside research or discussing an ongoing case.

- California passed a new law, AB141, which went into effect on January 1, 2012, that make a willful violation of the prohibition on research or use or social media punishable by not only civil contempt, but also makes it a misdemeanor.  Cal. Civ. Proc. Code s. 611; Cal. Penal Code s. 1122.

- Indiana courts require the bailiffs to collect and store computers, cell phones, and other electronic communications devices prior to deliberations.

- Why does is matter is a juror is blogging, tweeting, or checking social media during a trial?

# Are there rules for Judges?

- Ethics opinions vary as to whether it is okay for a judge to “friend” a lawyer on a social media networking site.
- South Carolina ruling says it is okay as long as there is no discussion of anything relating to the judge’s position.
- Florida ruling determined that judges may not “friend” lawyers on Facebook and vice versa, as it creates an inappropriate appearance.
- What guides these rulings?

# Judges, like lawyers, have a Model Code of Conduct they must follow.

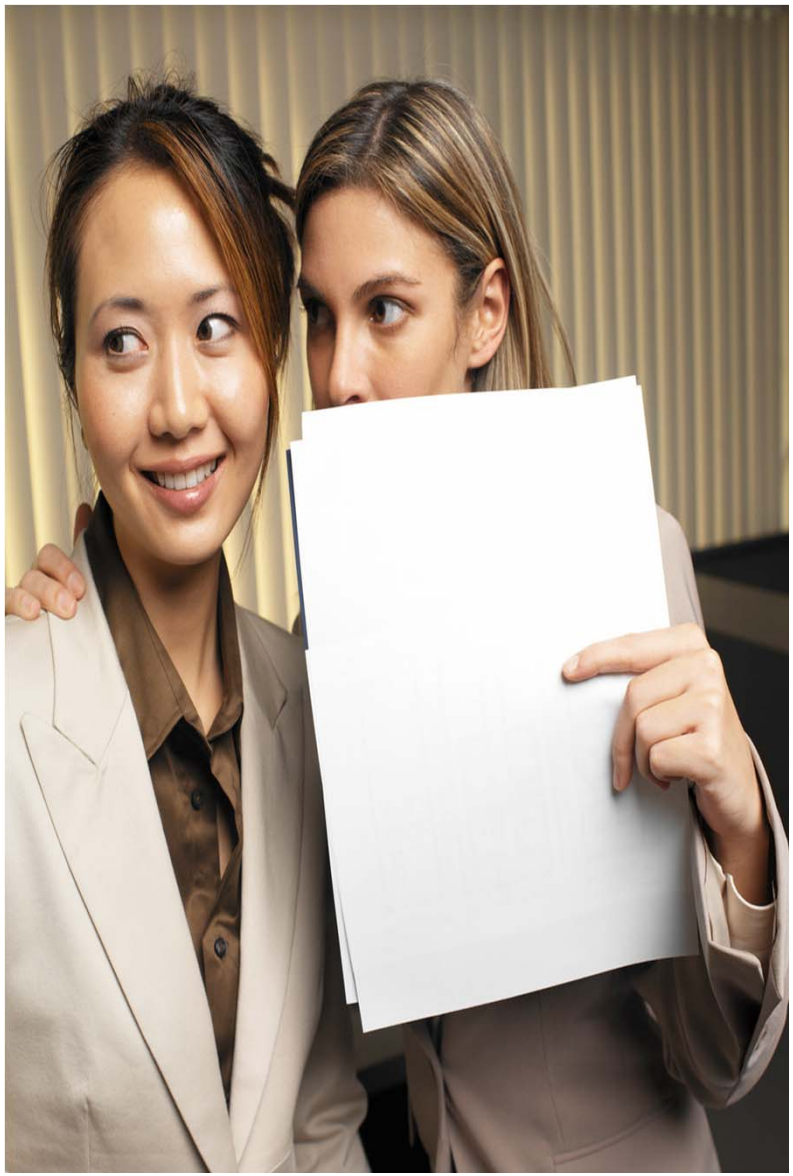
A 2011 article from the ABA lists key considerations for Judges and the Model Rules that might be implicated:

- A judge must maintain dignity in every comment, photograph and other information shared on social networking sites (Rule 1.2, Promoting Confidence in the Judiciary).
- A judge should not make comments on a social networking site about any matters pending before the judge — not to a party, not to a counsel for a party, not to anyone (Rule 2.9, Ex Parte Communications).
- A judge should not view a party's or witnesses' pages on a social networking site and should not use social networking sites to obtain information regarding the matter before the judge (Rule 2.9, Ex Parte Communications).
- A judge should disqualify himself or herself from a proceeding when the judge's social networking relationship with a lawyer creates bias or prejudice concerning the lawyer or party (Rule 2.11, Disqualification).
- A judge may not give legal advice to others on a social networking site (Rule 3.10, Practice of Law).
- A judge should be aware of the contents of his or her social networking page, be familiar with the social networking site policies and privacy controls, and be prudent in all interactions on a social networking site ("common sense").

