South Carolina Bar
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2018 SC BAR CONVENTION

Torts & Insurance Practices Section/Young Lawyers Division

"Litigation Updates: Role of Insurance Carriers and E-Discovery"

Friday, January 19

SC Supreme Court Commission on CLE Course No. 180802

South Carolina Bar
Continuing Legal Education Division

2018 SC BAR CONVENTION

Torts & Insurance Practices Section/Young Lawyers Division

Friday, January 19

What is the Insurance Carrier's Role in Litigation? (Panel Discussion)

E. Glenn Elliott
Phillip W. Segui, Jr.
Ashley B. Stratton
Moderator: Amanda M. Blundy

2018 SC BAR CONVENTION

Torts & Insurance Practices
January 19, 2018

Speakers: Shelley Montague, Phillip Segui, and Glenn Elliott
Moderator: Amanda Blundy

Ethical and Practical Issues Related to an Insurance Carrier's Role in Litigation

I. PRE-LITIGATION OR EARLY IN LITIGATION

- Insurance carrier's obligation to issue Reservation of Rights letter to its insureds in litigation, as discussed in detail in *Harleysville Group Insurance v. Heritage Communities*, et al., 420 S.C. 321, 803 S.E.2d 288 (2017).
    - Declaratory judgment action filed by Harleysville
    - South Carolina initially issued its opinion in January of 2017, but a new opinion was refiled on July 26, 2017
    - Background of underlying cases
        - Two separate construction defect cases brought by Riverwalk at Arrowhead Country Club Horizontal Property Regime and Magnolia North Horizontal Property Regime
        - Harleysville provided a defense for its insureds, the corporate entities that developed and constructed the condominium complexes, under Reservation of Rights in both of the underlying lawsuits
        - Magnolia North verdict: $6.5 million actual and $2 million punitive
        - Riverwalk verdict: $4.25 million actual, $250,000 punitive for POA, $250,000 loss of use for class action, and $750,000 punitive for class action
    - Findings by Special Referee
        - Harleysville could not contest coverage because RORs were insufficient

- It was too speculative to attempt to allocate general verdict between covered and non-covered damages, so Harleysville had to indemnify for entire amount of actual damages

    - Although Harleysville's indemnity obligations were limited by its time on risk

- Both sides appealed, and appeal was taken up by the South Carolina Supreme Court

- Findings by South Carolina Supreme Court

    - Court mostly upheld Special Referee's findings

    - Of note, in upholding the Special Referee, the Court created an exception to the general rule that a third party has no basis to assert inadequacies in an insurer's reservation of rights to an insured

        - The exception seems to be predicated upon the unique circumstances of this case in that the insured was defunct

        - "However, based on the special circumstances in this case, we conclude the Special Referee did not err in allowing the POAs to stand in the shoes of Harleysville's insured to challenge the adequacy of the reservation of rights letters."

            - *Harleysville*, 420 S.C. at 337, 803 S.E.2d at 297.

    - The Court stated that "it is axiomatic that an insured must be provided with sufficient information to understand the reasons the insurer believes the policy may not provide coverage. We agree with the Special Referee that generic denials of coverage coupled with furnishing insured with a verbatim recitation of all or most of the policy provisions (through a cut-and-paste method) is not sufficient."

        - *Harleysville*, 420 S.C. at 337-338, 803 S.E.2d at 297.

    - The Court points out that first ROR not sent until 6 months after lawsuit filed

        - But declines to further comment because parties did not take issue with the timing of the ROR's

    - Each ROR had nine to ten pages of cut-and-paste policy excerpts, with no discussion as to reasons for relying on the provisions

- RORs failed to specify particular ground upon which Harleysville might contest coverage

- Court specifically noted that ROR did not advise insured of need for allocation of damages between covered and non-covered losses

    - Court indicated that because insurer typically has right to control litigation and is in best position to see to it that the damages are allocated, other courts have found that where an insurer defends under a ROR, an insurer has a duty to inform the insured of the need for an allocated verdict as to covered versus non-covered damages

- RORs also inadequate because they did not reference possible conflict of interest or carrier's intent to pursue a DJ action following any adverse jury verdict

- Of note: the Court found that the RORs did adequately reserve the carrier's rights to dispute coverage for punitive damages, and therefore the Court allowed Harleysville to contest coverage for the punitive damages awarded against its insureds

    - But the Court disagreed with Harleysville's coverage arguments, and found that the punitive damages were covered because the policies' language did not unambiguously exclude punitive damages

II. MEDIATION

- Compliance with South Carolina ADR Rules

Rule 6(b): Attendance:

The following persons shall physically attend a mediation settlement conference unless otherwise agreed to by the mediator and all parties or as ordered or approved by the Chief Judge for Administrative Purposes of the circuit:

(1) The mediator;

(2) All individual parties; or an officer, director or employee having full authority to settle the claim for a corporate party; or in the case of a governmental agency, a representative of that agency with full authority to negotiate on behalf of the agency and recommend a settlement to the appropriate decision-making body of the agency;

(3) The party's counsel of record, if any; and

(4) For any insured party against whom a claim is made, a representative of the

insurance carrier who is not the carrier's outside counsel and who has full authority to settle the claim.

- If a party fails to comply with ADR Rule 6(b), a court can award sanctions under ADR Rule 10(b)

  Rule 10(b) Sanctions:

  If any person or entity subject to the ADR Rules violates any provision of the ADR rules without good cause, the court may, on its own motion or motion by any party, impose upon that party, person or entity, any lawful sanctions, including, but not limited to, the payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference; contempt; and any other sanction authorized by Rule 37(b), SCRCP.

- Meaning of a representative of the insurance carrier is a subject of debate

  - If the representative is not educated on the case and the applicable law, a court could find that the representative's lack of knowledge as the basis for awarding sanctions.

- Meaning of "full authority" is not clear

II. AT TRIAL

- Insurance carrier may move to intervene at trial in order to request for the court to have the verdict allocated between covered and uncovered damages and/or claims

- Language in *Harleysville v. Heritage Communities*
  "Importantly, however, none of the reservation letters advised Heritage of the need for allocation of damages between covered and non-covered losses…" 803 S.E.2d 288 at 299
  "And in no way did the letters inform the insureds that a conflict of interest may have existed or that they should protect their interests by requesting an appropriate verdict." 803 S.E.2d 288 at 300

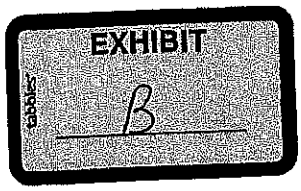
- Potential challenges with carrier's motion to intervene: Defense lawyer for the carrier's insured is put in a difficult ethical and business situation in responding to the motion

  - Certain obligations imposed upon the defense counsel as part of the "tripartite relationship"

  - Defense counsel hired by carrier should not be involved in coverage disputes

- If the court denies the motion, the carrier may appeal, which could stay the litigation

- If the court grants the motion, it could complicate the process for the jury



STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF ALLENDALE	
David Gilyard,	CASE NO.: 2014-CP-03-00269
Plaintiff,	
vs.	
Riley Forest Products, LLC, Christina, Riley, d/b/a Riley Express 1, Isaiah Riley d/b/a Riley Express 2, Riley and Sons Trucking, John Doe, Tidewater Equipment Company, and Tigercat Industries, Inc.,	**ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS**
Defendants.	

This matter came before the Court upon the motion of Plaintiff seeking an Order sanctioning Defendant Tidewater Equipment Company ("Tidewater") for failing to properly and meaningfully attend and participate in the mediation of this matter, pursuant to the Supreme Court's standing order to conduct mediation, Rules 6(b) and 10(b), SCADRR, and Rule 37(b), SCRCP. The Court heard oral argument on Plaintiff's motion on March 27, 2017 at the Allendale County Courthouse. Plaintiff was represented by [redacted] and [redacted]. Tidewater was represented by [redacted]. After reviewing written submissions of the parties and hearing oral argument, the court hereby orders as follows.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff filed this lawsuit on or about December 12, 2014. Plaintiff alleges he was struck in the head by a Tigercat 234 log loader, manufactured by Tigercat Industries, Inc. ("Tigercat") and sold by Tidewater to Riley Forest Products, LLC ("Riley"), resulting in an

alleged brain injury. Plaintiff's Complaint asserts product liability causes of action against Tigercat and Tidewater for allegedly designing, manufacturing, and/or selling the defective and unreasonably dangerous log loader that injured Plaintiff. Various depositions have been taken, including the depositions of Plaintiff's experts. According to Plaintiff's experts, Plaintiff's past and future economic damages exceed $2,500,000. Mediation was scheduled by the parties for February 1, 2017, with John Tiller the agreed-upon mediator.

Tidewater is insured by [redacted]. Prior to mediation, [redacted], the adjuster for [redacted], sent an email to [redacted] regarding this lawsuit and including a settlement offer of $500 as to the claims against Tidewater. [redacted] replied to [redacted] email on January 3, 2017. In his response, [redacted] outlined the various theories of liability against Tidewater, noted the extent of damages alleged by Plaintiff, and asked [redacted] to re-evaluate [redacted] position prior to mediation and "come in good faith with significant authority" so the parties could explore settlement possibilities at mediation. Tidewater's attorney, [redacted], was copied on the letter. It appears no response to [redacted] letter was made by [redacted], [redacted], or counsel for Tidewater.

The parties proceeded to mediation on February 1, 2017. The only representative to attend mediation for Tidewater was its attorney, [redacted]. Neither a corporate representative nor insurance adjuster attended mediation on behalf of Tidewater. As a result of mediation, Plaintiff reached a settlement with Riley Forest Products, LLC and its insurer, but no settlement was reached as to either Tigercat or Tidewater. Plaintiff filed the instant motion for sanctions against Tidewater on February 16, 2017.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court finds as follows:

1. This action is subject to the Supreme Court's November 12, 2015 standing order to conduct mediation.

2. As to Tidewater, Rule 6(b), SCADRR, expressly required the physical attendance at mediation of the following individuals: (1) Tidewater's attorney, (2) a corporate representative of Tidewater with full authority to settle the claim, and (3) a representative of Tidewater's insurance carrier who is not the carrier's outside counsel and who has full authority to settle the claim.

3. Rule 10(b), SCADRR, provides that the Court may impose sanctions upon any party, person, or entity who violates the ADR Rules without good cause, including but not limited to, the payment of attorney's fees, mediator's fees, and expenses incurred by persons attending the conference, contempt of court, and any other sanctions authorized by Rule 37(b), SCRCP.

4. Rule 37(b), SCRCP, provides that the Court may issue sanctions due to a party's failure to obey a court order, including but not limited to, issuing an order designating certain facts to be taken as true for purposes of the action, refusing a party's ability to support or oppose designated facts, claims or defenses, prohibiting a party from introducing designated matters into evidence, striking a party's pleadings, dismissing the action, or entering judgment against the disobedient party.

5. Neither a corporate representative nor insurance adjuster attended the February 1, 2017 mediation on behalf of Tidewater, and there was no good cause for Tidewater's failure to comply with the ADR Rules in this regard.

6. Without the proper representatives at mediation with authority to negotiate this matter, Tidewater was unable to properly and meaningfully participate in the mediation process.

THE COURT'S ORDER

Based upon these findings of fact and conclusions of law, the Court hereby orders as follows:

1. The parties are ordered to return to a second mediation with [redacted] no later than April 15, 2017.

2. Tidewater and/or [redacted] is ordered to pay for all costs associated with the second mediation, including the mediator's fee, reasonable attorney's fees for [redacted], [redacted], and [redacted] (counsel for Tigercat), and all travel expenses incurred by the attorneys, parties, corporate representatives, and insurance representatives to attend the second mediation.

3. Tidewater is ordered to comply with Rule 6(b), SCADRR, and have the following persons physically present at the second mediation: (1) Tidewater's attorney, (2) a corporate representative of Tidewater with full authority to settle the claim, and (3) representatives of Tidewater's insurance carriers who are not the carrier's outside counsel and who have full authority to settle the claim without having to make any phone calls to consult or get permission or approval from another person or entity that is not physically present at the mediation conference.

4. Counsel for Tidewater is ordered to identify, prior to the second mediation, the identities of the corporate representative(s) and insurance representative(s) that will physically attend the second mediation on behalf of Tidewater, and certify to the mediator and parties that such individuals will have full authority to settle the case, as required by the ADR Rules and ordered above. "Full authority" in this context means that such individuals must be empowered with the decision to offer a settlement sum up to the existing demand of the Plaintiff or the policy limits of coverage, whichever is less.

5. The matter of contempt of court, amount of attorney's fees, and other potential sanctions, including but not limited to striking Tidewater's Answer to Plaintiff's Complaint, shall be left open until after the second mediation is completed, so the Court can determine if the parties have complied with the ADR Rules and this order, and participated in the mediation process in good faith. If necessary, the Court will hold a hearing following the second mediation to hear from the parties on these matters and evaluate the reasonableness of attorney's fees incurred with the second mediation.

IT IS SO ORDERED.

_____
The Honorable Perry M. Buckner, III
Judge, Fourteenth Judicial Circuit

_____, 2017

_____, South Carolina

Allendale Common Pleas

Case Caption: David Gilyard VS Riley Forest Products LLC

Case Number: 2014CP0300269

Type: Order/Mediation

It is so Ordered

s/ Perry M Buckner III 2122

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE 2002 MAY 16 A 10:13 CASE NO. 00-CP-21-902

CONNIE R. BELL
CCP & GS
FLORENCE COUNTY SC

REDBONE ALLEY OF COLUMBIA, INC., D/B/A REDBONE ALLEY RESTAURANT AND BAR

Plaintiff,

vs.

FLORENCE RESTAURANT SUPPLY, INC., DONALD BALL, ORBITAL ENGINEERING, INC., AND LEONARD GREENE,

Defendants.

ORDER GRANTING MOTION FOR SANCTIONS AND PROTECTIVE ORDER

CERTIFIED: A TRUE COPY
Connie R. Bell
CLERK OF COURT, C.P. & G.S.
FLORENCE COUNTY, S.C.

This matter was initially before the Court pursuant to the Notice of Motion and Motion for Sanctions filed by the Plaintiff herein on July 19, 2001. In that Motion, Plaintiff requests an Order pursuant to S.C.R.C.P., Rule 37, and Circuit Court Alternative Dispute Resolution Rules 5 and 11 sanctioning the Defendants Donald Ball, Florence Restaurant Supply, Inc., and their insurer, [redacted] for allegedly failing to comply with the mandatory mediation process in a number of respects. This Motion also requests an award of attorney's fees, costs and disbursements and other related relief. This Motion, with supporting Affidavits and documentation, was properly served upon all parties and the matter is properly before the Court.

A hearing was scheduled in this matter for February 22, 2002. Present at the hearing in this matter were [redacted], Esquire, of the Florence County Bar, on behalf of Plaintiff, [redacted].

#1 Def

Mailed 5/21/02
[illegible] Bernstein

[redacted], Esquire, of Richland County Bar, on behalf of the Defendants, Donald Ball and Florence Restaurant Supply, Inc., [redacted], Esquire, of the Charleston County Bar, on behalf of Donald Ball individually, [redacted], Esquire, of the Horry County Bar, on behalf of Harleysville Insurance Company, and [redacted], Esquire, of the Florence County Bar, on behalf of Orbital Engineering, Inc., and Leonard Greene.

By way of procedural history, upon the filing of the Notice of Motion and Motion for Sanctions by the Plaintiff, Plaintiff served certain Deposition Notices upon employees of Harleysville Insurance Company. As a result of the service of those Subpoenas and Deposition Notices, attorneys for Donald Ball and Florence Restaurant Supply, Inc., filed a Motion for Protective Order. A hearing was held on the Motion for Protective Order on September 13, 2001. After carefully considering the issues raised, an Order was filed October 12, 2001 by this Court, which denied the Motion for Protective Order and allowed the Plaintiff to take the requested depositions. These depositions were, in fact, taken in Nashville, Tennessee by the Plaintiff on December 3, 2001. The original depositions were presented to the Court for consideration in conjunction with the Motion for Sanctions.

Each attorney argued the respective positions to the Court. The Court has carefully considered the entire file in this matter, as well as the argument of counsel and finds and concludes as follows:

Circuit Court Alternative Dispute Resolution Rules, Rule 5(a), provides as follows:

> The following persons shall physically attend a mediated settlement conference unless otherwise agreed to by the mediator and all parties or as ordered or approved by the Chief Judge for Administrative purposes of the Circuit;... (4)for any insured party against whom a claim is made, **a representative of the insurance carrier who is not the carrier's outside counsel and who has full authority to settle the claim."** (Emphasis added)

Circuit Court Alternative Dispute Resolution Rules, Rule 11(b), provides as follows:

> If a person fails to attend the mediated settlement conference without good cause, the Court may impose upon the party or his principal any lawful sanctions, including, but not limited to, the payment of attorney's fees, mediator's fees, and expenses incurred by persons attending the conference, contempt, and any other sanction authorized by Rule 37(b), S.C.R.C.P..

The sanctions available to the Court for failing to comply with these rules, include the following:

> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence; © An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical

or mental examination; (E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and © of this subdivision, unless the party failing to comply show that he is unable to produce such person for examination.

This action was commenced by the Plaintiff as a result of alleged negligence in the design and construction of the Redbone Alley Restaurant in Columbia, South Carolina. The action was filed in Florence County, South Carolina, which county is subject to the Mandatory Alternate Dispute Resolution Rules and Regulations. This action is subject to mandatory mediation.

[redacted] was appointed mediator in this matter by Stipulation of Neutral Selection, and the original mediation conference was set for June 21, 2001. At that initial mediation conference, all of the aforementioned attorneys, with the exception of [redacted] (who was not involved in the litigation at the time) appeared on behalf of the respective parties. [redacted], adjuster for [redacted], appeared on behalf of Florence Restaurant Supply, Inc. and Donald Ball. [redacted], adjuster for [redacted], appeared for the remaining Defendants. The individual Defendants were also present.

The Court has carefully reviewed the deposition of [redacted], the adjuster for [redacted], who attended the first mediation on behalf of Florence Restaurant Supply, Inc., and Donald Ball. It is clear from the deposition that [redacted], at the time she appeared for the mediation, knew

virtually nothing about the facts of this case or the law applicable thereto. She had only reviewed the file for a limited period of time a day or two prior to the mediation, and had extremely limited knowledge regarding it. [redacted] was clearly not in a position to negotiate a settlement in good faith and her appearance at the mediation conference was virtually useless to the process.

I find that the first mediation session lasted an excessive number of hours, during which time [redacted] was being educated on the facts involved in this case and the law applicable thereto by the Plaintiff and its counsel. It is further clear that a crucial issue in this litigation is a legal theory known as joint and several liability. Although [redacted], prior to the mediation conference had heard of it, she had never been involved in joint and several liability applicable to negligence actions in the State of South Carolina, and had no working knowledge as to how that legal theory would apply to the case. [redacted] was clearly sent by [redacted] to "physically appear" at the mediation conference, even though she had no working knowledge of the case and was not in a position to negotiate any type of settlement on behalf of their insureds.

The June 21, 20001 mediation was adjourned and scheduled to reconvene on July 18, 2001 at the request of [redacted]. [redacted] asked for additional time to review the file with her superiors, in order to be in a position to meaningfully enter into negotiations with Plaintiff's counsel at the subsequent mediation

conference, which was scheduled at her request. Upon the reconvening of the mediation on that date, [redacted] did not attend. Instead, [redacted] sent [redacted] as their representative.

[redacted] works from his home in the Charlotte area on behalf of [redacted] and has been an adjuster for them a number of years. While employed at [redacted], [redacted] has never handled a negligence claim, has never been involved in a case where negligence theories were involved (except as they relate to the payment of workers compensation liens from third party liability actions), and basically handled nothing for [redacted] other than Workers' Compensation claims in the States of North Carolina and South Carolina.

The sum and substance of [redacted] knowledge of the case was obtained in telephone conversations with his supervisors at the Nashville, Tennessee office late in the afternoon prior to the second mediation session. [redacted] had no file on the matter, had reviewed no documents or pleadings, and had never reviewed depositions, discovery, responses or expert opinions. In fact, [redacted] clearly had no knowledge whatsoever of the case and was simply sent by [redacted] to "physically attend" the mediation conference. [redacted] was clearly not in a position to enter into negotiations in this matter. In fact, he had virtually no knowledge whatsoever of the facts, issues involved or legal theories. Of note is the fact that [redacted] was not even aware of the extent of Plaintiff's alleged damages as a result of the

Defendants' action. He had only learned of the mediation conference and his required attendance on the afternoon prior to the mediation conference.

Circuit Court Alternative Dispute Resolution Rules, Rule 5(d), provides that "communications during the mediated settlement conference shall be confidential" and that "the parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding, any oral or written communications having occurred in a mediation proceeding...". Counsel for Defendants, Ball and FRS, refers the Court to Rule 11 (b), which Defendants contend only allows sanctions if "a person fails to attend the mediated settlement conference without good cause." It is their contention that so long as someone appears physically at the mediation conference, even though that person may have limited or no authority, and no working knowledge of the file, that the ADR rules have been complied with.

Counsel for Plaintiff contends that Plaintiff is entitled to request sanctions if the insurance carrier fails to act in good faith and/or fails to have the physical appearance of an insurance adjuster "who has full authority to settle the claim." Plaintiff's contention is that the mediation process will be completely thwarted and avoided by Defendants and their carriers if the rules simply require the physical attendance of someone at the mediation conference, even though that person might have no knowledge of the file, and no ability to discuss and negotiate a settlement.

The issue for the Court to decide is whether or not the insurance carrier, [redacted] has complied with these rules, when it sent two adjusters to the mediation conferences who clearly had limited authority, and no ability to discuss or negotiate the settlement of this claim. [redacted], in fact, after attending the mediation conference for a significant number of hours, knew so little about the case, that she never even made an offer of any type to the Plaintiff. [redacted] did not either.

The Court agrees with the Plaintiff and finds that in order to comply with the implied duty of good faith and the Rule cited above, the carrier is required to send an adjuster to the mediation conference with sufficient knowledge of the file to be in a position to "negotiate the claim in good faith". To allow an adjuster to simply to appear and draw breath would destroy the ADR process and render the rules ineffective and useless. The Court clearly finds that the insurer, Harleysville Insurance Company, failed to comply with these mandatory rules. As a result, their insureds, Florence Restaurant Supply, Inc., and Donald Ball, should be sanctioned pursuant to the Rules.

Plaintiff contends that the violations of the Defendants are so severe that this Court should strike the Answer of Florence Restaurant Supply, Inc., and Donald Ball, and render Judgment in favor of the Plaintiff. The Court finds that such a remedy is too severe, in that the insurance company is the culprit and not the insureds. To punish the insureds in such a drastic fashion for the failures of its insurance carrier would be unfair and inappropriate

in this case. As a result, Plaintiff's request for such a sanction is hereby denied.

On the other hand, the Plaintiff has incurred significant expenses as a result of the failed mediation conferences, to which it is entitled to reimbursement. Plaintiff submitted to the Court an Affidavit in support of an attorney's fees and costs award with attachments, as well as a Supplemental Affidavit in support of same. The Court has carefully considered the request and finds that the Defendants should be responsible to pay a portion of the attorney's fees incurred by [redacted] on behalf of the Plaintiff and certain costs. The Court will address and outline this award below. The Court, however, declines to require the Defendants to be responsible for the expenses incurred in traveling to and from Nashville, Tennessee for these depositions of the adjusters, and the time associated with that travel.

The Court has carefully considered the factors in regard to an award of attorney's fees, including "1) the nature, extent and difficulty of the legal services rendered; 2) the time and labor necessarily devoted to the case; 3) the professional standing of counsel; 4) the contingency of compensation; 5) the fee customarily charged in the locality for similar services, and; 6) the beneficial result obtained". *Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 377 S.E. 2d 296 (1989). The Court has carefully considered the fees charged by counsel for Plaintiff and finds them to be reasonable, particularly in light of the difficulty and

complexity of the issues and the beneficial results obtained. However, after deducting from that bill certain expenses associated with the travel to and from Nashville, the Court find that a reasonable attorney's fee to counsel for Plaintiff is the sum of $6,427.50. In addition, counsel for Plaintiff has submitted certain expenses for which Plaintiff is requesting reimbursement. The Court approves the reimbursement to Plaintiff's counsel for the following expenses: Plaintiff's portion of mediator fee--$1,122.50; service of process fee--$210.00, and; Court reporting fees--$1,032.10 for a total of $2,364.60.

In summary, Defendants shall pay to [redacted], attorney for Plaintiff, Post Office Box 107, Florence, South Carolina 29503, within ten days of the date of this Order, the sum of $8,792.10.

Any and all other sanctions requested by the Plaintiff are hereby denied, including the right to depose certain other officers and directors of [redacted]. The Court would note that subsequent to the Nashville depositions, counsel for Plaintiff noticed other depositions of Harleysville officials. As a result of those notices, Defendants again moved for a Protective Order asking the Court to not allow those depositions to go forward. The Motion for Protective Order in regard to those further depositions is hereby granted.

ACCORDINGLY, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That Defendants, Florence Restaurant Supply, Inc., be sanctioned for failing to comply with the Circuit

Court Alternative Dispute Resolution Rules, said sanction to be as outlined above.

2. That the Motion for Protective Order filed by [redacted] dated January 7, 2002 be granted.

3. That any further sanctions requested by the Plaintiff herein in regard to the aforementioned failure be denied.

AND IT IS SO ORDERED!

JAMES E. BROGDON, JR.
CIRCUIT COURT JUDGE

Florence, South Carolina

May 16, 2002

#11

FILED
2002 MAY 16 A 10:13
CONNIE R. BELL
CCCP & GS
FLORENCE COUNTY SC

South Carolina Bar
Continuing Legal Education Division

2018 SC BAR CONVENTION

Torts & Insurance Practices Section/Young Lawyers Division

Friday, January 19

Navigating the Perilous Waters of E-Discovery (Panel Discussion)

Gray T. Culbreath
Ben Hayes
John "Jack" J. Pringle, Jr.
Moderator: Lindsay A. Joyner

Control Risks

LEGAL TECHNOLOGIES
DIGITAL EVIDENCE ACQUISITION FORM

CASE/MATTER INFORMATION
CONTROL RISKS REF #:
CLIENT REF # N/A
EVIDENCE ITEM #

CONTACT DETAILS				
COLLECTION TECHNICIAN NAME:			**DATE:**	
TITLE:			**START TIME:**	
OFFICE ADDRESS:			**END TIME:**	
CITY:	**STATE:**	**ZIP:**	**COUNTRY:**	**PHONE:**

CUSTODIAN DETAILS				
COLLECTION LOCATION:		**ADDRESS:**		
CITY:	**STATE:**	**ZIP:**	**COUNTRY:**	**PHONE:**

EVIDENCE RECEIVED FROM:	**TITLE:**
MACHINE OWNER/CUSTODIAN (*if different than received from above***):**	**TITLE:**

COMPUTER/DEVICE

WAS COMPUTER ON? **YES** _____ **NO** ____	**IF YES, SHUTDOWN FOR COLLECTION:** **YES** _____ **NO** _____
WAS COMPUTER CONNECTED TO A NETWORK? **YES** _____ **NO**_____	**IF YES, DISCONNECTED FOR COLLECTION:** **YES** _____ **NO** _____

TYPE OF COMPUTER (CIRCLE ONE): **DESKTOP** **LAPTOP** **SERVER** **NAS DEVICE** **OTHER:**_____

DESCRIBE NETWORK OR MODEM ACTIVITY OBSERVED:

DESCRIBE PROGRAMS RUNNING AND DOCUMENTS IN USE, ETC.:

DESCRIBE MACHINE CONDITION (marks, scratches, issues)**:**

DESCRIBE ANY EXTERNAL LABELS/STICKERS:

OPERATING SYSTEM (Microsoft, MAC, etc.):	**EMAIL TYPE (**Lotus Notes, Exchange):
SYSTEM DATE/TIME:	**ACTUAL DATE/TIME:**

NUMBER OF HARD DRIVE(S): _____ **IF MORE THAN ONE (**circle one**): MASTER/SLAVE DYNAMIC RAID RAID TYPE** _____

IF DRIVE WAS REMOVED BEFORE ACQUISITION – BY WHOM: _____

OTHER MEDIA DEVICES PRESENT (circle all that apply**): FLOPPY CD DVD CD/DVD OTHER:** _____

Control Risks

LEGAL TECHNOLOGIES
DIGITAL EVIDENCE ACQUISITION FORM

CASE/MATTER INFORMATION
CONTROL RISKS REF #:
CLIENT REF # N/A
EVIDENCE ITEM #

DESCRIBE COMPUTER SHUTDOWN METHOD:		
Machine Seized: YES ___ NO ____	MACHINE IMAGED? YES ___ NO ___	MACHINE PHOTOGRAPHED? YES ___NO ___

LIST OF ITEMS SEIZED:

ITEM	MANUFACTURER	PART NO.	SERIAL NO.
EXTERNAL HARD DRIVE			
INTERNAL HARD DRIVE			
BLACKBERRY			
PDA			
CAMERA			

ACQUISITION

EVIDENCE IMAGED:	MAKE:	MODEL:	SIZE:
SERIAL #		TYPE:	

DESTINATION DRIVE:	MODEL:	SERIAL #
IMAGING SOFTWARE:		SOFTWARE VERSION:
IMAGING HARDWARE:		HARDWARE VERSION:

WRITE PROTECTION:
HARDWARE: _____ SOFTWARE: _____

COMPRESSION? YES ___ NO ____	COMPRESSION TYPE:

IMAGE HASH:

VERIFICATION HASH:

VERIFICATION METHOD:		VERIFIED? YES ___ NO ____

ADDITIONAL COMMENTS:

Control Risks

LEGAL TECHNOLOGIES
DIGITAL EVIDENCE CHAIN OF CUSTODY

CASE/MATTER INFORMATION
CONTROL RISKS REF #:
CLIENT REF # N/A
EVIDENCE ITEM #

SUBMITTING ACTIVITY	
NAME AND TITLE OF PERSON RECEIVING ITEM:	
ADDRESS:	CONTACT PHONE#:
LOCATION FROM WHERE OBTAINED:	
ITEM DESCRIPTION:	DATE COLLECTED
NAME AND TITLE OF PERSON COLLECTING ITEM: (*if different from above*)	TIME COLLECTED

FOR INTERNAL USE

ARTICLE RECEIVED FROM: *(name, title, federal express package, etc)*

DESCRIPTION OF ITEM			
MAKE:	MODEL:	SERIAL #	OTHER IDENTIFYING #

CHAIN OF CUSTODY

DATE & TIME	RELEASED BY	RECEIVED BY	PURPOSE OF CHANGE IN CUSTODY
	SIGNATURE	SIGNATURE	For Imaging
	NAME, TITLE	NAME, TITLE	
	SIGNATURE	SIGNATURE	Return to Client
	NAME, TITLE	NAME, TITLE	
	SIGNATURE	SIGNATURE	
	NAME, TITLE	NAME, TITLE	
	SIGNATURE	SIGNATURE	
	NAME, TITLE	NAME, TITLE	

Control Risks

LEGAL TECHNOLOGIES
DIGITAL EVIDENCE CHAIN OF CUSTODY

CASE/MATTER INFORMATION
CONTROL RISKS REF #:
CLIENT REF # N/A
EVIDENCE ITEM #

	SIGNATURE	SIGNATURE	
	NAME, TITLE	NAME, TITLE	
	SIGNATURE	SIGNATURE	
	NAME, TITLE	NAME, TITLE	
	SIGNATURE	SIGNATURE	
	NAME, TITLE	NAME, TITLE	
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	NAME, TITLE	NAME, TITLE	
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	NAME, TITLE	NAME, TITLE	
	SIGNATURE	SIGNATURE	
	NAME, TITLE	NAME, TITLE	

Control Risks

LEGAL TECHNOLOGIES
DIGITAL EVIDENCE CHAIN OF CUSTODY

CASE/MATTER INFORMATION
CONTROL RISKS REF #:
CLIENT REF # N/A
EVIDENCE ITEM #

	SIGNATURE	SIGNATURE	
	NAME, TITLE	NAME, TITLE	
	SIGNATURE	SIGNATURE	
	NAME, TITLE	NAME, TITLE	
	SIGNATURE	SIGNATURE	
	NAME, TITLE	NAME, TITLE	
	SIGNATURE	SIGNATURE	
	NAME, TITLE	NAME, TITLE	
	SIGNATURE	SIGNATURE	
	NAME, TITLE	NAME, TITLE	
	SIGNATURE	SIGNATURE	
	NAME, TITLE	NAME, TITLE	

FINAL DISPOSAL ACTION

RELEASED TO: _____

DESTROYED: _____
DATE SIGNATURE

_____
NAME, TITLE

WITNESS TO DESTRUCTION OF ARTICLE(S)
THE ARTICLE(S) LISTED ABOVE WAS(WERE) DESTROYED BY THE EVIDENCE CUSTODIAN, IN MY PRESENCE, ON THE DATE INDICATED ABOVE.

_____ _____
NAME, TITLE SIGNATURE

Parent Evidence ID	Evidence ID	Custodian Name	Category	Collection Date	Entity	Location	Examiner	Target Drive ID	Target_SerialNumber	Backup Drive	Backup Drive SN	Encryption	Host_Make	Host_Model	Host_SerialNumber	MD5	Extraction ID	Source_Make	Source_Model	Source_SerialNumber	Size (GB)	Imaging Software	MD5 Hash	SHA1 Hash	Start Time	End Time	Comments	System Date/time Drift	Integrity

CUSTODIAL INTERVIEW CHECKLIST

Custodian:
Title:
Phone:
Office Location:
Administrative Asst.: _____
Admin Phone:
Network ID:
Interview Date:
Interview Location:
Primary Interviewer:
Primary Note-taker:
Others Present:

Substance of the Request

- You should have received a Preservation Order regarding this matter. Did you?
- Did you understand the substance of the Preservation Order?
- Do you have any questions or comments about the Preservation Order?
- Did you comply with the Preservation Order?
- As a reminder, the Preservation Order covers the following categories of documents, which I will ask you about today:

General Information

- How long have you worked for the employer?
- What is your current position and how long have you been at this position?
- Please provide a brief overview of your current role/position.
- What is the reporting structure in your current position? To whom do you report? Who reports to you?
- Who was your predecessor in this position?
- Did you inherit any documents or gain access to any electronic files/folders from your predecessor?
- Please provide a brief overview of any previous positions, including dates and predecessors or successors to the positions.
- Are you aware of any audio or video recordings that are related to this matter?

Hard Copy Documents

- Do you have any hard copy documents in your possession that are related to this matter?
- If so, how and where are those documents stored?

- Do you maintain or are you aware of any inactive or offsite files that are related to this matter?

- Are you aware of any other locations that may contain hard copy or other documents related to this matter?

Personal Notes and Journals

- Do you use a handwritten journal, daybook, personal log, or other notebook?

- If so, are there any notations in these journals that are related to this matter?

- Do you retain old notes and journals?

Potentially Privileged and/or Confidential Documents

- Do you ever work with attorneys, either the employer's attorneys or outside counsel?

- Have you generated any documents in connection with the civil or criminal investigations related to this matter?

- Do you have files or emails that reflect communications with attorneys?

Other Employees/Contractors

- Do you work with other employees or contractors that may possess relevant records?

Personal Computer Usage

- What computer do you use for work? Desktop? Laptop? Both? How long have you used your current computer?

- Please list any previous employer computers you have used, including dates of usage.

- Do you use any other computer for employer-related work such as a home PC, Laptop or tablet such as an iPad? If yes, please describe the computer and who else has access to it.

- • Do you use any other computers that aren't specifically assigned to you, such as a shared computer, for employer-related work? If yes, describe the computer and usage.

External Media

- Do you have an external back-up drive for your employer-related files and folders?

- If so, when and how do you back up to the external drive?

- Do you back-up data on other media such as CDs, thumb drives, cameras, MP3 players or online data storage (such as x drive)?

Email

- Do you use or have you used more than one employer email address? If yes, please provide details.

- Do you have access to or monitor a shared email mailbox?

- How is you Outlook inbox organized? By subject matter? By date? By sender? Not at all?

- Are there any particular subfolders in your Outlook inbox that you know contain email messages related to this matter?

- Do you ever move email messages out of Outlook to your Desktop or folders on your hard drive?

- Have you copied or backed-up email messages to another .pst or archive file? If so, where is that .pst file located? On your computer? On an external storage device?

- Do you ever use an employer webmail application to open and reply to email messages? If yes, please describe that computer.

- Do you ever open, create or save email attachments from work-related email messages on your personal computer? If yes, please describe.

- Is it your practice to print and retain email messages?

- If yes, have you printed and retained any email messages that relate to this matter?

- Does your administrative assistant or anyone else act as your email delegate and send or reply to email messages on your behalf?

- Do you use the Tasks or Journal functions in Outlook?

- Can you send and/or receive faxes from your computer?

Mobile Devices

- Do you/did you receive email messages on a mobile device, such as a Blackberry, iPhone or tablet?

- If yes, is the device issued by your employer?

- Is your mobile device configured to delete email from your mailbox (Outlook or Exchange server) when an email is deleted on the device?

- Is there unique data on these devices that is not also present on your work computer, *e.g.*, text messages or photos?

- If so, does any of this data relate to this matter?

Other Communications

- Do you use instant messaging applications, such as Office Communicator or Yahoo Messenger?

- If yes, have you saved any chat logs?

- If so, do any relate to this matter?

Calendars

- Do you keep a work-related calendar on Outlook?

- Do you maintain your calendar on a cell phone or mobile device too?

- Is it your practice to print and retain pages from your online or electronic calendar?

- If you receive a meeting request with attachments, do you save the attachments to your computer or do you leave them attached to the calendar invite?

- Do you use a paper calendar? If yes, does that paper calendar have any information recorded on it that relates to this matter?

Electronic Documents

- Do you create and/or work with electronic documents that relate to this matter, *e.g.*, Word, Excel, Power Point documents?

- If so where do you store documents you create/work with?
  - Computer hard drive (C:\ drive)?
  - Personal Network Drive (P:\ drive)?
  - Shared Network Drive (O:\ drive)?

- Any other Public Network or Shared Drive?

- Any Intranet or SharePoint Site?

- Any other electronic locations? Assistant's computer?

- Are any of these electronic documents password protected?

- Are any of these electronic documents encrypted?

Other Data

- Are you aware of any saved voice-mail messages that are related to this matter?

Business Applications

• Are there any other applications/business systems you use that are related to this matter that we have not yet discussed? [If so, move to questions in Attachment 1.]

In Closing

- Do you have any comments or questions about anything we covered today?

- Please contact us if you have any additional thoughts or questions that arise after the interview.

- As a reminder, please keep our conversation today confidential and continue to comply with the Preservation Order.

ATTACHMENT 1: Company Business Applications

- What business applications or systems would generate documents or capture relevant information? For each system you have knowledge of, please answer the following:
    - Who created this system? Was it developed by the employer or is it an off-the-shelf product?
    - Who is the responsible for maintaining this system?
    - Who provides technical support if you have issues with the system?
    - Who is responsible for monitoring this system?
    - Does the system have various modules? If so, which ones do you use?
    - How long have you been using this system?
    - Do you know of other departments or groups that use this system? If so, which ones?
    - How is the data stored – in a database, online or on files such as spreadsheets, etc.?
    - How do you access it? Are there various permission levels that provide different levels of access? What level of access do you have?
    - How does the data get populated into the system? (Is it manually entered, imported or automatically fed?)
    - Are there any other systems that this system relies upon? Is it dependent on a system to receive data? Is any other system dependent on this system for data?
    - Do you print any reports from it? Which reports? Where do you store the printed reports and how long do you retain them?
    - Do any reports get auto-generated and exported or sent? If so, which ones?
    - Are the reports stored in a different location than the raw data? If so, where?
    - Are there any passwords or encryption on the reports?
    - How often is the data backed up? How is it backed up? Where is it backed up? Where are the backups stored?
    - Do you ever back up the data yourself? How? Where?
    - Does the system have an audit trail or any logs (i.e. access logs, event logs, error logs)? If so, what type and where are these stored (with the raw data or elsewhere)?
    - Did this system replace any other system? Please describe (What? When?).
    - Is the data in this system routinely auto-archived and/or auto-deleted? If so, how often? Is this documented somewhere?

Ethics and Social Media

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I. The Ethical Boundaries of Discovery in Social Media

Social media sites undoubtedly contain potential evidence, as demonstrated by the amount of time people spend memorializing and displaying their thoughts, communications, and history there. According to Nielsen, consumers spend fully 20% of their personal computer time and 30% of their mobile device time on social networks.[1] And the prevalence and growth of social networks is due in large part to the way they enable information-sharing: "the defining feature of social networking, for our purposes, is that it enables users to communicate with almost anyone, at any time, from anywhere."[2] Given the ways social networking platforms both facilitate "oversharing" and archive that shared information, it is not surprising that attorneys have taken notice: "the potential availability of helpful evidence on these internet-based sources make them an attractive new weapon in a lawyer's arsenal of formal and informal discovery devices."[3]

Certain characteristics of social media, in particular the way information is stored, exchanged, and protected on social networking platforms, may be unfamiliar to attorneys seeking to obtain information for use as potential evidence. Without a working knowledge of how social networks work, attorneys may run afoul of the Rules of Professional Responsibility (RPR) governing allowable communications with jurors and witnesses.

In some cases, the RPR's historical application to traditional media communications (e.g. print and telephone) translates to social media communications. In other words, sometimes social media is not that different from traditional media. In other contexts, however, social media communications differ from legacy communications methods. Understanding both the similarities and differences between traditional media and social media will help attorneys meet their ethical obligations.

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[1] State of the Media: The Social Media Report 2012, Nielsen, http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2012-Reports/The-Social-Media-Report-2012.pdf

[2] Hon. Amy J. St. Eve and Michael A. Zuckerman, "Ensuring an Impartial Jury in the Age of Social Media," Duke Law and Technology Review, Volume 11, available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1228&context=dltr

[3] The Association of the Bar of the City of New York Committee on Professional Ethics, Formal Opinion 2010-2 "Obtaining Evidence from Social Networking Websites," September 2010.

A. What is "Social Media" or "Social Networking"?

There are many definitions for what I will interchangeably refer to as "social media," or "social networking." One succinct description is:

> Social networks are internet-based communities that individuals use to communicate with each other and view and exchange information, including photographs, digital recordings and files. Users create a profile page with personal information that other users may access online. Users may establish the level of privacy they wish to employ and may limit those who view their profile page to "friends" – those who have specifically sent a computerized request to view their profile page which the user has accepted. Examples of currently popular social networks include Facebook, Twitter, MySpace and LinkedIn.[4]

And the profiles created by individuals in these communities contain information about themselves and others, and communications that result from the connections or links established with others. Typically information is grouped on a social networking platform into 1) a profile (of an individual, group, or organization); 2) posts by an individual and comments or responses related to that post; and 3) private messages (in the form of emails, instant messaging, or wall posts) between users.

As referenced above and described below, some categories of information stored on social networking platforms are public in nature, while some types of data are restricted. Knowing the difference is important when seeking information from social networking platforms for use as evidence.

B. The Differences between "Public-Facing" Information and Private Information are Significant when Gathering Social Media Evidence

"Public-facing" information generally consists of a limited user profile or page accessible by any individual using a simple Internet search or utilizing public access (as a member or otherwise) to a social media site or platform. Structurally, "public-facing" information is not protected by any privacy settings or user permissions. Practically, "public-facing" information is (supposedly) what users will allow you to see without asking them to see more. Obtaining and using publically available information is not typically prohibited as an ethical or legal proposition, although doing so may violate the terms of service or use of a particular platform: "If you collect information from users, you will: obtain their consent . . ."[5]

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[4] Association of the Bar of the City of New York Committee on Professional Ethics, Formal Opinion 2010-2, "Obtaining Evidence from Social Networking Sites."

[5] Facebook Statement of Rights and Responsibilities, Revision December 11, 2012, accessed on July 26, 2013. Available at https://www.facebook.com/legal/terms

By contrast, access to a user's private information is restricted, typically both by platform membership (you have to sign up) and by affinity (the user must give you permission to access her site and its information). For example, a Facebook user may need to accept your friend request in order for you to have access to certain areas of her page or to receive messages from you. Some information deemed private (considered in the context of the restrictions imposed by the Stored Communications Act) includes:

- Facebook's private messages, "wall" posts and comments (*Crispin v. Christian Audigier,* 717 F.Supp.2d 965 (C.D. Cal. 2010);
- Webmail services (*Id.*); and
- Private YouTube videos. *Viacom International Inc. v. YouTube Inc.*, 253 F.R.D. 265 (S.D.N.Y. 2008).

As described below, generally the pursuit of public information (about parties, jurors, or witnesses) is not likely to trigger ethical concerns, while accessing private information may be prohibited or limited by ethics rules and/or various provisions of law.

C. Some Examples of "Social Media Information-Seeking" and the Application of the South Carolina Rules of Professional Conduct to Same

1. Visiting the website or social networking site of a party represented by counsel

Rule 4.2, SCRPC, "Communication with Person Represented by Counsel" forbids *communication* with a person represented by counsel. However, Oregon State Bar Association Formal Opinion No. 2005-164 (August 2005), explains why visiting a website is not "communication." Reading a post on a website is no different than "reading a magazine article . . . written by that adversary." And reading "information posted for general public consumption" is purely a one-way flow of information from the adverse party to the lawyer (not the other way around) with no interaction.

Similarly, an opposing attorney's access of a publically available social media post created by a party is not considered "communication." N.Y. State 843 (2010) (lawyers may access *public* pages of social networking websites maintained by any person, including represented parties). Also analogizing to other types of media, the New York State Bar Association reasoned that "Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted." In this instance, a social media post is also treated like a magazine article for purposes of the RPR.

2. Interacting with a party represented by counsel to gain access to a social media post

Rule 4.2 may operate differently in the event that an attorney sends a "friend request" to a represented party on Facebook. Oregon State Bar Formal Opinion No. 2005-164 also indicates that "written communications via the Internet are directly analogous to written communications via traditional mail or messenger service . . . ." Accordingly, an interaction involving a friend request initiated by the lawyer and directed to the opposing party is no different than a letter from the attorney to that party, and may constitute a "communication" violating Rule 4.2.

3. Seeking to "friend" a witness not represented by counsel

Rule 4.1, SCRPC prohibits a lawyer from making "a false statement of material fact or law to a third person," and Rule 8.4(c) prohibits a lawyer from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation."

a) Attempting to "friend" a witness under false pretenses

Requesting access to a user's account (and her non-public information) using a pretext may be a violation of Rule 4.1 and Rule 8.4(c). *See* New York City Bar Formal Opinion 2010-2 ("A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent."). This opinion highlights the relative ease with which an attorney or investigator could create an online profile and make a "friend request"-- "falsely portraying the attorney or investigator as the witness's long lost classmate, prospective employer, or friend of a friend." On the other hand, using truthful information to obtain access to a website would not violate these rules.

b) Attempting to "friend" a witness not represented by counsel without telling her you are trying to obtain information for the lawsuit.

The NY City Opinion cited above makes a distinction between affirmative "deception" and failing to disclose the purpose for the connection: "an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request."). In other words, as long as you don't tell the witness information that is untrue, the request does not violate the rules.

Similarly, Oregon State Bar Formal Opinion No. 2013-189 concluded that a "lawyer may request access to non-public information if the person is not represented by counsel in that matter and no actual representation of disinterest is made by" the lawyer. The "representation of disinterest" language comes from Rule 4.3 (identical language in the S.C. rule): in dealing on a client's behalf: "a lawyer shall not state or imply that the lawyer is disinterested." According to the Oregon Bar, a lawyer's "request for access to non-public information does not in and of itself make a representation about the Lawyer's role."

The Philadelphia Bar Association took a different approach, concluding that the *omission* of a "highly material fact" (that the party seeking access plans to seek and obtain information for use in a lawsuit) would constitute deceptive conduct and a violation of Rule 8.4 (c).[6] At least in Philadelphia, then, failing to disclose that you are *not* disinterested may violate the RPC.

D. Juror Social Media Misconduct

It is not surprising, given the explosive growth of social media usage, that Facebook and Twitter could taint a jury pool. The Arkansas Supreme Court reversed a death sentence because a juror Tweeted during deliberations.[7]

Closer to home, the 4th Circuit Court of Appeals reversed the animal fighting convictions of various South Carolina defendants because juror misconduct in "performing unauthorized research of the definition of an element of the offense on Wikipedia.org (Wikipedia), an "open access" internet encyclopedia, deprived him of his Sixth Amendment right to a fair trial." *U.S. v. Lawson*, 677 F.3d 629 (4th Cir. 2012). As part of its conclusion that the juror's reference to a Wikipedia entry defining "sponsor" constituted prejudice that warranted a new trial, the 4th Circuit, like other federal courts, was very concerned with Wikipedia's "lack of reliability" due to the fact that "[a]nyone with Web access can access Wikipedia . . . ."

As a means to combat this type of juror misconduct, both federal district courts and state trial courts in South Carolina have juror instructions available for their use. On July 20, 2009, the South Carolina Supreme Court issued Order No. 2009-07-20-01, "Juror use of Personal Communication Devices":

> *The court shall instruct jurors selected to serve on a jury that until their jury service is concluded, they shall not:*
>
> > *(a) discuss the case with others, including other jurors, except as otherwise authorized by the court;*
> >
> > *(b) read or listen to any news reports about the case;*
> >
> > *(c) use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation. These devices may be used during lunch breaks, but may not be used to obtain or disclose information prohibited in subsection (d) below;*

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[6] Philadelphia Bar Association Professional Guidance Commission Opinion No. 2009-02 (Mar. 2009) available at http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf

[7] Arkansas Defendant Saved by the Tweet, Wall Street Journal Law Blog, December 8, 2011, available at http://blogs.wsj.com/law/2011/12/08/arkansas-defendant-saved-by-the-tweet/

(d) use a computer, cellular phone, or other electronic device with communication capabilities, or any other method, to obtain or disclose information about the case when they are not in court. Information about the case includes, but is not limited to the following:

(i) information about a party, witness, attorney, or court officer;

(ii) news accounts of the case;

(iii) information collected through juror research on any topics raised or testimony offered by any witness;

(iv) information collected through juror research on any other topic the juror might think would be helpful in deciding the case.

In the federal courts, the Judicial Conference Committee on Court Administration and Case Management has issued "Proposed Model Jury Instructions- The Use of Electronic Technology to Conduct Research on or Communicate about a Case." Highlights of these Model Jury Instructions include:

Research: "[d]uring the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case."

Communication: "You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. You may not use any similar technology of social media, even if I have not specifically mentioned it here. I expect you will inform me as soon as you become aware of another juror's violation of these instructions."

The Internet as an Information Source: "Information on the internet or available through social media might be wrong, incomplete, or inaccurate."

II. Client Confidentiality Breaches

A. Putting Proactive Steps In Place to Avoid Being Hacked[8]

1. Use Strong, Unique Passwords.

a. Strong Passwords. The reason to choose a strong password is so that a computer cannot guess it by means of trying many characters. Accordingly, a strong password has both a larger number of characters and different types of characters (i.e. numbers, upper and lower case characters, special characters).

a) Unique Passwords. The reason to choose a unique password is so that a person cannot guess or read it. Therefore, don't use personal information, words that are in dictionaries, part or all of your account number, or passwords that are easy to spot while you are typing them in (e.g. "12345," "qwerty"). And do not use the same password on multiple websites.

2. Safeguard Usernames and Passwords

a. Do not give your password to anyone, especially if asked to do so in an email or phone call.

a) Do not store your password in a place (on the computer or elsewhere) where someone can have access to it.

3. Use Good Security Software. Do your research:

a. PC Magazine The Best 2013 Security Suites http://www.pcmag.com/article2/0,2817,2369749,00.asp

a) CNET Computer and Internet Security:

http://www.cnet.com/internet-security/

4. Keep all of your programs (including browsers) up-to-date

5. Use Two-Factor Authentication: This allows (or requires) you to use two stages to verify your identity: a combination of a knowledge factor (something you know, like a password or a PIN), and a possession factor (something you have, like an ATM card or a token), or an inherence factor (something unique to you, like a fingerprint or a retinal scan). Typically the two factors are the knowledge factor (username and password) plus a text to

[8] Drawn in large part from "Hacked Email," OnGuard Online.gov, Office of Justice Programs, July 2013, available at http://www.onguardonline.gov/articles/0376-hacked-email.

your phone (the possession factor) with a code that you use to register.

6. Be Skeptical

a. Don't click on suspicious links, or open attachments from mysterious senders.

a) When in doubt, don't click—Links Are Not Your Friends

b) Mouse-over links

7. Research before you download free software

8. Beware of the Public (Unsecured) Wi-Fi. If you are not asked for a password, you are on an unsecure network where someone could access the information you are sending or your log-in credentials. There are a couple of ways to deal with Wi-Fi networks that do not ask for a WPA ("Wi-Fi Protected Access") or similar password:

a. Browse only on sites that are secure- bearing the "Https" ("s" for "secure"). Those sites encrypt (scramble) information so others can't access it. Some browser plug-ins will force sites to use https.

a) Sign out of accounts when you are finished

b) Consider using a VPN ("Virtual Private Network") to encrypt your data.

9. Secure Your Account/Take Advantage of Your Account Settings[9]

a. Browse Securely- use the "Https" version of sites where possible

a) Choose Login Notifications/Approval- This feature will allow sites to notify you when your account is accessed from unknown browers, and in some cases require you to enter a security code that has been texted to your phone.

[9] See Shehzad Mirza, "How to Secure Your Facebook Account," Center for Internet Security, May 2013, available at http://msisac.cisecurity.org/resources/reports/documents/FacebookPaperSM_May2013.pdf, making reference to Facebook Help: https://www.facebook.com/help/security

10. Secure Your Devices

a. Password protection

a) Whole-disk encryption

b) Remote Location, Shutdown, and Disk-Wiping Software

B. What to Do if Your Social Media Account Has Been Hacked

Update Your Security Software
Configure Your Hardware and Software to Update Automatically
Check the Platform's Advice for Restoring Your Account

C. Social Media Policies for Businesses

Social media offers great marketing potential for businesses, principally because of the ease with which information can be distributed and shared. Conversely, "frictionless" information sharing also can create a number of business risks. As such, a social media policy balances those risks and benefits based on the four main ways social media are put to use:[10]

- By a company to establish a business presence based upon a corporate objective;
- By employees to pursue legitimate business goals (authorized or otherwise);
- By employees for personal use on company property;
- By third parties to comment on a company, product, or service.

Accordingly, an effective policy identifies the business objectives for the policy, considers the benefits and risks of using social media, gives clear guidance to employees, provides for appropriate oversight and responsibility, and is updated regularly.

Determine Your Objectives: Why Do You Need a Policy in the First Place?

The first step in the development of a policy or program is to determine the reason such a document or system is necessary. In other words, what does the company expect to gain from social media? Is the organization seeking to use social media for its corporate purposes (e.g. to build an online brand) or establish guidelines for social media use by its employees (to prevent unauthorized posts attributable to the company)? What stakeholders (existing customers, new customers, media, business partners, the community at large, regulators) will be the "target" of the company's social media efforts?

[10] *The Sedona Conference Primer on Social Media*, October 2012, Sedona Conference Working Group on Electronic Document Retention & Production, available at https://thesedonaconference.org/publication/Primer%20on%20Social%20Media

A good policy will provide clear guidance on how the company will use social media to further its corporate purposes, as well as the authorized uses (business and personal) of social media by employees.

In addition, the business will want to identify other company policies (Acceptable Use Policy, Employee Manual, Privacy Policy) that may be affected by a social media policy, and ensure all those policies are consistent. In fact, some smaller businesses may consider having their social media policy be a part of an Acceptable Use Policy or Privacy Policy.

Identify the Benefits and Risks of Using Social Media in Your Business

Before implementing a policy, a business will want to understand the potential benefits of social media, as well as its risks.

Benefits

Enhanced Collaboration. Social media enables a business to have interactions with many customers and business partners at a fairly low cost, and facilitates real-time knowledge sharing.

Improved Business Relationship. Social media enhances communication with customers and business partners, and gives a company more opportunities to engage its customers and learn about their needs and preferences.

Increased Productivity. By enabling access to information and to communities of interest, social media can increase employee productivity.

Risks

Loss of Productivity. If employees have access to social networking sites, a company runs the risk that employees will use social media for non-work purposes.

Lack of Security. Social media sites are typically not as secure as some corporate networks, and therefore organizations risk disclosure of confidential information, misuse of personal data, and damage to brand and reputation.

Disclosure of Information. The risks of "oversharing" using social media are well-documented.

Preservation of Social Media Information. Information stored in social media may be subject to production in litigation. However, third parties (and not the business) may be the custodians of that information. As a result, preservation of information posted in or share on a social media site presents challenges for a business.

Create and Implement a Policy and Plan

- Identify who will be responsible for implementing and overseeing the company's social media efforts.
- Establish how the company will interact with the public, and identify those individuals authorized to do so.
- Identify the social media outlets to be utilized, as well as those tools which may be used to monitor other social media and the web at large.
- Set Rules for Communication. Set clear rules for how information can be communicated, and consider including the following:
    - Protect confidential and proprietary information (and identify what qualifies as confidential and proprietary information);
    - Do not compromise policy or public positions
    - Do not speak on behalf of the organization unless authorized to do so
    - Restrict use of trademarks, logo, etc.
    - Prohibit negative behavior and put employees on notice of potential negative consequences
    - Prohibit competing activities (e.g. sale of a product of a competitor)
    - Make clear that legal liability may attach to online writings or postings
    - Online activities cannot interfere with job performance
- Set Rules for Collecting Information. Will the company collect personally identifiable information from customers or consumers? Will the use of information collected via social media comport with the company's existing privacy policy?- Establish guidelines for collecting information through social media.
- Train Employees on Proper Social Media Conduct. The business should provide regular training on appropriate use of social media in the workplace, as well as guidance on how to protect information and minimize information security risks.
- Conduct Appropriate Audit/Review- Update The Plan. The company should review its program on a regular basis to measure its effectiveness relative to the objectives set by the business, as well as the extent to which the program addresses and minimizes risks. Moreover, the program should be updated based upon evolving corporate objectives, legal and regulatory requirements, and social media tools.

[CLIENT] Custodian Collection Questionnaire

INTERVIEWEE:		CURRENT TITLE & START DATE:	
EMPLOYEE NUMBER:		PRIOR RELEVANT TITLES (START/END DATES):	
BUSINESS UNIT/DEPT NAME:		MANAGER NAME:	
E-MAIL ADDRESS:		PHONE NUMBER:	
INTERVIEWER:		INTERVIEW DATE:	

Questions	Comments
I. GENERAL INFORMATION	
You have received one or more DRNs ("Document Retention Notices") related to the Matter asking you to preserve Relevant materials, and will continue to receive reminders until the matter is closed. The requirements of the DRN remain in place until you receive a release notice from your legal department or your lawyer. This is true without exception even if your documents are provided to or copied by your legal department or your lawyer, or if others have copies of the same Relevant Materials. Do you understand and comply with all of these statements?	

Questions	Comments
The DRN describes the potentially Relevant Materials and your duty to preserve information within your custody and control. If you have any questions about your obligations under the DRN, we can review this in detail today. Do you have any questions about the scope of the DRN or your obligations under the DRN?	
What was your involvement in the issues related to this matter?	
Since beginning your employment, have you held any previous positions where you would have been involved in issues related to this matter? If yes, list positions and dates held (limited to the relevant time period).	
Have you ever received related data from a predecessor or departing colleague during the relevant time period or transferred any Potentially Relevant Materials ("PRM") to a successor of a previous position? If yes, explain.	
Even if you don't have the data itself, are you aware of any PRM from a predecessor or departed colleague? If yes, explain.	
Have you ever had your hard drive imaged or any other data collected for Legal? If yes, by whom, when and why?	
Estimate the percentage of non-English PRM you have related to this matter. List languages.	
List and explain any abbreviations, acronyms, terms, names of people, unique phrases or code names used to refer to relevant issues or projects that can help us find PRM.	
Generally, what types of documents / information did you create / receive related to this matter?	
II. SOURCES/LOCATION OF POTENTIALLY RELEVANT MATERIAL (PRM)	
Describe types of computers that might have PRM (PC, desktop, laptop, tablet, etc. or all of the above; use of home computer for business purposes).	

Questions	Comments
Have you at any time during the relevant time period changed to a new PC, desktop, laptop, or tablet or all of the above? If yes, please provide any information about any data that was not transferred to your new machine and the point of contact you worked with for that transition.	
Describe external storage devices/loose media used to store PRM (CD/DVD, flash/thumb drives, external hard drives, etc.).	
Describe specific locations of PRM (shared /sub-directories) and methods/naming conventions for storing data.	
Identify hard drives or other media that may contain PRM that is password-protected or encrypted; provide password/encryption keys.	
Have you had any hard drive crashes, lost or stolen computers or hard drives/thumb drives or other data loss from the start of the relevant time frame to the present? Other examples include, but are not limited to, migration failures to a new computer or to an email account/system, etc. If yes, explain.	
Advise if administrative assistant is able to create/save documents on your behalf. If yes, where are documents stored (desktop, individual and/or departmental shared drive(s), etc.)?	
III. Types of Potentially Relevant Material	
A. Electronic Material	
1. Email	
Describe if potentially relevant emails are stored in folders and subfolders. Can any email folders be excluded as entirely personal?	

Questions	Comments
Estimate volume of potentially relevant emails based on your involvement in the matter. Please include any email you have sent.	
Describe any routine practice for disposition of emails (*e.g.*, routine deletion of Deleted Folder).	
Describe any routine practice for organizing items in your Sent Items.	
Explain your practice if you reach the size limit of your mailbox (e.g., deleting, archive to PST, transfer to external media, other)? What are the locations of any such PSTs or external media?	
Explain process for archiving emails (*e.g.*, PST files on computer hard drive, network server, loose media, and/or enterprise archival system).	
Do you receive voicemail by email?	
Is personal web email used for business purposes? If yes, is there a folder for business related emails? Are business related emails from personal email forwarded to business email?	
Have you deleted or otherwise lost emails related to this matter? If yes, when?	
2. NON-EMAIL	
Identify if any non-email files (Pages, Word, PowerPoint, Excel, PDF, etc.) contain PRM, including any file types specific to your role (*e.g.*, drawing files, CAD files, etc.).	
Identify location of potentially relevant non-email documents on desktop, laptop, home, loose media, etc.	
During the relevant time period, identify if you routinely use password protection or encryption on PRM files, zip containers, etc. Please provide any likely or known passwords that have been used.	

Questions	Comments
Identify location of potentially relevant non-email documents in departmental / shared directories or Document Management System, including [CLIENT] