



Protective
Insurance Company

AUGUST 24-25

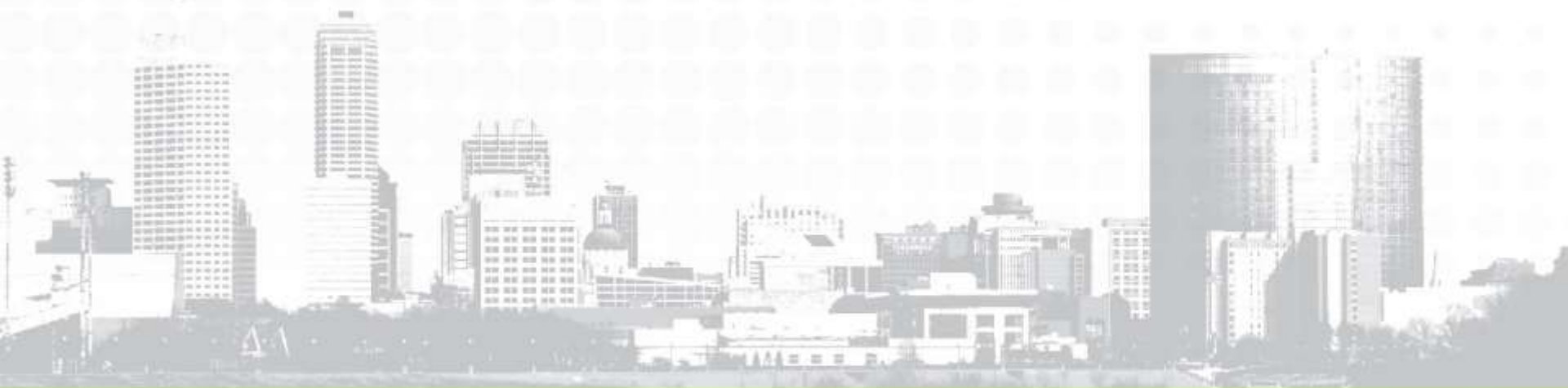


CLAIMS

SAFETY



2015 SEMINAR



Hosted by Protective Insurance Company

@ProtectiveIns
#ClaimsSafety




John T. Pion
24 Hour Emergency Response Line
412-600-0217
jpion@pionlaw.com


TRENDS IN LITIGATION: THE UTILIZATION OF SOCIAL MEDIA IN LITIGATION

Protective Insurance Company Symposium
Indianapolis, Indiana
August 24, 2015

SOCIAL NETWORKING

- ▶ In a world of growing technological advancements, social networking has emerged as one of the most useful tools in litigation
 - ▶ The issues being brought before the court didn't exist in the past and have a significant impact on all aspects of litigation
 - ▶ Legal departments are forced to determine methods to mitigate the risks and accentuate the advantages associated with social networking
- 

Social Networking Sites


- Social networking allows users to examine profiles containing photos, videos, ideas, comments, and locations without direct interaction with another person.
 - Facebook
 - Instagram
 - LinkedIn
 - Twitter
 - Google +
- 

Private Resources– Facebook

- ▶ <http://www.facebook.com/>
- ▶ Users can post news stories
- ▶ Create a profile showing interests, clubs, hobbies
- ▶ “Check In” and various locations and post their current geographic location

All of this can be vital relevant evidence in the defense or prosecution of a claim of lawsuit

Private Resources– Facebook

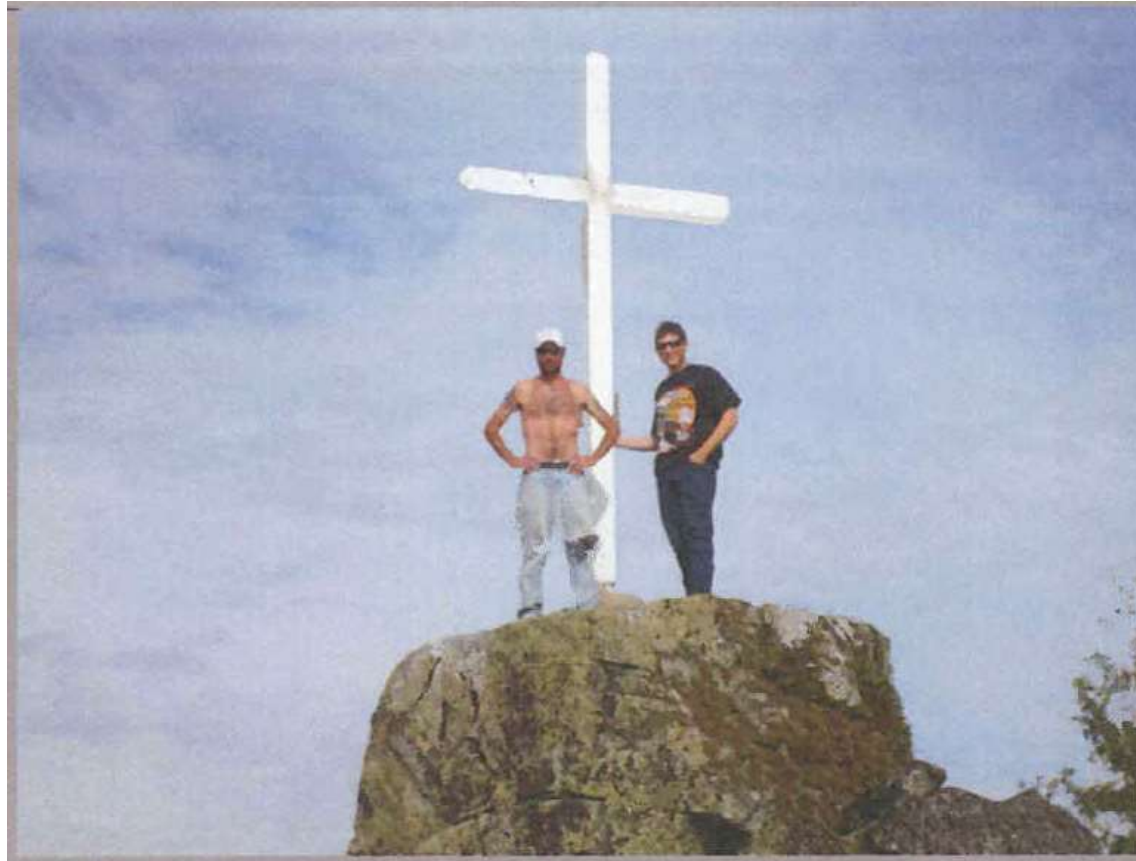
- ▶ The advantages of being able to access Facebook
 - ▶ Access to evidence which may be probative to key issues in the prosecution of, or defense of, a litigation matter.
 - ▶ A primary advantage: determining whether opposing party or your client is truthful about extent of his/her injuries
- 

Private Resources–

Facebook

- ▶ Example: plaintiff truck driver claims he is physically impaired from a truck accident.
- ▶ Facebook pictures show plaintiff truck driver, post-accident, fishing, building houses, and climbing a mountainous hill.

Private Resources– Facebook



Private Resources– Facebook



Private Resources– Facebook

**Discoverability of Private portions of a
Facebook profile**

**Threshold Consideration: Obtaining access
to Facebook profile**

Private Resources– Facebook

Discoverability of Private portions of a Facebook profile

- Cooperation of Opposing Party
- Objection of Opposing Party
 - Legal tools per state: Motions to Compel
- When ruling on a Motion to Compel, courts focus on the relevancy of the information that is hidden from the public
 - Context clues from public portions of party's Facebook page, other discoverable sources (i.e., Opponent's deposition)

Private Resources– Facebook

Discoverability of Facebook

- Example:
 - Minor plaintiff injured in school bus accident
 - Relevant issues in case: executive function, emotional capability, whether she followed advice of physicians
 - Photos on Facebook accessible to the public showed plaintiff, post-injury, dancing with friends







ADMISSION POSTS AND PHOTOGRAPHS THAT AFFECT LIABILITY

“I guess texting and driving ain’t smart after all 😊”

- Time stamped hours after accident

“One too many, should have stayed overnight!”

- Time stamped night of accident

OMG! CLUTZ! HA!

- Time stamped right after injury

JURY WILL LOVE THIS



AND THIS



AND THIS



POSTS AND STATUS UPDATES THAT AFFECT THE PLAINTIFF'S CREDIBILITY

“Stupid attorneys believe anything”

- ❖ Time stamped 2 hours after deposition

“Lawsuit #4 – check. Beats working”

- ❖ Time stamped week of prior settlement

POSTS, STATUS UPDATES AND PHOTOGRAPHS DISPROVE INJURIES

They say, a photograph says
a thousand words...

DISABLING HIP OR BACK HUH?



**CAN'T GET AROUND OR EXERCISE
ANY LONGER, HUH?**



IMMOBILE, STOPPED RECREATIONAL ACTIVITIES?



THIS PHOTO PROBABLY PROVES THE EXISTENCE OF BRAIN DAMAGE



YOU HAVE TO LOVE STATUS UPDATES TO SHOW JUST HOW HURT ARE YOU?

- ❖ VAIL!!!!!! Black diamonds!!!!
- ❖ Hiking San Bernardino
- ❖ Cross training for triathlon.
- ❖ Just benched 300 lbs.
- ❖ 13.1 – ran half a marathon!

Private Resources– Facebook

Discoverability of Facebook

- Example:
 - Defendant argues that similar content on protected Facebook posts will be probative of true extent of plaintiff's injuries
 - This is a threshold showing that relevant evidence may exist in private portions of plaintiff's profile.

Private Resources– Facebook

Discoverability of Facebook

- Example:
 - In Pennsylvania, anything relevant to the case which is not protected by privilege is discoverable. (Pa.R.Civ.P. 4003.1(b))
 - There are some limitations: causing unreasonable annoyance, embarrassment, etc. (Pa.R.Civ.P. 4011(b))
 - Relevant, no privilege, no limitation applies – material is discoverable.

Private Resources– Facebook

Discoverability of Facebook

- Example:
 - Judge: given what was public on plaintiff’s profile, the items password-protected are “reasonably calculated” to produce relevant evidence. (PA Rule of Civil Procedure 4003.1(a))
 - “Reasonably calculated” – because it is likely she posted other pictures/information in private sections that could reduce likelihood that she continues to suffer injuries alleged.

Discovered Information

- ▶ As a result of the Judge's decision, Defendants were able to obtain access to Plaintiff's Facebook messages.
- ▶ A vendor compiled the information using software that would produce the messages in an excel spreadsheet.
- ▶ Several messages were found which relate to evidence of the extent of Plaintiff's injuries.

Private Resources– Facebook

Discoverability of Facebook

- Similar decisions throughout county courts in PA.
- Largent v. Reed, 2011 WL 5632688 (Franklin Cty. 2011 (compelling production of Facebook username and password upon discovery of plaintiff's comments regarding going to work out and photographs of family gatherings, to disprove permanent physical injuries, pain and suffering.)

Private Resources– Facebook

Discoverability of Facebook

- Zimmerman v. Weis Markets Inc., 2011 WL 2065410 (Northumberland Cty. 2011) (compelling production of Facebook and MySpace username and password upon discovery of comments and photos suggesting plaintiff continued to perform bike stunts and openly displayed a scar on his leg, where plaintiff's alleged injuries included embarrassment over scar, degradation of his health, and inability to enjoy life's pleasures.)

Private Resources– Facebook

Discoverability of Facebook

- McMillen v. Hummingbird Speedway, Inc., 2010 WL 4403285 (Jefferson Cty. 2010) (compelling production of Facebook username and password upon discovery of public comments regarding a fishing trip and attendance at Daytona 500, where plaintiff alleged permanent impairment, health concerns, and inability to enjoy life's pleasures.)

Private Resources– Facebook

Discoverability of Facebook

“A requirement that the requesting party must first show a reasonable likelihood that relevant information exists on the Facebook account strikes a balance between a litigant’s broad right to discovery and a litigant’s right to be protected by unreasonably burdensome, and overbroad, discovery requests.”

Private Resources– Facebook

Discoverability of Facebook Other Examples

- Perrone v. Lancaster Regional Medical Center, No. C1-11-14933 (C.P.Lanc.Co. May 13, 2013) (requiring plaintiff to provide Facebook username and password to a neutral forensic computer expert; expert instructed to download contents of plaintiff's account to hard drive and isolate the data for a specific range of dates. Also, expert able to indentify times plaintiff engaged in physical activity).

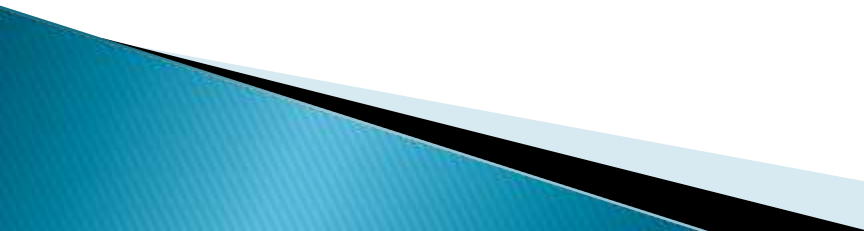
Private Resources– Facebook

Discoverability of Facebook Other Examples

- Offenback v. L.M. Bowman, Inc., 2011 WL 2491371 (M.D.Pa. 2011) (plaintiff claimed injuries resulting from motor vehicle accident; court permitted discovery of Facebook relating to plaintiff's hobbies and activities including motorcycle riding, travel and hunting).

Private Resources– MySpace/Facebook

Discoverability & Admissibility Ohio

- Little case law in Ohio concerns the discoverability of social media in Ohio.
 - The social media cases that have been litigated concern admissibility.
 - Evidence admission standards are greater than discovery, so the below principles also apply to discovery.
- 

Private Resources– MySpace/Facebook

Discoverability & Admissibility Ohio

- Ohio uses traditional evidence admission principles with regard to the admissibility of social media information.
- Most case law involves domestic relations and criminal matters, but equally apply to civil cases.
- Online social media material must first be authenticated pursuant to Ohio Evidence Rule 901(A), then must be found to be relevant and not prejudicial under Rules 401 and 403.

Private Resources– MySpace/Facebook

Discoverability of Facebook Ohio Examples

- State v. Miller, 2012–Ohio–1263 (9th Dist., Lorain Cty.) (photographs obtained from MySpace were admissible as a fair and accurate representation of individuals displaying a gang sign.)
- In re D.L., 2012–Ohio–1796 (3rd Dist., Crawford Cty.) (allowed Facebook communications into evidence to overturn a finding of delinquency by reason of rape.)

Private Resources– MySpace/Facebook

Discoverability of Facebook Ohio Examples

- State v. Rossi, 2012-Ohio-2545 (2nd Dist., Montgomery Cty.) (MySpace post determined to be forged by key testimony from FBI and National White Collar Crime Center expert witnesses, showing difficult process to bar the admissibility of social media evidence in Ohio.)

Private Resources– MySpace/Facebook

Discoverability of Facebook West Virginia

- There has been little litigation of Facebook in West Virginia courts.
- A Federal Court case in the Northern District of West Virginia forced a litigant to respond to a Request for Production of Documents concerning a litigant's Facebook account as they supported damage claims stemming from an alleged wrongful discharge from a trucking company. Beckman v. T.K. Stanley, Inc., Civil Action No. 1:11-cv-133 (N.D. West Virginia, 2012).

Private Resources– Facebook


Discoverability of Facebook

The court in Offenback:

“the scope of discovery into social media sites requires the application of basic discovery principles in a novel context and the challenge is to define appropriately broad limits... on the discoverability of social communications.”


Private Resources– Facebook

Discoverability of Facebook


- Litigants must have ample opportunity to obtain all evidence to build case.
 - Must not be forced into situation of surprise or unfairness at trial.
 - Discovery is to be broadly allowed.
- 

Public Resources– Online Newspapers & Blogs

Use of Other Electronic Media

- Online newspapers and blogs
 - Such electronic media may reveal evidence relevant to key issues in the case.
 - In many cases, the extent of a plaintiff's injuries may be documented by online newspapers and blogs (including personal blogs).
- 

Public Resources– Online Newspapers & Blogs

- ▶ Due to the speed with which news is reported, it is important to do a sweep of all available online information in addition to social media.
 - ▶ Often times, local and other news publications will have useful information such as the identity of witnesses, the individuals injured and the nature and extent of their injuries.
- 

Public Resources– Online Newspapers & Blogs

Use of Other Electronic Media

- Example:
 - Online newspaper interviews local celebrity who coincidentally is plaintiff in MVA case.
 - When interviewed, plaintiff states that although still injured “and in pain,” he was strong enough to go back to work full time.
 - Interview also outlines course of treatment and positive outlook he’ll be able to participate in same hobbies as before (i.e., motorcycle riding).

Public Resources– Online Newspapers & Blogs

Use of Other Electronic Media

- Example:
 - Newspaper interview also casts a shadow on plaintiff’s credibility.
 - Plaintiff seeks sympathy, states he had “brain injuries.”
 - However, admits he’s back to work 2 months from accident; medical records will show no brain injuries. Earlier online article noted he was on the air with his radio show less than 3 weeks after accident.

Public Resources– Online Newspapers & Blogs

- ▶ For example, the following information was obtained following an accident in the Baltimore within hours of the occurrence of the accident.

www.baltimoresun.com/explore/harford/news/ph-ag-darlington-motorcycle-crash-0426-20130424,0.1894398.story

baltimoresun.com

Baltimore radio personality Ed Norris in serious condition after Harford motorcycle crash

BY ALLAN VOUGHT, avought@theeagles.com

9:42 AM EDT, April 25, 2013

Baltimore radio personality and former high ranking state and Baltimore City police official Ed Norris was injured in a traffic accident in northern Harford County Wednesday afternoon.

He was in serious condition at Maryland Shock Trauma Center Thursday morning, a spokesperson said.

Maryland State Police confirmed that Norris was driving a motorcycle and was injured when he swerved to avoid colliding with a box truck at the intersection of Routes 1 and 161 (Main St.) in Darlington shortly after 2:30 p.m.

The duty officer at the Maryland State Police Bel Air Barrack confirmed the identity of Norris, the morning drive host on the highly-rated Norris and Davis Show on 105.7-FM, The Fan, who formerly commanded the State Police and before then was Baltimore City City's Police Commissioner.

Norris was flown to shock trauma by a State Police Medevac.

The state police duty officer said Wednesday afternoon that Norris' injuries were non-life threatening, according to reports from troopers at the scene.

"There were no serious injuries," the duty officer said. "He was alert and talking to everyone. He may have suffered a broken arm."

In a news release issued shortly after 5:30 p.m., State Police said the preliminary investigation indicates a GMC truck, owned by Ward Trucking and driven by Doderick McClain of Windsor Mill, was making a left turn from Route 161 to travel south on Route 1.

Norris was traveling north on Route 1 on a 2013 Victory motorcycle approaching the intersection. According to the State Police news release, the GMC truck "failed to yield the to the Victory



Background information was obtained through Wikipedia

Ed Norris

From Wikipedia, the free encyclopedia

Edward T. Norris (b. April 10, 1960^[1]) is an American radio host and former law enforcement officer in Maryland. He is the cohost of a talk show on WJZ-FM (105.7 The Fan) in Baltimore, Maryland. Norris, a 20-year veteran of the New York Police Department, served as Police Commissioner for Baltimore from 2000 to late 2002 and Superintendent of the Maryland State Police in 2003. Norris was later convicted of a felony and spent six months in federal prison.