# How do rules relating to lawyers and judges impact you?

- While there are not specific rules or statutes, YET, addressing how you utilize social media in relation to legal issues, the rules guiding lawyers and judges should be used as a guide to what is proper or improper.

- For example, if it would be improper for your lawyer to utilize social media in a certain way, it is also improper for your lawyer to ask you to do so.



# Questions, Comments, Discussion…

Slip Copy, 2012 WL 3763545 (D.Or.)
**(Cite as: 2012 WL 3763545 (D.Or.))**

**C**
Only the Westlaw citation is currently available.

United States District Court,
D. Oregon.
Yulonda ROBINSON, Plaintiff,
v.
JONES LANG LASALLE AMERICAS, Inc., an Illinois Corporation, Defendant.

No. 3:12–cv–00127–PK.
Aug. 29, 2012.

Michael J. Estok, Portland, OR, Toby J. Marshall, Jennifer Rust Murray, Terrell, Marshall, Daudt & Willie PLLC, Seattle, WA, for Plaintiff.

Elizabeth E. Falone, Amanda A. Bolliger, Portland, OR, for Defendant.

OPINION AND ORDER

PAPAK, United States Magistrate Judge:

***1** Plaintiff Yulonda Robinson brings this employment discrimination action against defendant Jones Lang LaSalle Americas, Inc. ("Jones Lang"). Robinson alleges claims for race discrimination under 42 U.S.C. § 1981, and Or.Rev.Stat. § 659A.030, and retaliation under Title VII and Or.Rev.Stat. § 659A,030(l)(f). Now before the court is Jones Lang's motion to compel discovery. (# 24.) For the reasons below, defendant's motion is granted in part and denied in part.

Jones Lang seeks to compel discovery in three categories: (1) all of Robinson's email and text message communications with current and former Jones Lang employees [FN1]; (2) all social media content involving Robinson since July 1, 2008, including photographs, videos, and blogs, as well as Facebook, LinkedIn, and MySpace content that reveals or relates to Robinson's. "emotion, feeling, or mental state," to "events that could be reasonably expected to produce a significant emotion, feeling, or mental state," or to allegations in Robinson's complaint [FN2]; and (3) information concerning Robinson's prior employment since she left high school, including employer names, addresses and telephone numbers, dates of employment, and position worked.[FN3]

FN1. Pursuant to RFP Nos. 68 and 69.

FN2. Pursuant to RFP Nos. 70–79.

FN3. Pursuant to Special Interrogatory No. 1.

Federal Civil Procedure Rule 26(b)(1) provides that "any matter, not privileged, that is relevant to the claim or defense of any party" is discoverable, and that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1). However, district courts have discretion to limit the scope of discovery if: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. Fed. R. Civ. P. 26(b)(2)(C).

**I. Emails, Text Messages, and Social Media Content**

Although plaintiff addresses the first and second categories of discovery separately, I see no principled reason to articulate different standards for the discoverability of communications through email, text message, or social media platforms. I therefore fashion a single order covering all these communications.

The most frequently cited and well-reasoned case addressing the discoverability of social media communications involving emotional distress is *E.E.O.C. v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 432 (S.D.Ind.2010) ( "*Simply Storage* ").[FN4] There, where employment discrimination plaintiffs alleged emotional distress that went beyond "garden variety," the court permitted discovery of social media communications relevant to plaintiffs' emotional distress

claims, even though those communications did not reference the events described in plaintiffs' complaint. *Id.* at 434–436. The court explained:

> FN4. At least one recent published district court opinion adopted the reasoning of *Simply Storage*. *See* Holier v. Wells Fargo & Co., 281 F.R.D. 340 (D.Minn.2011). Moreover, treatises and law reviews discuss *Simply Storage* at length as the benchmark case in this area. *See, e.g.,* Merrick T. Rossein, 1 Employment Discrimination Taw and Litigation § 14:33.70 (2012 ed.); Steven S. Gensler, *Special Rules for Social Media Discovery?*, 65 Ark. L.Rev. 7, 17 (2012).

***2** It is reasonable to expect severe emotional or mental injury to manifest itself in some [social media] content, and an examination of that content might reveal whether onset occurred, when, and the degree of distress. Further, information that evidences other stressors that could have produced the alleged emotional distress is also relevant.
*Id.* at 435. In essence, the court recognized that social media can provide information inconsistent with a plaintiff's allegation that defendant's conduct caused her emotional distress, whether by revealing alternate sources of that emotional distress or undermining plaintiff's allegations of the severity of that distress. Consequently, the court authorized discovery of:

> [A]ny profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and [social media] applications for [plaintiffs] for the [relevant period] that reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state.
>
> * * *
>
> Third-party communications to [plaintiffs] ... if they place these [plaintiffs'] own communications in context.

*Id.* at 436.

Here, plaintiff has already agreed to provide social media content directly referencing her allegedly discriminatory supervisor or "work-related emotions." Generally consistent with the principles explained in *Simply Storage* regarding the proper scope of electronic discovery relevant to alleged emotional distress damages, the court also orders plaintiff to produce:

> (1)any:
>
> (a) email or text messages that plaintiff sent to, received from, or exchanged with any current and former employee of defendant, as well as messages forwarding such messages; or
>
> (b) online social media communications by plaintiff, including profiles, postings, messages, status updates, wall comments, causes joined, groups joined, activity streams, applications, blog entries, photographs, or media clips, as well as third-party online social media communications that place plaintiff's own communications in context;
>
> (2) from July 1, 2008 to the present;
>
> (3) that reveal, refer, or relate to:
>
> (a) any significant emotion, feeling, or mental state allegedly caused by defendant's conduct; or
>
> (b) events or communications that could reasonably be expected to produce a significant emotion, feeling, or mental state allegedly caused by defendant's conduct.

The first category of communications—any emotion, feeling, or mental state that plaintiff alleges to have been caused by defendant—is meant to elicit information establishing the onset, intensity, and cause of emotional distress allegedly suffered by plaintiff because of defendant during the relevant time period. The second category—events or communications that could reasonably be expected to produce a significant emotion, feeling, or mental state allegedly caused by defendant's conduct—is meant to elicit information establishing the absence of plaintiff's alleged emotional distress where it reasonably should have been evident. As *Simply Storage* recognized, it is impossible for the court to define the limits of discovery in such cases with enough precision to satisfy

the litigant who is called upon to make a responsive production. 270 F.R.D. at 436. Nevertheless, the court expects counsel to determine what information falls within the scope of this court's order in good faith and consistent with their obligations as officers of the court. Defendant may, of course, inquire about what "has and has not been produced and can challenge the production if it believes the production fails short of the requirements of this order." *Id.* Moreover, the parties may ask the court to revise this order in the future based on the results of plaintiff's deposition or other discovery.

**II. Prior Employment Information**

*3 Defendant seeks basic information concerning plaintiff's prior employment back to her exit from high school more than 20 years ago. I decline to delve deeply into the hypothetical relevance of various employment documents that are not currently requested by defendant, as the parties do in their briefing. Suffice it to say that the mere existence and nature of plaintiff's relatively recent prior employment may be relevant to plaintiff's claims. Accordingly, plaintiff must identify the name, address and telephone number of the employer, dates of employment, and position for all employment since July 1, 1998, approximately ten years prior to the beginning of her work with Jones Lang.

CONCLUSION

For the reasons stated above, defendant's motion to compel (# 23) is granted in part and denied in part.

IT IS SO ORDERED.

D.Or.,2012.
Robinson v. Jones Lang LaSalle Americas, Inc.
Slip Copy, 2012 WL 3763545 (D.Or.)

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| IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF PENNSYLVANIA–FRANKLIN COUNTY BRANCH | | |
|---|---|---|
| **KEITH LARGENT and JENNIFER LARGENT,** Plaintiffs | : | CIVIL ACTION - LAW |
| **vs.** | : | |
| **JESSICA REED,** Defendant | : | No. 2009-1823 |
| **vs.** | : | |
| **SAGRARIO PENA,** Additional Defendant | : | JUDGE RICHARD J. WALSH |

## *OPINION AND ORDER*

"Facebook helps you connect and share with the people in your life."[1] But what if the people in your life want to use your Facebook posts against you in a civil lawsuit? Whether and to what extent online social networking information is discoverable in a civil case is the issue currently before the Court.

1. http://www.facebook.com.

Defendant Jessica Rosko[2] has filed a *Motion to Compel Plaintiff Jennifer Largent's Facebook Login Information.* Rosko has a good faith belief that information on Jessica Largent's Facebook profile is relevant to Rosko's defense in this matter. For the following reasons, the Court holds that the information sought is discoverable, and we will grant the motion to compel.

**Background**

## I. Underlying Facts

This case arises out of a chain-reaction auto accident that occurred four years ago. According to the pleadings, Plaintiff Keith Largent was driving a 1986 Honda Shadow Motorcycle on Lincoln Way East in Chambersburg, with Plaintiff Jessica Largent as a passenger. Compl. ¶¶ 4, 19. At an intersection, Rosko collided with a minivan driven by Additional Defendant Sagrario Pena, pushing the van into Plaintiffs' motorcycle. Id. ¶¶ 6-7. As a result of the crash, Plaintiffs allege serious and permanent physical and mental injuries, pain, and suffering. Id. ¶¶ 11-14, 17, 21-24, 27.

On April 27, 2009, Plaintiffs filed their four-count Complaint against Rosko. Plaintiffs allege two counts each of negligence and loss of consortium. On July 20, Rosko filed an Answer with New Matter, to which Plaintiffs filed a Reply on August 11. The pleadings joining Pena as an additional defendant are not relevant here, and he is not a party to the instant motion.

During the deposition of Jennifer Largent, taken May 18, 2011, Defense counsel discovered that she has a Facebook profile, that she had used it regularly to play a game called FrontierVille, and that she last accessed it the night before the deposition. Def.'s Mot. to Compel, Ex. A, Dep. of Jennifer Elaine Largent, 90-91, 94. Rosko refused, however, to disclose any

2. Ms. Rosko was formerly known as Jessica Reed. Def.'s Answer with New Matter ¶ 3. The Court will refer to her by her current name.

information about the account, and Plaintiffs' counsel advised that it would not voluntarily turn over such information. Id. This motion to compel followed on August 1, 2011.

## II. Facebook

Facebook is a free social networking site. To join, a user must set up a profile, which is accessible only through the user's ID (her email) and a password. Facebook allows users to interact with, instant message, email, and friend or unfriend other users; to play online games; and to upload notes, photos, and videos. Facebook users can post status updates about what they are doing or thinking. Users can post their current location to other friends, suggest restaurants, businesses, or politicians or political causes to "like," and comment or "like" other friends' posts.[3]

Social networking websites like Facebook, Google+, and MySpace are ubiquitous. Facebook, which is only seven years old, has more than 800 million active users, 50% of whom are active on the site at any given day.[4] Facebook has spawned a field of academic research, books, and a movie. Social networking websites also have a dark side—they have caused criminal investigations and prosecutions and civil tort actions. See, e.g., Chapman v. Unemp't Comp. Bd. of Review, 20 A.3d 603 (Pa. Cmwlth. 2011) (employee fired for posting on Facebook while at work); United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009) (woman criminally prosecuted for breaching MySpace's terms of use); In re Rolando S., 129 Cal. Rptr. 3d 49 (Ct. App. 2011) (prosecution of a juvenile who hacked another child's Facebook account and posted

3. Facebook currently does not allow a person to "dislike" (or in Facebook parlance, "un-like") a friend's post, probably for good reason.

4. Facebook Statistics http://www.facebook.com/press/info.php?statistics (last visited Oct. 25, 2011).

vulgar material therein); Finkel v. Dauber, 906 N.Y.S.2d 697 (Sup. Ct. Nassau 2010) (lawsuit concerning allegedly defamatory material posted in a Facebook group).

Facebook has a detailed, ever-changing privacy policy. Only people with a user account can access Facebook. For all practical purposes, anyone with an email account can set up a Facebook account.[5] Users can set their privacy settings to various levels, although a person's name, profile picture, and user ID are always publically available. At the least restrictive setting, named "public," all 800 million users can view whatever is on a certain user's profile.[6] At an intermediate level, only a user's Facebook friends can view such information, and at the least restrictive, only the user can view his or her profile. Facebook also currently allows users to customize their privacy settings.

Facebook alerts users that Facebook friends may "tag" them in any posting, such as a photograph, a note, a video, or a status update. A tag is a link to a user's profile:

> If someone clicks on the link, they will see your public information and anything else you let them see.
>
> Anyone can tag you in anything. Once you are tagged in a post, you and your friends will be able to see it. For example, your friends may be able to see the post in their News Feed or when they search for you. It may also appear on your profile.
>
> You can choose whether a post you've been tagged in appears on your profile. You can either approve each post individually or approve all posts by your friends. If you approve a post and later change your mind, you can always remove it from your profile.

---

5. To comply with federal law, one must be 13 or older to have a Facebook account. This policy is apparently hard to enforce and is openly flouted.

6. Facebook Data Use Policy—Sharing and finding you on Facebook, http://www.facebook.com/about/privacy/your-info-on-fb#controlprofile (last visited Oct. 27, 2011).

> If you do not want someone to tag you in their posts, we encourage you to reach out to them and give them that feedback. If that does not work, you can block them. This will prevent them from tagging you going forward.
>
> If you are tagged in a private space (such as a message or a group) only the people who can see the private space can see the tag. Similarly, it you are tagged in a comment, only the people who can see the comment can see the tag.[7]

Therefore, users of Facebook know that their information may be shared by default, and a user must take affirmative steps to prevent the sharing of such information.

Facebook also alerts users that it may reveal information pursuant to legal requests:

> **Responding to legal requests and preventing harm**
>
> We may share your information in response to a legal request (like a search warrant, court order or subpoena) if we have a good faith belief that the law requires us to do so. This may include responding to legal requests from jurisdictions outside of the United States where we have a good faith belief that the response is required by law in that jurisdiction, affects users in that jurisdiction, and is consistent with internationally recognized standards. We may also share information when we have a good faith belief it is necessary to: detect, prevent and address fraud and other illegal activity; to protect ourselves and you from violations of our Statement of Rights and Responsibilities; and to prevent death or imminent bodily harm.[8]

**Discussion**

Rosko has moved to compel Jennifer Largent to disclose her Facebook username and password. She claims that, as of January 2011, Largent's Facebook profile was public, meaning that anyone with an account could read or view her profile, posts, and photographs. Rosko says that certain posts on Largent's Facebook account contradict her claims of serious and severe

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7. Facebook Data Use Policy—Sharing and finding you on Facebook, http://www.facebook.com/about/privacy/your-info-on-fb#friendsshare.

8. Facebook Data Use Policy—Some things you need to know, http://www.facebook.com/about/privacy/other (internal hyperlinks removed).

injury. Specifically, Rosko claims that Largent had posted several photographs that show her enjoying life with her family and a status update about going to the gym.

Jennifer Largent responds that the information sought is irrelevant and does not meet the prima facie threshold under Pennsylvania Rule of Civil Procedure 4003.1. She further argues that disclosure of her Facebook account access information would cause unreasonable embarrassment and annoyance. Finally, she claims that disclosure may violate privacy laws such as the Stored Communications Act of 1986, Pub. L. No. 99-508, tit. II, § 201, 100 Stat. 1848 (codified as amended at 18 U.S.C. §§ 2701-12).

## I. Discovery Standard

In Pennsylvania,

> a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Pa. R.C.P. 4003.1(a). It is no objection that the material sought will be inadmissible at trial, so long as the material "appears reasonably calculated to lead to the discovery of admissible evidence." Pa. R.C.P. 4003.1(b). Therefore, the material Rosko seeks must be relevant and not privileged.

The Pennsylvania discovery rules are broad, and the relevancy threshold is slight. E.g., George v. Schirra, 814 A.2d 202, 204 (Pa. Super. 2002). Relevancy is not limited to the issues raised in the pleadings, and it carries a broader meaning than the admissibility standard at trial. Id. at 205; 9 Goodrich Amram 2d § 4003.1(a):(6).

There are no Pennsylvania appellate opinions addressing whether material contained on social networking websites is discoverable in a civil case. This is most likely because social networking is a recent phenomenon and issues are just beginning to percolate in the courts. See Evan E. North, Comment, *Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites*, 58 U. Kan. L. Rev. 1279, 1308 (2010) (noting social networking websites' effect on discovery).

Because of the lack of binding authority, the Parties have cited trial courts in this State and others. Rosko cites two cases in which the court permitted discovery of material on social network websites. Zimmerman v. Weis Mkts., Inc., No. CV-09-1535, 2011 WL 2065410 (Pa. C.P. Northumberland May 19, 2011); McMillen v. Hummingbird Speedway, Inc., No. 113-2010 CD, 2010 WL 4403285 (Pa. C.P. Jefferson Sept. 9, 2010). In response, Plaintiffs cite two cases where courts have denied discovery of Facebook material. Piccolo v. Paterson, No. 2009-4979 (Pa. C.P. Bucks May 6, 2011); Kennedy v. Norfolk S. Corp., No. 100201437 (Pa. C.P. Phila. Jan 15, 2011).[9]

Courts in other jurisdictions have also allowed discovery of social networking data in civil lawsuits. See, e.g., Offenback v. LM Bowman, Inc., No. 1:10-CV-1789, 2011 WL 2491371 (M.D. Pa. June 22, 2011); EEOC v. Simply Storage Mgmt., LLC, 270 F.R.D. 430 (S.D. Ind. 2010); Romano v. Steelcase, Inc., 907 N.Y.S.2d 650 (Sup. Ct. Suffolk 2011).

In Offenback, a personal injury case, the court ordered the plaintiff to turn over data contained on his Facebook page in a form mutually agreeable to the parties. Offenback, 2011

9. Counsel's citation of these cases (via an online *Pittsburgh Post-Gazette* article and an article written by an attorney from a law firm specializing in plaintiffs' personal injury representation) is inadequate. Counsel is reminded that the proper way to cite an unreported case is, at minimum, to provide a docket number so that the Court does not need to conduct a wild goose chase to find the case.

WL 2491371, at *2-3. Specifically, the court ordered Offenback to turn over information that contradicted his claim of injury. Id. In Simply Storage, a Title VII sexual harassment case, the court allowed discovery of Facebook material including status updates, communications between two plaintiffs who alleged emotional distress injuries, and photographs and videos. Simply Storage, 240 F.R.D. at 436. In Romano, a personal injury action, the court ordered access to all the plaintiffs' social networking website information. Romano, 907 N.Y.S.2d at 657.

As far as the threshold relevancy inquiry is concerned, it is clear that material on social networking websites is discoverable in a civil case. Pennsylvania's discovery rules are broad, and there is no prohibition against electronic discovery of relevant information. Furthermore, courts in other jurisdiction with similar rules have allowed discovery of social networking data.

Rosko claims a good faith basis for seeking material contained on Jennifer Largent's Facebook account. Largent has pleaded that she suffers from, among other things, chronic physical and mental pain. Compl. ¶ 21. At her deposition, Largent testified that she suffers from depression and spasms in her legs, and uses a cane to walk. Def.'s Mot. to Compel, Ex. A 65, 85. Rosko claims that Largent's formerly public Facebook account included status updates about exercising at a gym and photographs depicting her with her family that undermine her claim for damages. The information sought by Rosko is clearly relevant. The information sought by Rosko might prove that Largent's injuries do not exist, or that they are exaggerated. Therefore, Rosko satisfies the relevancy requirement.

## II. Privilege and Privacy Concerns

Having determined that Rosko satisfies the threshold relevancy requirement, the Court must determine whether privilege or privacy rights protect against discovery. Privileged matter is

not discoverable. Pa R.C.P. 4011(c); 4003.1(a). The term "privilege" refers only to those recognized by the common law, statutory law, or the Constitution. S.M. ex rel. R.M. v. Children & Youth Servs. of Del. Cnty., 686 A.2d 872, 874-75 (Pa. Cmwlth. 1996). If either Pennsylvania's law of privilege or statutory law, such as the Stored Communications Act, prohibits disclosure, the relevant information Rosko seeks is not discoverable.

**A. Privilege Under Pennsylvania Law**

Pennsylvania disfavors privileges, and the law recognizes only a limited number of privileges. Joe v. Prison Health Servs., Inc., 782 A.2d 24, 30-31 (Pa. Cmwlth. 2001).

There is no confidential social networking privilege under existing Pennsylvania law. McMillan 2010 WL 4403285. There is no reasonable expectation of privacy in material posted on Facebook. Almost all information on Facebook is shared with third parties, and there is no reasonable privacy expectation in such information.[10] Cf. Commonwealth v. Proetto, 771 A.2d 823, 828 (Pa. Super. 2001).

When a user communicates on Facebook, her posts may be shared with strangers. McMillan, 2010 WL 4403285. And making a Facebook page "private" does not shield it from discovery. Simply Storage Mgmt., 270 F.R.D. at 434; Patterson v. Turner Constr. Co., --- N.Y.S.2d ---, 2011 N.Y. Slip Op. 07572, 2011 WL 5083155 (App. Div. Oct. 27, 2011). This is so because, as explained above, even "private" Facebook posts are shared with others.

The Court holds that no general privacy privilege protects Jennifer Largent's Facebook material from discovery. No court has recognized such privilege, and neither will we. By

10. There may be a reasonable expectation of privacy in undelivered Facebook email messages. That expectation of privacy vanishes once the email reaches the intended recipient. Commonwealth v. Proetto, 771 A.2d 823, 828 (Pa. Super. 2001); accord United States v. Lifshitz, 369 F.3d 173, 190 (2d Cir. 2004). ("[Computer users have no reasonable] expectation of privacy in transmissions over the Internet or e-mail that have already arrived at the recipient.").

definition, there can be little privacy on a *social* networking website. Facebook's foremost purpose is to "help you connect and share with the people in your life." That can only be accomplished by sharing information with others. Only the uninitiated or foolish could believe that Facebook is an online lockbox of secrets.

**B. The Stored Communications Act**

The Court next must determine whether the Stored Communications Act (SCA or Act) prohibits disclosure of Jennifer Largent's Facebook information.[11] The SCA is part of the Electronic Communications Privacy Act, Pub. L. No. 99-508, 100 Stat. 1848 (1986). The SCA fills the gaps left by the Fourth Amendment, which weakly protects the digital and electronic worlds. Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislature's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1212-13 (2004). The SCA does this by creating limits on the government's ability to compel Internet Service Providers (ISPs) to disclose information about their users, and it places limits on ISPs' ability to voluntarily disclose information about their customers and subscribers to the government. See 18 U.S.C. §§ 2702-03.

Crucial to the resolution of this motion, the SCA regulates only ISPs or other types of network supporters. It divides ISPs into two categories: electronic communications services (ECSs) and remote computing services (RCSs). An ECS is "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). An RCS stores data long-term for processing or storage. Id. § 2711(2). The terms are somewhat confusing because they reflect the state of computing technology as it existed in 1986 (a time before smartphones, Facebook, and the World Wide Web). Kerr, 72 Geo. Wash. L. Rev. at 1213.

11. Largent argues that disclosure of her Facebook information "may violate privacy laws." Pls.' Answer to Def.'s Mot. to Compel ¶ 21. As she cites only the SCA, it is the only authority that the Court addresses.

To simplify greatly, RCSs store information for longer periods of time than ECSs.[12] The SCA applies differently to each but, as will be apparent below, the minutiae are irrelevant for our purposes.

Only one court has addressed whether Facebook is an entity covered by the SCA. See Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965 (C.D. Cal. 2010). In Crispin, the defendants served subpoenas upon Facebook and other social networking sites seeking information about the plaintiff's online postings. Id. at 969. The plaintiff filed a motion to quash the subpoenas arguing, among other things, that the SCA prohibited disclosure. Id. In a comprehensive opinion, the court held that Facebook is both an ECS and an RCS, depending on which function of the site is at issue. Id. at 987-88, 990.

The court granted the motion to quash. In doing so, it held that civil subpoenas are never permissible under the SCA. Id. at 975-76 (quoting Viacom Int'l, Inc. v. YouTube, Inc., 253 F.R.D. 256, 264 (S.D.N.Y. 2008); In re Subpoena Duces Tecum to AOL, LLC, 550 F. Supp. 2d 606, 611 (E.D. Va. 2008); O'Grady v. Super. Ct., 139 Cal. App. 4th 1423 (2006)).

Crispin is distinguishable. In that case, the defendants sought information via subpoena to Facebook and other social networking sites. In this case, Rosko seeks the information directly from Jennifer Largent. The SCA does not apply because Largent is not an entity regulated by the SCA. She is neither an RCS nor an ECS, and accessing Facebook or the Internet via a home computer, smartphone, laptop, or other means does not render her an RCS or ECS. See Kerr, 72 Geo. Wash. L. Rev. at 1214. She cannot claim the protection of the SCA, because that Act does not apply to her. "The SCA is not a catch-all statute designed to protect the privacy of stored

12. For a much more comprehensive explanation of the SCA, see the law review article cited herein and Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965, 971-73 (C.D. Cal. 2010).

Internet communications." Id. Rather, it only applies to the enumerated entities. Largent being neither an ECS nor an RCS, the SCA does not protect her Facebook profile from discovery.

## III. Breadth of Discovery Request

Finally, having determined that the information sought by Rosko is relevant and not privileged, the Court must consider whether her request is overbroad. No discovery is permitted if it is not relevant to the pending action or if it would cause unreasonable annoyance, embarrassment, oppression, burden, or expense. Pa. R.C.P. 4011. The mere existence of some annoyance or embarrassment is insufficient to bar discovery. 9A Goodrich Amram 2d § 4011(b):1. Unreasonableness is determined on a case-by-case basis.

As we noted above, Largent has no privacy rights in her Facebook postings, and there is no general Facebook social networking privilege. Furthermore, she cannot claim the protections of the Stored Communications Act.

We further note that, in filing a lawsuit seeking monetary damages, Largent has placed her health at issue, which vitiates certain privacy interests. Any posts on Facebook that concern Largent's health, mental or physical, are discoverable, and any privilege concerning such information is waived. Gormley v. Edgar, 995 A.2d 1197, 1206 (Pa. Super. 2010); Kraus v. Taylor, 710 A.2d 1142 (Pa. Super. 1998), alloc. granted, 727 A.2d 1109 (Pa. 1999), and alloc. dismissed, 743 A.2d 451 (Pa. 2000).

Largent complains that Rosko's motion is akin to asking her to turn over all of her private photo albums and requesting to view her personal mail. Pls.' Answer to Def.'s Mot. to Compel ¶ 23. But those analogies are mistaken in their characterization of material on Facebook. Photographs posted on Facebook are not private, and Facebook postings are not the same as

personal mail. Largent points to nothing specific that leads the Court to believe that discovery would cause unreasonable embarrassment. Bald assertions of embarrassment are insufficient. As the court stated in McMillan, Facebook posts are not truly private and there is little harm in disclosing that information in discovery.[13]

Nor does the Court believe that allowing Rosko access to Largent's Facebook profile will cause unreasonable annoyance. The court notes that the entire cost of investigating Largent's Facebook information will be borne by Rosko. Also, Largent can still access her account while Rosko is investigating. As Rosko argues, this is one of the least burdensome ways to conduct discovery.

Finally, the Court finds it significant that the only two Pennsylvania trial courts (of which we are aware) have granted discovery in identical situations. Zimmerman, 2011 WL 2065410; McMillen 2010 WL 4403285. The cases cited by Largent, though to the contrary, lack any persuasive authority because those orders are unsupported by any written opinion or memorandum.

We agree with Rosko that information contained on Jennifer Largent's Facebook profile is discoverable. It is relevant and not covered by any privilege, and the request is not unreasonable. We will thus allow Rosko access to Largent's Facebook account to look for the necessary information. Plaintiff Jessica Largent must turn over her Facebook login information to Defense counsel within 14 days of the date of the attached Order. Defense counsel is allotted a

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13. The Court does not hold that discovery of a party's social networking information is available as a matter of course. Rather, there must be a good faith basis that discovery will lead to relevant information. Here, that has occurred because Jennifer Largent's profile was formerly public. In other cases, it might be advisable to submit interrogatories and requests for production of documents to find out if any relevant information exists on a person's online social networking profiles.

21-day window in which to inspect Largent's profile. After the window closes, Plaintiff may change her password to prevent any further access to her account by Defense counsel.

An Order follows.

**IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF PENNSYLVANIA–FRANKLIN COUNTY BRANCH**

| | | |
|---|---|---|
| **KEITH LARGENT and JENNIFER LARGENT,** Plaintiffs | : | CIVIL ACTION - LAW |
| vs. | : | |
| **JESSICA REED,** Defendant | : | No. 2009-1823 |
| vs. | : | |
| **SAGRARIO PENA,** Additional Defendant | : | JUDGE RICHARD J. WALSH |



## *ORDER OF COURT*

November 7, 2011, the Court having reviewed Defendant Jessica Rosko' *Motion to Compel Plaintiff Jennifer Largent's Facebook Login Information*, Plaintiffs' *Answer* thereto, the briefs, the record, and the law,

**IT IS HEREBY ORDERED** that Defendant's Motion to Compel be, and hereby is, **GRANTED.**

**IT IS FURTHER ORDERED** that Plaintiff Jennifer Largent shall turn over to Defense counsel her Facebook username email and password within 14 days of the date of this Order. Plaintiff shall not delete or otherwise erase any information on her Facebook account. After 35 days from the date of this Order, Plaintiff may change her Facebook login password to prevent further access by Defense counsel.

ATTEST A TRUE COPY

LINDA L. BEARD, PROTHONOTARY

*Pursuant to the requirements of Pa. R.C.P. 236 (a)(2), (b), (d), the Prothonotary shall immediately give written notice of the entry of this Order, including a copy of this Order, to each party's attorney of record, or if unrepresented, to each party; and shall note in the docket the giving of such notice and the time and manner thereof.*

By the Court,

J.

**The Prothonotary shall give notice to:**
Christopher T. Moyer, Esq., Counsel for Plaintiffs
Donald L. Carmelite, Esq., Counsel for Defendant
Stephen J. Magley, Esq., Counsel for Additional Defendant