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Social Networking: A Source of Discoverable Information

Social media is in widespread use across the world and, as a result, people today continually place more and more information and content in the public domain. While the majority of this information goes unnoticed outside a user's circle of friends or network, sometimes this information or content may be of great consequence and highly relevant to any litigation involving that person.

This is, of course, not a unique or earth-shattering revelation. Social media sites and their users are aware that the content and materials published on their profiles can be read by others. To protect their users, social media sites utilize password protection limiting access to user profiles unless you are a "friend" of the user. However, a recent decision in Pennsylvania held that a social media user's profile is discoverable if the information contained therein is shown to be relevant to litigation.

In the case of *McMillen v. Hummingbird Speedway, Inc., et al.*, the Jefferson County Court of Common Pleas held that where a person's social networking sites contain information that may be relevant to the claims or defenses presented in a lawsuit, access to those sites during discovery should be freely granted.

The *McMillen* case involved a car accident during a cool down lap following a July 7, 2007, stock car race. Plaintiff alleged he sustained substantial injuries, including possible permanent impairment, loss and impairment of general health, strength, and vitality, and inability to enjoy the pleasures of life. To ascertain the validity of Plaintiff's injury claims, Defendant Hummingbird Speedway, Inc. inquired if the Plaintiff belonged to any social networking sites and, if so, requested the name of the site, Plaintiff's user name, login, and password. Plaintiff responded that he belonged to Facebook and MySpace but withheld his login and password information as confidential. Defendant Hummingbird Speedway, Inc. filed a motion to compel this

information on the basis that such information was not confidential and did not fall within any recognized privilege under Pennsylvania law. The *McMillen* Court granted the motion referencing the broad discovery rules of Pennsylvania and the lack of any recognized privilege under Pennsylvania law protecting this type of information.

Citing Facebook's Privacy Policy and MySpace's Terms, the Court emphasized that the social networking sites advise their users that their posted information may be disclosed and, thus, users cannot reasonably expect any information posted in their profile to remain confidential. (As this issue becomes more and more common, most social media sites have developed their own procedures for handling subpoenas for user data. Facebook, for example, describes how it handles subpoenas: <http://www.facebook.com/help/?safety=law>.)

Further, the Court stated that the overriding goal of the search for truth in a civil trial should prevail in favor of the disclosure of relevant information that may not otherwise have been known.

Utilizing the *McMillen* opinion, a defendant should be able to obtain access to the social media profiles of a plaintiff, provided the profile's likely potential to contain relevant information. The approach applied in *McMillen* and referenced by the Court was to access the public portion of the plaintiff's social media profile to establish a basis for further inquiry into the private portions of their social media profile. This approach, coupled with pointed discovery requests, offers defendants a new avenue for investigating plaintiffs.

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If you have any questions or comments regarding this information, or would like to discuss the information further, please contact Gregory C. Michaels at 412-392-5355 or send an e-mail to gmichaels@dmclaw.com.