Contents

- 1 Law enforcement career
- 2 Indictment
- 3 Radio career/other media
- 4 References
- 5 External links

Ed Norris

Superintendent of Maryland State Police

Preceded by David B. Mitchell

Succeeded by Thomas J. Hutchins

Baltimore City Police Commissioner

In office

2000–2002

Preceded by Ronald Daniel

Succeeded by Kevin P. Clark

Personal details

Born New York, NY

Law enforcement career

In March 2000, Norris was selected to become **Police Commissioner** of the Baltimore Police Department by Mayor Martin O'Malley. He left the Baltimore Police Department in December 2002 in a flurry of media speculation about acrimony between Norris and staffers in the O'Malley administration. Norris continues to have an acrimonious relationship with members of the O'Malley administration. ^[*citation needed*]

In 2002, Maryland Governor Robert Ehrlich appointed Norris as Superintendent of the Maryland State Police. He resigned from that position when he was indicted on criminal charges. Norris continues to have a good relationship with Ehrlich, who is a frequent guest on the Ed Norris Show. ^[*citation needed*]

Indictment

In December 2003, Norris was indicted on three charges by U.S. Attorney Thomas DiBiaggio. Two of the counts charged Norris had made illegal personal expenditures of over \$20,000 to pay for expensive gifts, personal expenses, and extramarital affairs with at least six women from the Baltimore Police Department's supplemental account.^[2] The third count alleged that he had lied on a mortgage application, stating that approximately \$9,000 he received from his father was a gift, when it was actually a loan.

Articles detailing prior indiscretions involving dishonesty were readily available.

RECEIVE CREDIT FOR PRIOR LEARNING
Get credit for the courses you've taken

JOB REELS HOME LINKS CLASSIFIED ADVERTISEMENTS STORE NEWSROOM SUBSCRIBE CONTACT

MARYLAND SPORTS DRIBLES BUSINESS LIFE HEALTH ENTERTAINMENT EVENTS OPINION VIDEO BRISLS
 BREAKING NEWS WEATHER TRIPS OUT THERE PHOTOS KITCHENWIRE ARTS & LITERATURE MUSIC OFFER BOOKS THE US SUN VACATION PARTNER UP

Home » Columns » West Baltimore

Public Group



It's Ed Norris, armchair commissioner

July 20, 2007 by LAURA COVATTA

In Baltimore, Ed Norris is the one everyone has to deal with. Many so-called politicians have no qualms about paying money to his book store. Inevitably, he's the one who's behind the numbers. Baltimore apparently is still in a lull.

I remember Ed Norris making a comment for a while about the police show evidence, and it was that seven reports and that 17 camera guys needed to be the FBI. It's a joke for the police, the 17 camera guys needed to be the FBI.

THE CITY OF BALTIMORE, an emergency law firm, an emergency law firm, a Baltimore.com message board, and a Baltimore.com message board, the views of Ed Norris, owner of Four Angels and of Baltimore.com, are not necessarily shared by the Baltimore.com editorial staff.

Public Group

Baltimore Luxury Condos

Located on the Inner Harbor 1 Bedroom Flones from \$159,900!
<http://www.4steel.com>

Dental Implant Warnings

What You Should Know Before Getting Dental Implants Read Expert Article
<http://symptom.com/DentalDentistCare>



Related Articles

The Road To... (Part 1) and The Road To... (Part 2)

July 10, 2011

For 11 months, a new and improved...

July 10, 2011

When was the last time you...

July 10, 2011

Police: Study says...

July 10, 2011

When you're looking for...

July 10, 2011

When you're looking for...

July 10, 2011

Find More Stories About

West Baltimore

Baltimore Sun

Ed Norris

www.baltimoresun.com/bal-te.md.profile11dec11,0,7672124.story

baltimoresun.com

A career and legacy suffer under accusations

Profile: Criminal charges against Norris may be remembered more than his reputation as a reform-driven leader.

By Del Quentin Wilber

Sun Staff

December 11, 2005

Edward T. Norris, a blunt yet charming New York police commander, swept into Baltimore in early 2000 promising to refocus the city Police Department on crime-fighting, boost the agency's sagging morale and root out corrupt officers.

Three years later, when Norris left the city force to become head of the Maryland State Police, Baltimore's crime rates had dropped and yearly homicide totals had consistently been held below 300 for the first time in a decade. And Norris had attracted national attention for criticizing the federal government's efforts on fighting terrorism.

But yesterday's federal indictment charging Norris, 43, with stealing more than \$20,000 from the city force threatens to destroy his police career and besmirch the law-and-order legacy he had been building in Maryland and New York.


"Everything else will be lost, and I think this may well be what people who do not know him, or did not work for him closely, will remember," said John McIntee, a former deputy commissioner under Norris who retired this year after briefly acting as police chief. "He did a lot of good things for the Police Department and the city. But I can't help but think [the indictment] will affect how people think of Eddie Norris in the long run."

The son of a hard-charging New York City police officer, Norris grew up in a Brooklyn neighborhood similar to South Baltimore. Although he seemed destined for police work - some of his most vivid memories are of his father leaving the house to go on patrol - he said in several interviews last year that he dreamed of being a doctor.

As a student, he excelled in math and science. He graduated from Brooklyn Technical High School, a magnet school, and starred in sports. He was a running back and linebacker on his high school



Public Resources– Online Newspapers & Blogs

- ▶ When reviewing online newspapers and other periodicals, it is important to view the section where individuals are able to “comment” on the article.
 - ▶ Often times, individuals with information, whether good or bad, will reveal themselves in the comments section.
- 

Public Resources– Online Newspapers & Blogs

Use of Other Electronic Media


- Example:
 - Online blogs: may reveal evidence relevant to key issues in case.
 - May reveal extent of plaintiff's injuries, as well as other relevant factors.
 - MVA involving a small child hit in a stroller at the corner of a busy intersection.
 - Mother's blog showed child walking about and being transported about easily a couple months after accident.

Public Resources– Online Newspapers & Blogs

- ▶ This blog post provided information that the child was recovering after undergoing an operation and showed a photograph of him in the ICU.




Public Resources– Online Newspapers & Blogs


- ▶ This particular blog also provided useful information that was not forthcoming from Plaintiff's counsel. For instance the child had suffered injuries to his posterior and had undergone several surgeries including a colostomy and subsequent reversal. This photograph depicting the child revealed that the injuries must have been healing well based on the manner in which the child is being carried.
- 



Use of Facebook and other social media in investigating a loss

- Facebook and other social media can be accessed to gain immediate information the same day as a loss to aid in the investigation and defense of claims.
 - These resources can be used during the pendency of a claim to assess the viability of a claimant's alleged injury claims.
- 

Social media as investigator

- Using only the name of the claimant involved in an accident, using social media birth date, phone number, email address, address, property value, marital status, children, next of kin, employment, and more can be obtained.
 - On the very same day of the accident, all of the above can be found, allowing for a more efficient claim resolution process.
 - Nature of claims and their potential value become immediately apparent.
- 

Social media as investigator


- Example: In an accident in Ohio involving death, information of gained from social media allowed for immediate contact with the next of kin of the deceased.
 - It facilitated educated negotiations at an early stage.
 - The enhanced information allowed for a more complete and timely valuation of the claim, and led to its early mediation and successful resolution.
- 



Photo of claimant obtained from Facebook following accident. Shows her son, the next of kin.

Family struggling with loss of Middletown mom killed in crash


By Rick McCrabb *Staff Writer*

- ▶ MIDDLETOWN — While at work Monday, another nurse at Kindred Nursing and Rehabilitation in Lebanon told Nichole Turner there was a fatal accident in Middletown involving a female driving a yellow Chevrolet Cobalt.
- ▶ Turner knew her sister-in-law, Melissa Renner, 38, of Middletown, owned a yellow Cobalt.
- ▶ She texted: “R U OK?”
- ▶ She never heard back, and an hour later, when her husband, Sam Turner, called, Nichole Turner said she “just knew” by his voice.
- ▶ It was her sister-in-law who was killed around 2 p.m. when a semitrailer apparently slammed into her vehicle at the intersection of Roosevelt Boulevard and Wicoff Street, near the entrance to AK Steel.
- ▶ Jorge Carrasco Jr., 28, of Harlingen, Texas, the driver of the semitrailer, was cited for failure to yield turning left. Middletown police said Carrasco, who was uninjured in the accident, may face more serious charges when the investigation is complete. He will appear in Middletown Municipal Court May 2, according to court documents.
- ▶ Renner died from internal injuries, said Andy Willis, an investigator for the Butler County Coroner’s Office. She was pronounced dead at the scene, Willis said.

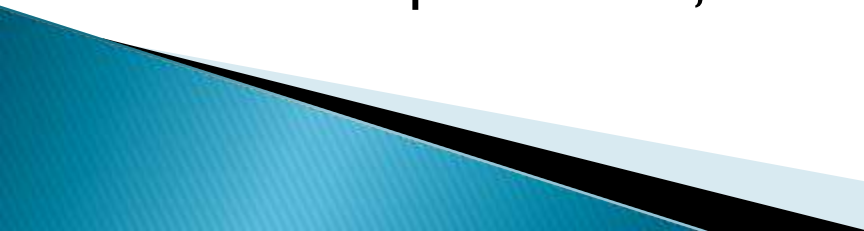
Family struggling with loss of Middletown mom killed in crash (cont.)

- ▶ It was the first fatal accident in the city since Aug. 30, 2011, according to Middletown police records.
- ▶ Renner, a single mother, lived with her father, James Turner, in the 1600 block of Meadow Avenue in Middletown. Her son, Austin, 14, lives in the Kettering area with his father.
- ▶ At the time of the accident, Renner was headed to the bank, then to her second-shift job at the Cintas Distribution Center in Mason, her sister-in-law said. Amy Schraeder, human resources manager at Cintas, said Renner had worked there for seven years. She said Renner was well liked by her co-workers because she always helped others.
- ▶ “It’s a tough thing here,” Schraeder said. “We’re all devastated.”
- ▶ Turner said the entire family is in shock.
- ▶ “You don’t expect to lose someone that young,” she said. “When we were at the funeral home, we were lost. They were asking questions that we didn’t know the answers. None of us was prepared for this.”
- ▶ She said the family is in “survival mode” and concerned most about her son and father. Besides them, Renner is survived by three brothers, James Jr. and Jonathan, both of Middletown; and Sam, of South Lebanon.
- ▶ Visitation will be from 6 to 8 p.m. Friday at Herr-Riggs Funeral Home, 210 S. Main St. The funeral will be at 11 a.m. Saturday with burial at Butler County Memorial Park.
- ▶ Obituary obtained online following accident assisted with handling and settlement of claim.

Social media as investigator

- Once the claim and potentially a lawsuit has been filed, social media can be utilized to assist with defense of a claim in a variety of ways.
 - It can be used as evidence as discussed previously.
 - Social media can also inform all elements of the strategy in defending a case, including the scheduling of depositions, the crafting of written discovery requests, the course of settlement negotiations with counsel, and preparation for trial.
- 

Social media as investigator

- Example: After a lawsuit was filed in an Ohio state court, Facebook revealed that a young man claiming a closed head injury with psychological effects entered the U.S. Marine Corps.
 - Photos on the claimant's Facebook page show him engaging in a variety of physical activities.
 - Status updates and posts demonstrated cognitive abilities that do not match up with elements of his claim.
 - The social media searches led to a targeted discovery request for the military application that, once produced, showed claimant's dishonesty.
- 




Accessed from claimant's
Twitter page.
Caption: A weeks worth of fun
#17cases




Accessed from
claimant's
Facebook page,
showing he is a
Marine.
38 people liked
this.

The Downside of Social Media

- Example: Directly following an accident with another vehicle, a truck driver took to his Facebook page to post the pictures of the fiery wreck which took 2 decedents' lives.
 - In the comments section, the truck driver complains of the decedents, and curses about them.
 - Agrees with other commenter that the decedents “paid for” the accident.
 - Uses crass language and phrases to describe the wreck and the people who died.
- 

The Downside of Social Media

- Causes disturbance in case. Decedents' families outraged.
 - Harms the likeability and credibility of driver as a witness.
 - Garneres further sympathy for decedents and their families.
 - Casts the company and driver in a poor light.
 - Prevent such risks: caution drivers, in the course of regular business, against posting about work-related incidents on Facebook.
- 









**Status of Social Media Cases—
All 50 States (and D.C.)**



Alabama

“The Disciplinary Commission agrees with and adopts the rationale ... that lawyers and private investigators conducting a pre-litigation investigation may misrepresent their identity and purpose to detect ongoing violations of the law where it would be difficult to discover those violations by any other means. [e.g. “friending” someone on Facebook]. Such misrepresentations, limited in scope to identity and purpose, do not constitute ‘dishonesty, fraud, deceit or misrepresentation’ proscribed by Rule 8.4(c), Ala. R. Prof. C.” Alabama State Bar, Office of the General Counsel: Ethics Op. RO-2007-05.


Alaska

David S. v. Jared H., 308 P.3d 862 (Supreme Court of Alaska) (case analyzing communications between biological father and daughter in disputing adoption by maternal grandparents).

“David also testified that after Alicia contacted him via social media in 2009 and asked him to contact her so he could see pictures of Katie, he made no attempt to respond until December 2010 when he ‘friended’ her on a social networking site.” (Found to be not enough contact).


Arizona

“The State Bar of Arizona’s Committee on the Rules of Professional Conduct has not yet issued any opinions that touch on the discovery of social media, but the Committee has stated that Arizona’s Ethical Rules apply fully to online conduct.” Peter S. Kozinets & Aaron J. Lockwood, “Discovery in the Age of Facebook” (citing Ariz. Formal Ethics Op. 1997-04 (April 1997)).



Arkansas

“[T]he contents of social media, regardless of the privacy settings selected, are discoverable if they are relevant and not privileged...” Steven S. Gensler, *Special Rules for Social Media Discovery*, *Arkansas Law Review* (concluding that no special discovery rules are necessary in the social media context).



California

Cal. Labor Code § 980.

(b) An employer shall not require or request an employee or applicant for employment to do any of the following: (1) Disclose a username or password for the purpose of accessing personal social media. (2) Access personal social media in the presence of the employer. (3) Divulge any personal social media, except as provided in subdivision (c).

(c) Nothing in this section shall affect an employer's existing rights and obligations to request an employee to divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding.

Colorado


Moore v. Miller, No. 1:10-cv-00651-JLK-MJW (D. Colo. June 6, 2013)).

A district court judge in Colorado ordered that a plaintiff provided his entire Facebook account history, arguing that it was relevant to his claims of emotional pain and suffering, physical pain, and humiliation.

Connecticut

State v. Eleck, 130 Conn. App. 632 (2011).

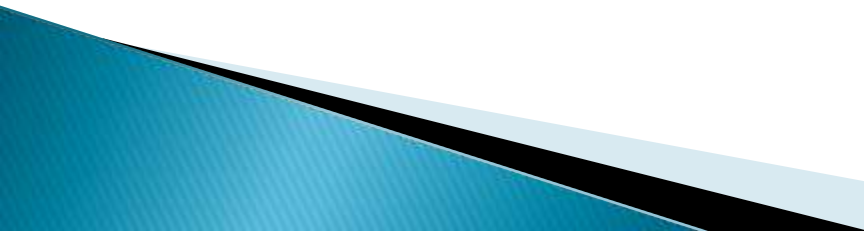
“We agree that the emergence of social media such as e-mail, text messaging and networking sites like Facebook may not require the creation of new rules of authentication with respect to authorship... Nevertheless, we recognize that the circumstantial evidence that tends to authenticate a communication is somewhat unique to each medium.”



Delaware

Del. Default Std. for Discovery of Electronic Documents
("E-Discovery")

“Search methodology. – If the parties intend to employ an electronic search to locate relevant electronic documents, the parties shall disclose any restrictions as to scope and method which might affect their ability to conduct a complete electronic search of the electronic documents. The parties shall reach agreement as to the method of searching, and the words, terms, and phrases to be searched with the assistance of the respective e-discovery liaisons, who are charged with familiarity with the parties’ respective systems.”



District of Columbia

Coleman v. District of Columbia, 275 F.R.D. 33, 36 (2011).

The same relevance standards in social media discovery that apply to a party also apply to a third party served with a subpoena.

Florida

Dubois v. Butler (Fl. App. 2005).

Lawyer's duty to use Internet resources as part of due diligence, not to use methods that have gone "the way of the horse and buggy and the eight track stereo."

Georgia

Jewell v. Aaron's Inc., 2013 U.S. Dist. LEXIS 102182.

Request for Production of Documents submitted by Defendant—"All documents, statements, or any activity available that you posted on any internet Web site or Web page, including, but not limited to, Facebook, MySpace, LinkedIn, Twitter, or a blog from 2009 to the present during your working hours at an Aaron's store."

The Court ruled that "Defendant has not made a sufficient predicate showing that the broad nature of material it seeks is reasonably calculated to lead to the discovery of admissible evidence."

Hawaii

Lindsey v. Matayoshi, 2013 WL 3092450 (D. Haw. June 19, 2013).

A student threatened, bullied, and teased other students through Facebook posts and text messages. The student was expelled. She and her parents sued the state, seeking damages and injunctive relief for the deprivation of their due process rights, emotional distress, and a violation of state administrative laws. The court ruled that the Eleventh Amendment barred suit.

Idaho


Local Rules of Procedure for the United States District Court for the District of Idaho.

Rule 16.1(b)—“The parties shall discuss the parameters of their anticipated e-discovery at the Rule 26(f) conference, as well as at the Rule 16 scheduling conference.”

Illinois

People v. Fulmer, 2013 IL App. (4th) 120747.

The attorney argued that the trial court erred by finding he violated Ill. Sup. Ct. R. 415(c). The appellate court noted that the record did not disclose whether the attorney posted the video on the social media websites before or after defendant appeared with him on March 29, 2011, waived preliminary hearing and entered a plea of not guilty. The attorney's use of the discovery materials was improper and violative of supreme court rules.



Indiana

Munster v. Groce (Ind. App. 2005).

A lawyer has a “duty to Google” as part of due diligence.

Iowa


Bierman v. Weier, 826 N.W.2d 436.

“In recent years, ... the Internet and social media have evened the playing field somewhat, by giving individuals with access to a computer a ready platform for spreading falsehoods or engaging in cyberbullying. Yet unlike the media, these individuals may have fewer incentives to self-police the truth of what they are saying.”

Kansas

Gallion v. Gallion, FA114116955S.

From a Court Order—“Counsel for each party shall exchange the password(s) of their client’s Facebook and dating website passwords. If either party already possesses the password of the other, the party whose password is in the possession of the other party may change their password and give the new password to opposing counsel only.”



Kentucky

Sluss v. Commonwealth, 381 S.W.3d 215 (2012).

“This Court concludes that the trial court erred in not giving full consideration to Appellant’s claim of juror misconduct, which is founded on a question of first impression alleging that jurors may have lied during voir dire and juror bias through the use of social media websites, namely Facebook.”


Louisiana

Weatherly v. Optimum Asset Management (La. App. 2005).
Lawyer's need to perform Internet research as part of the diligence, to uncover information the court found "reasonably ascertainable."

Maine

2013 Bill Text ME H.B. 838. Social Media Privacy in Education.

An educational institution may not: Disclosure for access. Require or cause a student or applicant to disclose, or request or suggest that a student or applicant disclose, the username, password or any other means for access, or provide access through the username, password or other means, to a social media account or personal e-mail account.”



Maryland


Griffin v. State (Court of Appeals of Maryland, April 28, 2011)

Authentication methods for an online profile:

Ask the creator if she indeed created the profile.

Search the computer of the person who allegedly created the profile and posting and examine the computer's internet history and hard drive to determine whether that computer was used to originate the social networking profile and posting in question.

Obtain information directly from the social networking website that links the establishment of the profile to the person who allegedly created it and also links the posting sought to be introduced to the person who initiated it.



Massachusetts

Clay Corp. v. Colter, 2012 Mass. Super. LEXIS 357.

“The Colters have claimed on their website many times that there were others fired from Clay for the same reasons, yet they have not produced a single shred of documentation to support that claim. They have deleted from the websites posts for other Clay employees who reported that Clay was extremely supportive of them in similar circumstances. Although it may very well be within their rights to delete such posts, those posts put the Colters on notice that there was a substantial likelihood that their assertions were false.”

Michigan

Tompkins v. Detroit Metro. Airport, 2012 WL 179320 (E.D. Mich. Jan. 17, 2012).

Defendant did not prove that plaintiff giving authorization to her Facebook was reasonably calculated to lead to the discovery of admissible evidence and that this request was overly broad.

Minnesota

Holter v. Wells Fargo & Co. (U.S. Dist. Minn., May 4, 2011)
“Plaintiff’s counsel shall review all of plaintiff’s social media content for the period of April 2005 (the date she alleges her problems with Wells Fargo began) to the present, and produce any content or communications that reveals or refers to: (1) any emotion, feeling or mental state, including but not limited to any reference of depression, anxiety or mental disability; (2) to any events that could reasonably be expected to produce a significant emotion, feeling, or mental state; (3) defendant, plaintiff’s employment at defendant or termination of employment from defendant; and (4) plaintiff’s search for employment following her termination of employment from defendant.”


Mississippi

“It is essential to educate attorneys about the potential ethical ramifications involved in their use of social media and to establish clear standards and guidelines for the profession to help prevent future ethical violations.”

Kathryn Kinnison Van Namen, *Facebook Facts and Twitter Tips—Prosecutors and Social Media: An Analysis of the Implications Associated with the Use of Social Media in the Prosecution Function* (Mississippi Law Journal Vol. 81:3).

Missouri

Johnson v. McCullough (Missouri Supreme Court 2010)
Attorneys have great responsibilities “[i]n light of advances in technology allowing greater access to information.” This case involved online research and jury selection.



Montana

Keller v. National Farmers Union Property & Casualty Co.,
No. CV 12-72-M-DLC-JCL (Dist. Court, D. Montana, Jan. 2,
2013).

The court denied a request for “a full printout of all social media website pages and all photographs posted thereon including, but not limited to, Facebook, MySpace, Twitter, LinkedIn, LiveJournal, Tagged, Meetup, myLife, Instagram and MeetMe from [date of accident] to the present.”

Nebraska

Multiple cases involving custody of children and contact between a parent and a child. See, e.g., State ex. Rel. Tyrell T. v. Arthur F., 2013 Neb. App. LEXIS 149; State v. Jerry S. (In re Damien S.), 2013 Neb. App. LEXIS 183.


Nevada

Thompson v. Autoliv ASP, Inc., 2012 WL 2342928 (D. Nev. 2012).

Vehicular product defect claim with substantial injuries; plaintiff was ordered to produce all Facebook and MySpace account data to defendant for review under a detailed procedure. No *in camera* review was ordered by the court.

New Hampshire

Ethics Committee Advisory Opinion #2012-13/05, “Social Media Contact with Witnesses in the Course of Litigation.”
“The Rules of Professional Conduct do not forbid use of social media to investigate a non-party witness. However, the lawyer must follow the same rules which would apply in other contexts, including the rules which impose duties of truthfulness, fairness, and respect for the rights of third parties.”



New Jersey

Carrino v. Muenzen (N.J. appellate decision 2010).

Court granted new trial to medical malpractice plaintiff after trial judge barred attorney from performing online research during jury selection.

New Mexico

State v. Loera, 2011 N.M. App. Unpub. LEXIS 251.


“We remain persuaded that Defendant did not establish that the Facebook or MySpace page was relevant to whether Defendant knew K.E. was eighteen at the time of the incidents. Further, the fact that K.E. denied it was hers made the page collateral evidence.”

New York

Fawcett v. Altieri (Supreme Court of New York, Richmond County, January 11, 2013)

“Information posted in open on social media accounts are freely discoverable and do not require court orders to disclose them.”

“In order to obtain a closed or private social media account by a court order for the subscriber to execute an authorization for their release, the adversary must show with some credible facts that the adversary subscriber has posted information or photographs that are relevant to the facts of the case at hand.”




North Carolina

State v. Packingham, 748 S.E.2d 146 (2013).

“The statute plainly involves defendant’s First Amendment rights as incorporated through the Fourteenth Amendment because it bans the freedom of speech and association via social media. A statute regulating the time, place and manner of expressive activity is content-neutral in that it does not forbid communication of a specific idea.”

North Dakota

North Dakota Rule of Civil Procedure 26(f)(4)(B)(iii).
“... with respect to electronically stored information, and if appropriate under the circumstances of the case, a reference to the preservation of such information, the media form, format, or procedures by which such information will be produced, the allocation of the costs of preservation, production, and, if necessary, restoration, of such information, the method for asserting or preserving claims of privilege or of protection of the information as trial-preparation materials if different from that provided in Rule 26 (b)(5), the method for asserting or preserving confidentiality and proprietary status, and any other matters addressed by the parties.”



Ohio

State v. Rossi, 2012-Ohio-2545 (2nd Dist., Montgomery Cty.)

MySpace post determined to be forged by key testimony from FBI and National White Collar Crime Center expert witnesses, showing difficult process to bar the admissibility of social media evidence in Ohio.

Oklahoma

12 Okl. St. § 3226(B)(5)(b) (related to e-discovery).

“If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party shall promptly return, sequester, or destroy the specified information and any copies the party has; shall not use or disclose the information until the claim is resolved; shall take reasonable steps to retrieve the information if the party has disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party shall preserve the information until the claim is resolved. This mechanism is procedural only and does not alter the standards governing whether the information is privileged or subject to protection as trial preparation material or whether such privilege or protection has been waived.”

Oregon

2013 Ore. HB 2654. An Act relating to compelled access to social media accounts.

“It is unlawful employment practice for an employer to: (a) Require or request an employee or an applicant for employment to disclose or to provide access through the employee’s or applicant’s user name and password, password or other means of authentication that provides access to a personal social media account...”

Pennsylvania

Brogan v. Rosenn, Jenkins & Greenwald, LLP (Lackawanna County, PA, April 22, 2013)

“A party seeking discovery of private social media information must demonstrate a threshold showing of relevance by articulating some facts, gleaned from the publicly accessible portions of the user’s social networking account, which suggest that pertinent information may be contained on the non-public portions of the member’s account.”

“A discovery request seeking carte blanche access to private social networking information is overly intrusive, would cause unreasonable embarrassment and burden in contravention of Pa.R.C.P. 4011(b), and is not properly tailored ‘with reasonable particularity’ as required by the Pennsylvania Rules of Civil Procedure.”

“For example, the defense in personal injury litigation has the right to demand production of photographs portraying an allegedly disabled claimant engaging in unrestricted physical activity, but is not entitled to personally rifle through every photo album or electronic folder of digital photographs that the claimant possesses in the hope that the defense may discover a relevant photograph.”

Rhode Island


Daniels Agrosiences, LLC v. Ball DPF, LLC (US District Court, Rhode Island, Sept. 20, 2013).

Social media usage is considered as a factor in establishing minimum contacts for jurisdictional purposes.

South Carolina

McKinney v. Pedery, No. 5165 (S.C. Ct. App. Aug. 14, 2013).


“We are not persuaded by Husband subsequently referring to [her] engagement ring as a “friendship ring” or by [Husband’s Purported Cohabitant] changing her relationship status from “engaged” to “in a relationship” immediately following Wife’s initiation of this action. Rather, this is evidence of Husband’s attempt to downplay their relationship and living arrangements, which we find unconvincing.”



South Dakota

South Dakota Rules of Professional Conduct, Rule 3.4.

“A lawyer shall not:... unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value...” Applicable to both social media and electronic discovery.



Tennessee


Barnes v. CUS Nashville, LLC, 2010 WL 2265668
(M.D. Tenn.).

In a personal injury case, Judge offered to “friend” the plaintiff on Facebook to review her account and disseminate relevant information to the parties involved.

Texas

In re Christus Health Southeast Tex. (Court of Appeals of Texas, Ninth District, Beaumont, March 28, 2013)

“While the Lowes are seeking damages for their mental anguish, and the statements the Lowes made about Arthur’s death are within the general scope of discovery, the Lowes did not establish that they had an expectation of privacy in their statements on social media sites. Nevertheless, a request without a time limit for posts is overly broad on its face.”



Utah


Black v. Hennig, 2012 UT App. 250, 286 P.3d 1256.

In a custody proceeding, the trial court erred in not allowing the mother to admit Facebook screenshots at trial; evidence regarding the friendship between the clinical psychologist who conducted the custody evaluation and the father's attorney was offered to show the psychologist's bias or motive to testify differently than would otherwise be the case.

Vermont

State v. Lawrence, 2013 VT 55.

The trial court properly denied defendant's motion for a new trial based on a post on the complainant's social media page stating that she was not really sexually assaulted, as an adverse witness had access to the page and the post itself did not include information tending to show that the complainant was the author.



Virginia

World Mission Soc'y Church of God (WMSCOG) v. Colon (Circuit Court of Fairfax County, Virginia, July 20, 2012)

“In June of 2011, defendants Michelle Colon and Tyler J. Newton began a series of purportedly defamatory attacks against WMSCOG. Newton allegedly created a Facebook group and YouTube videos for the purposes of attacking WMSCOG. Additionally, Newton operates an Internet website that criticizes WMSCOG.”

“WMSCOG predicates its request for a protective order entirely upon its concern that Newton will publish on the Website any discovery materials obtained.”

“Vague apprehensions with respect to potential publication are insufficient to demonstrate the requisite good cause necessary to issue a protective order.... Any annoyance or embarrassment WMSCOG suffers is directly related both to WMSCOG’s decision to institute the current action and the extensive scope of the allegations propounded against Newton.”

Washington

Failla v. FixtureOne Corp., 2013 Wash. App. LEXIS 2647.

“We do conclude that Schutz did not transact business in Washington for the purpose of the long-arm statute. In reaching this holding, we do not ignore the potential effect of the recent, revolutionary advances in communications, such as e-mail, video conferencing, social media and the Internet, on the analysis of jurisdiction. If Schutz and FixtureOne had opened a physical branch office here, the case for jurisdiction over them would be much stronger.”

West Virginia

State v. Dellinger, 225 W. Va. 736 (2010).

Amber Hyre, a juror in a West Virginia case in 2008, did not disclose that she was MySpace friends with the defendant, a police officer being tried on criminal charges. After the relationship came to light, a state appeals court threw out the defendant's conviction and ordered a new trial.

Wisconsin

State v. Lowe, 2013 Wisc. App. LEXIS 776.


“The trial court excluded the after-the-fact social media posts and limited cross-examination of the victim regarding post-allegation activity. We conclude that the trial court’s exclusion of the proffered after-the-fact material did not violate Lowe’s constitutional right to confront his accuser and present a defense because trial counsel was able to fully cross-examine the victim regarding her behavior and present a defense...”

Wyoming

Maier v. State, 273 P.3d 1084, 2012 WY 50 (Wyo. Supreme Court).

The court ruled that an exchange on Facebook was a sufficient factual basis to support a guilty plea as the appellant admitted to all of the elements of the crime other than [the victim's] physical helplessness, and on that point he provided the jury with sufficient testimony to convict.

Questions & Answers

- ▶ There is no doubt that social media and online resources have come to the forefront as tools to gather evidence in defending claims. Investigating these sites and utilizing the information should encompass every aspect of the litigation process from the date of loss through trial. Further, risk management and legal departments need to stay actively aware of all legal decisions as this area of the law rapidly adjusts to exponential advancements in technology.
- 


John T. Pion
24 Hour Emergency Response Line
412-600-0217
jpion@pionlaw.com

ALTERNATIVES TO LITIGATION: IS THERE A BETTER WAY?


Protective Insurance Company Symposium
Indianapolis, Indiana
August 24, 2015


- ▶ Depending on the specific facts of a case, there are several alternatives to traditional litigation available that can help minimize exposure, risk and ultimately the total amount paid to defend and resolve a claim.

ALTERNATIVES AVAILABLE


- ▶ Mediation – Formal and Informal
 - ▶ Binding Arbitration/Private Judges
 - ▶ Mini-Trials
 - ▶ High-Low Agreements
 - ▶ Bifurcation of Liability and Damages
 - ▶ Contribution Actions
- 

MEDIATION

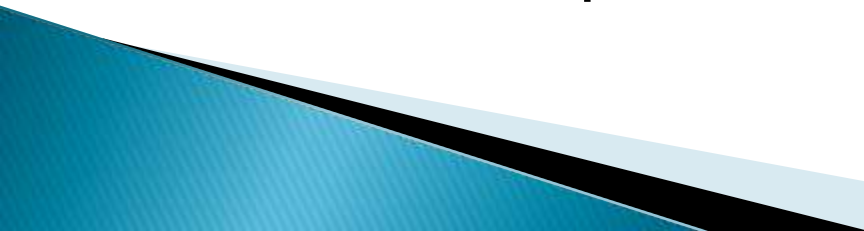
- ▶ Form of Alternative Dispute Resolution through use of neutral third party that facilitates rather than directs the process
 - ▶ Relatively inexpensive, swift and simple
 - ▶ Allows responsibility and authority for coming to agreement to remain with the people who are handling or have the conflict
 - ▶ Allows the parties to retain control of process rather than handing the decision making to a jury or judge
 - ▶ Process is confidential
- 


- ▶ Most commonly used Alternative Litigation Strategy
 - ▶ Developing in popularity over the years and often times required early on in Federal Court Claims
- 


ADVANTAGES

- ▶ Brings all interested parties together “in the same room” for the purposes of attempting resolution
 - ▶ Attendance alone shows willingness of both parties to achieve resolution
 - ▶ Mediator provides the parties with an opportunity to hear and learn about the strengths and weaknesses of their liability and damage positions from a neutral party
 - ▶ Allows for structured settlements to be utilized for long term benefits
- 


EXAMPLE


- ▶ Driver of insured tractor trailer becomes lost due to poor directions provided by employer company
 - ▶ Insured driver attempts to turn around at the intersection of U.S. Highway 6 and Main St. in order to head the opposite direction
 - ▶ Insured driver admits to police that is what he was doing
 - ▶ Alternative route available to driver that would not have required backing onto the highway
- 

- ▶ During the course of turning around trailer is perpendicular to U.S. Highway 6, blocking both lanes of travel
 - ▶ Visibility conditions were dark with some street light illumination
 - ▶ Speed limit on U.S. Highway 6 in both directions is 55 mph
- 

- ▶ As the trailer is blocking both directions of travel on U.S. Highway 6, 73 year old Plaintiff/decedent, driving a 2003 Chevy S-10 pickup, returning home after attending church, strikes insured driver's trailer
 - ▶ Plaintiff/decedent died at the scene
 - ▶ Survived by a daughter, with whom Plaintiff/decedent was close, pursues Wrongful Death and Survival Claim
- 


MEDIATION

- ▶ Allowed for the use of expert reports at mediation to shape the issues – through a third party neutral
 - ▶ Liability of truck driver clear; however, there were several contested issues as to Plaintiff/decedent's comparative negligence
- 

- ▶ Visibility and conspicuity of the tractor and trailer at issue
 - ▶ The level of Plaintiff/decedent's attentiveness and reaction at issue
 - ▶ Question as to whether Plaintiff/decedent was using headlights
 - ▶ Is there enough evidence at trial for an award of conscious pain and suffering?
 - ▶ Issues with future economic damages due to age and health of Plaintiff/decedent
- 

Defendant's expert provided that the trailer was properly fitted with retro-reflective tape - which should have allowed the trailer to be visible to Plaintiff/decedent




- ▶ Expert also was able to support insured driver's contention that the Plaintiff/decedent's headlights were not activated
 - ▶ Switch was damaged in crash and therefore inconclusive as to whether headlights were illuminated
 - ▶ Expert conducted inspection – no hot shock deformation indicative of headlights not being activated
- 



- ▶ Expert's scene inspection also found no evidence of skid or gouge marks allowing expert to opine that Plaintiff/decendent never made any evasive maneuvers to avoid the trailer therefore was not operating the vehicle attentively





- ▶ Also able to raise issues concerning Plaintiff/decedent's expert economic report and methodology. Specifically, the failure to take into consideration deductions for personal maintenance
 - ▶ Raised issues concerning conscious pain and suffering based on coroner's report
 - ▶ Raised issues concerning Plaintiff/decedent's medical conditions due to lifetime of heavy smoking and prior medical conditions
- 

- ▶ Introduction of these issues through third party neutral allows parties to discuss sensitive topics with less risk of parties becoming “entrenched” in their positions or becoming overly emotional and less rational

- ▶ Based on issues raised by Defendants through neutral third party – case resolved for significantly less than what was demanded


INFORMAL MEDIATION

- ▶ Informal meeting involving counsel, a representative from the trucking company and Plaintiff and/or Plaintiff's representatives
 - ▶ No formal neutral "mediator" but the parties understand that the individuals with full authority are present and willing to talk
 - ▶ Good strategy to employ early on in litigation
- 

- ▶ Nothing to lose – if case does not settle, allows for a dialogue to get started and for Defendant to assess Plaintiff and/or Plaintiff's representatives in person
 - ▶ Often times will result in obtaining critical information from Plaintiff and/or Plaintiff's representatives early on a case
 - ▶ Shows willingness of trucking company to want to resolve claim amicably without potentially emotional, protracted litigation
- 

UNIQUE SITUATIONS

- ▶ It is important to recognize and understand cultural differences.


- ▶ The accident presented unique situations regarding:
 - Accident investigation
 - Contact with family representatives
 - The Amish culture and belief system
 - Valuation
- 

On the evening of Sunday, November 3, 2013, a rear-end collision occurred between a tractor-trailer and a buggy. A couple was traveling in the buggy. One occupant was killed in the accident.

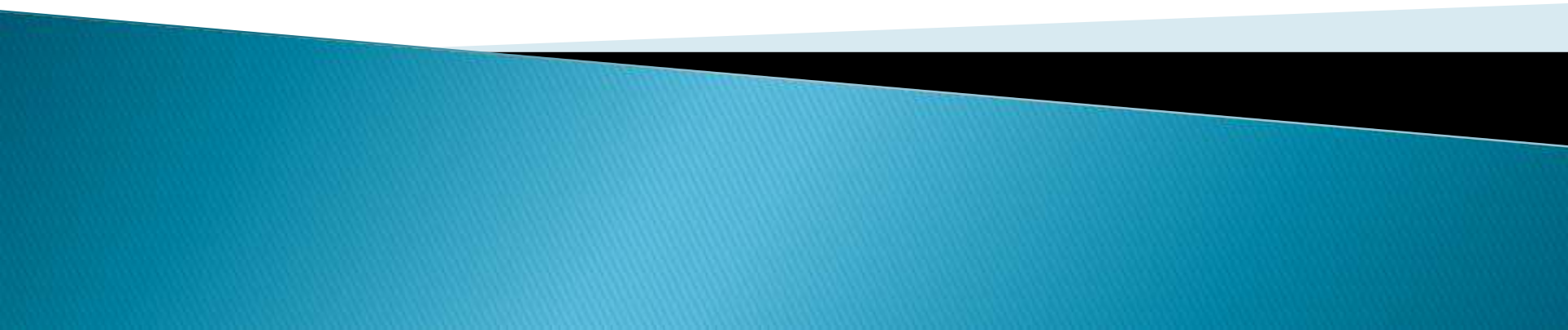


- ▶ Contact was made through church elders and a meeting was held with all family members, church elders and neighbors.

 - ▶ The meeting was lengthy and emotional. We had full buy-in and support of our client. The meeting was attended by:
 - Company owner
 - Driver
 - Safety Director
 - Counsel

 - ▶ On the evening of December 24, 2013, the matter was fully resolved.
- 

BINDING ARBITRATION WITH HIGH/LOW AGREEMENT



BINDING ARBITRATION WITH HIGH/LOW AGREEMENT



The Accident

This accident took place on Interstate 81 southbound, just a few hundred feet south of where another major interstate, I-78 westbound, junctions and the two major roads combine to make it a four lane super highway. Plaintiff, who was traveling from NYC to NC overnight, decided to park on the right shoulder at the merge point and sleep for a couple hours. Our tractor trailer was traveling South on I-81 and just at that point, suffered a blowout of the steer tire causing him to veer right and strike Plaintiff's "parked vehicle."

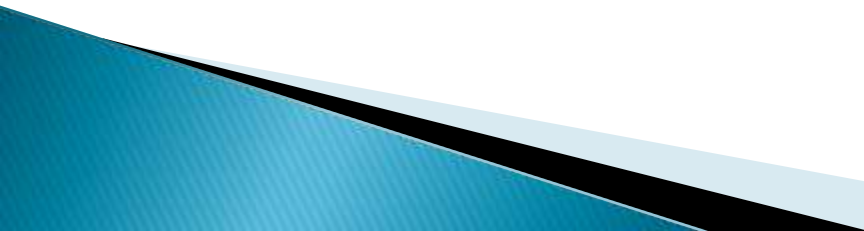


- ▶ Plaintiff has asserted a punitive damages claim
- ▶ Issue with spoliation due to the disappearance of the steer tire and rim on the tractor trailer that failed


PHILADELPHIA COUNTY VENUE

Despite Plaintiff residing in NY and/or NC, Defendant domiciled in Pittsburgh and accident occurring in Lebanon County, Plaintiff chose Philadelphia as the Venue. Despite efforts to remove and change venue, case remained in this Plaintiff oriented County.


VENUE AND “LOGISTICS”

- ▶ Plaintiff oriented venue
 - ▶ Plaintiff’s counsel from Philadelphia
 - ▶ Witnesses and parties from multiple locations
 - ▶ Multiple legal and factual issues; many experts
 - ▶ No date certain for Trial (month long jury pool)
 - ▶ Mediation tried but failed—high demand and low offer
 - ▶ 3 day Arbitration rather than a 2 week trial
 - ▶ All these factors pointed to an alternative way of litigating this case
- 


CHOOSING AN ARBITRATOR

- ▶ Highly reputable and familiar with complicated issues (former Phila. County judge)
 - ▶ Agreeable to both sides
 - ▶ Willing to make liability and damage decisions and to make pre-arbitration decisions on motions and other evidentiary issues.
- 


AGREEING TO PARAMETERS

- ▶ I wanted to confirm our understanding that we have agreed to pursue this case by private arbitration (Arbitrator Name) and further that we have agreed to a high/low agreement of \$175,000.00 and \$825,000.00.
 - ▶ We have further agreed that we will not advise the Arbitrator that a high-low agreement is in place but will wait until after he has rendered his decision to mold the decision accordingly.
 - ▶ We have further agreed that the arbitration will include issues on both liability and damages.
 - ▶ By separate correspondence we will provide you with a list of those witnesses we intend to call and I understand that you will do likewise.
 - ▶ We will have some additional discussions as to whether some of the expert witnesses may be introduced by report only and others may either appear live or via videotape deposition.
- 


AGREEING TO PARAMETERS (cont.)

- ▶ Payment under the terms of the high/low agreement will be made once an award is entered. In the event of a defense verdict or a verdict of less than \$175,000.00, Defendant will pay \$175,000.00.
 - ▶ In the event of a verdict in excess of \$825,000.00, your client will accept the amount of \$825,000.00, inclusive of any costs, fees, expenses, interest or delay damages.
 - ▶ In the event that there is an award between \$175,000.00 and \$825,000.00, that amount will be paid, inclusive of fees, costs, expenses, interest or delay damages.
 - ▶ Defendant will make payment to you and your client within 30 days of the receipt of the award.
 - ▶ Both parties agree that the award of the arbitrator is binding and that any appeal rights have been waived.
- 

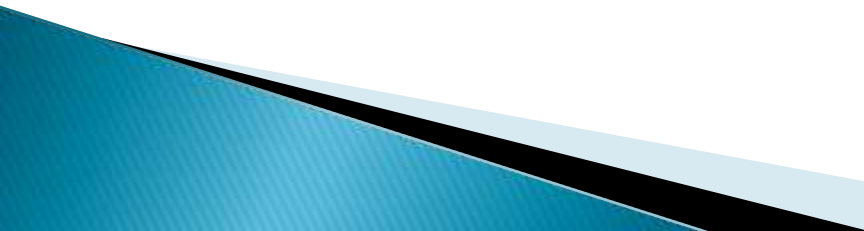
ARBITRATION AWARD AND DECISION

- ▶ In favor of Plaintiffs and against Defendant
 - ▶ Plaintiff Husband \$175,000
 - ▶ Plaintiff wife (consortium) \$5,000
 - ▶ Client would have paid up to \$300,000
 - ▶ Tremendous savings in legal fees and expenses
 - ▶ Minimized and controlled risk in Plaintiff oriented venue
- 

MINI-TRIALS

- ▶ Mini-trials are a unique method of alternative dispute resolution
 - ▶ It is a settlement process in which the parties present highly summarized versions of their respective cases to a panel.
 - ▶ Parties not bound to an outcome
- 

PLAINTIFF'S BACKGROUND

- ▶ Husband/father was a 51 year old high school principal earning \$110,000 per year
 - ▶ Wife/mother was a 58 year old legal secretary earning \$45,000 per year
 - ▶ Daughter is a 22 year old college graduate who is an only child. Employed as a school teacher and wanted to follow her father's career path. Wrongful death damages include the value of services such as guidance, tutelage and moral upbringing that her parents would have provided
- 

Multiple vehicle accident involving 25 vehicles that resulted from a snow squall that caused icy conditions








MULTIPLE CONTESTED LEGAL ISSUES

▶ Serious Liability dispute

- Both Plaintiff–husband and Defendant–driver were alleged to have been driving too fast for conditions and failed to control their vehicles
 - Witnesses say Plaintiff–driver was going 50–60 mph when he hit the back of a tanker truck
 - ECM from Defendant’s tractor shows Defendant’s speed prior to braking at 48 mph
 - Defendant had a forklift on the rear of a trailer that allegedly impacted braking capacity
 - Accident occurred during a white–out
 - Father was joined as an additional defendant on mother’s claim
- 

▶ Serious dispute over punitive damages claim


- Plaintiffs allege recklessness on the driver/company's failure to train regarding operation of the tractor trailer unit with a forklift on the back; no CB radio; company's failure to monitor the speed of its drivers; failure to train drivers for adverse weather conditions.
- Defendant's position is that the claims are irrelevant or only rise to the level of negligence. Furthermore, actions of the defendant driver were the same as the Plaintiff-husband.

▶ Serious dispute as to Plaintiffs' expert's projected future economic losses

- Plaintiffs' expert says husband's economic loss is \$2,900,000 and wife's economic is \$750,000.
- Our economic expert did not provide a "floor" for either Plaintiff. Instead our expert said Plaintiffs' expert used the wrong percentage for personal maintenance, overinflated the Plaintiffs' household services and used the wrong work life expectancy.

▶ Serious dispute over conscious pain and suffering

- Plaintiffs' biomechanical expert says the Duffys survived the initial impact and that their death was caused by our over ride of the Plaintiffs' vehicle.
- Our biomechanical said that there were sufficient forces from the frontal impact to cause death such that the Plaintiffs died before Defendant's impact.
- There were no lay witnesses to support a claim for conscious pain and suffering.
- At best Plaintiffs had a few seconds of conscious pain and suffering.


- ▶ Mediation had been attempted but failed partly due to the contested and disputed legal issues
 - ▶ Mini trial takes place after discovery is substantially completed
 - ▶ Mini trial provided an opportunity for the parties to file and argue Motions in Limine and have those pretrial legal issues resolved by a Judge
 - ▶ Helped to realistically frame parties' perspectives
 - ▶ Jury is not told that the verdict will only be advisable in nature
- 

- ▶ After rulings on Motions in Limine and before a verdict was rendered, the case resolved, for much less than what was demanded
 - Plaintiffs needed to tell their story to a jury. After Plaintiff presented their side they were ready to settle.

BIFURCATION OF LIABILITY AND DAMAGES



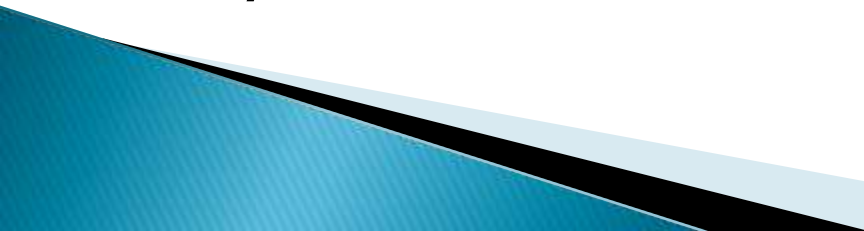
OFTEN USEFUL WHEN:

- ▶ Questionable liability, high exposure and/or complex damages
 - ▶ Allows parties to save on expenses by only having to litigate damages portion of case after a finding of negligence against Defendants by Jury
- 


Case can be bifurcated by agreement of the parties or by filing Motion to Bifurcate with the court

- ▶ Bifurcation is generally favorable to a defendant on the basis that by not introducing evidence of Plaintiff's damages, the Jury can focus on the liability questions presented without the potential for sympathy and prejudice


FACTS

- ▶ Plaintiff fails to stop at stop sign and drives directly into the side fuel tank of tractor trailer with the right of way. As a result of the incident, a fire ensues and Plaintiff dies.
 - ▶ Plaintiff's expert offers expert opinion that the case was an override accident despite overwhelming evidence to the contrary
 - ▶ Plaintiff's expert's report is deemed sufficient by the court to defeat summary judgment
- 



- ▶ At trial, Jury does not hear the gruesome details of Plaintiff's death or the testimony of her family concerning their loss
 - ▶ Jury, focusing solely on liability, finds in favor of Defendant
- 

CONTRIBUTION ACTIONS

- ▶ If favorable liability facts exist with respect to a co or additional defendants' liability, it can be advantageous from both a cost and recovery standpoint to resolve the underlying claim with the Plaintiff and pursue the co and/or additional defendants for contribution.
- 

EXAMPLE NO. 1










THE DILEMMA


- ▶ You are defending the bullet tractor-trailer in the above photographed four vehicle accident which occurred in a thick fog bank in the middle of the night:
- ▶ Three people are dead and the State Police are criminally prosecuting your driver;
- ▶ Tractor-trailer one significantly slowed or possibly may have even stopped in the right travel lane due to extremely impaired visibility resulting from the fog;
- ▶ Tractor-trailer two impacts the rear of tractor-trailer one pushing it across the left lane and comes to rest blocking the right lane—effectively closing the highway down in the middle of the fog bank;
- ▶ Somehow a passenger car maneuvers into the right lane behind tractor-trailer two and ahead of tractor-trailer three—the bullet truck;
- ▶ Tractor-trailer three impacts the passenger car and the rear of tractor-trailer two and erupts into flames.

THE SOLUTION

- ▶ The Aggressive Empathetic approach:
 - 1. Aggressively and consistently reaching out to the families of the deceased ultimately scheduling mediations after procuring all relevant materials through informal discovery
 - Including providing mothers of two of the decedents' children rent money and money to buy the children Christmas presents as an advance towards settlement;
 - 2. Aggressively pushing trucking company one and trucking company two to meaningfully participate in discussions regarding resolution with the decedents' families;
 - 3. Document invitations and the theories of liability against trucking company one and two;
 - 4. Settle each of the three wrongful death claims with general releases;

5. Make demands on trucking company one and two to contribute their share;
 6. File a contribution action against trucking company one and two and their respective drivers;
 7. Recover almost half of the settlement payments made.
- 

EXAMPLE NO. 2

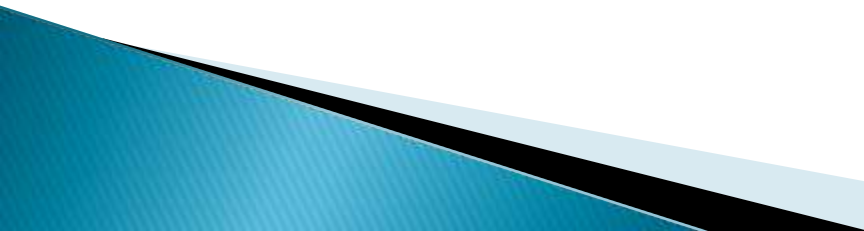
- ▶ Lawsuit arising from an accident involving an insured tractor-trailer left turn. Plaintiff claimed defendant turned in front of the van she was a passenger in. Defendant argued that the driver of the van, plaintiff's son, did not do enough to avoid the accident.
- 

- ▶ Driver falsified 30 days of logs which were disclosed through discovery.

- ▶ Badly injured and disabled plaintiff that would have garnished significant emotional sympathy with a jury

Photo of van



- ▶ By resolving that underlying claim, Defendant/Insured can then pursue other negligent parties for the amount Defendant/Insured paid to the injured party
 - ▶ Can assert at trial that, Defendant/Insured admitted they were negligent and did the right thing by resolving the claim without the injured party having to endure an emotional trial
 - ▶ Now the jury's job is to apportion the amount that the other negligent party should contribute to the underlying settlement
- 

PRECURSORS TO RECOVERY

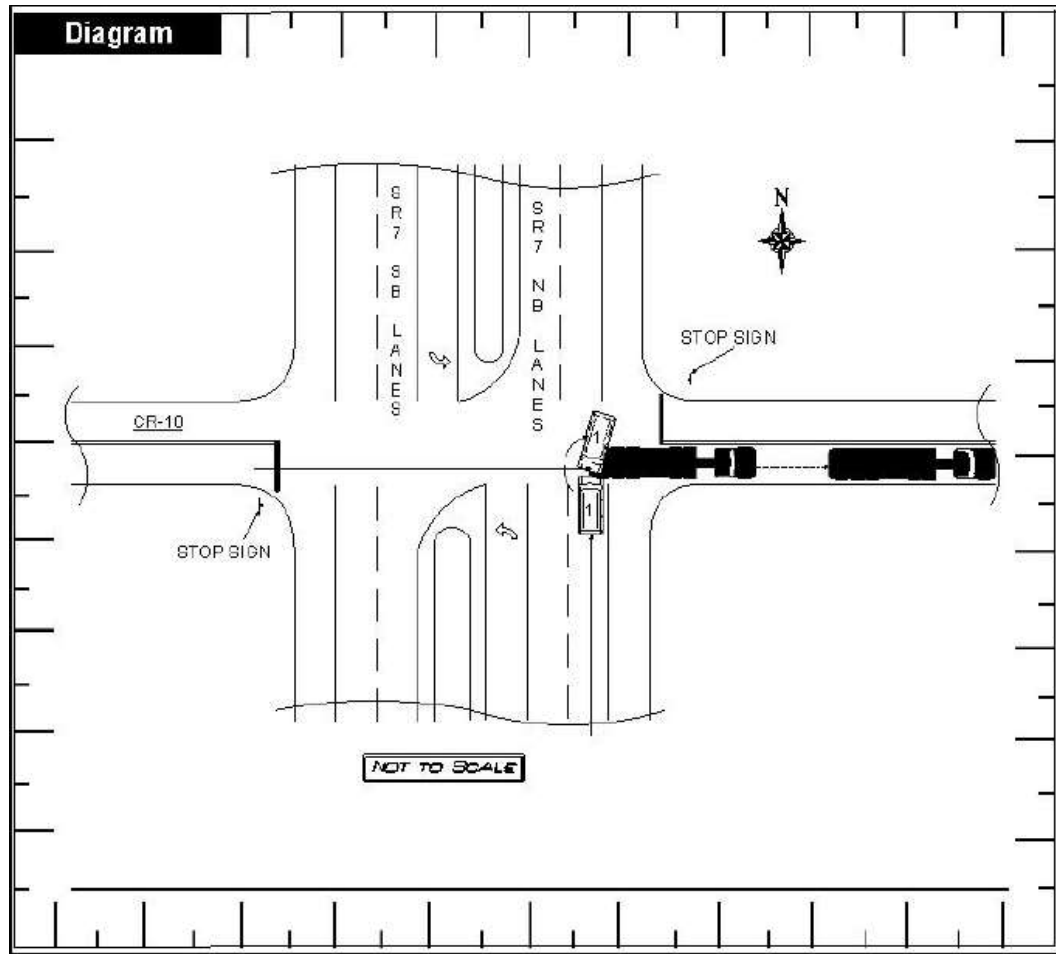
Settling party must admit it was at least 1% negligent

Settlement must be “fair and reasonable”


Often the non-settling parties will stipulate settlement was fair and reasonable

If not, may have to prove the value of the injured parties damages claim. If taken by non-settling party, this is a risky position as it paints the non-settling party in an even more unfavorable light

POLICE DIAGRAM



- ▶ Based on the forensic crash data available, an expert was retained that was able to provide an expert report that detailed the negligence of co-Defendant

- ▶ Van was traveling at 45 to 50 plus miles per hour pre-impact
 - ▶ Little to no significant braking by the van
 - ▶ Driver of van would have avoided the accident had the brakes been applied 1.0 second prior to when they were or if they had been applied more aggressively
 - ▶ Ample time and distance for the driver of the van to have avoided the collision
- 

- ▶ The below Jury Interrogatories assisted the Jury in the contribution action by simplifying the issues.

Interrogatories

1. Was negligent in causing the automobile collision?

CIRCLE YOUR ANSWER IN INK

Yes

or

No

Date: 10/3/2012

me &

2. What percentage of negligence is attributable to

? 65 %

What percentage of negligence is attributable to

? 35 %

TOTAL 100 %

- ▶ Non-Settling Defendant found 65% at fault.
- ▶ Settling Defendant is therefore entitled to recover 65% of the underlying settlement it paid from the Non-Settling Defendant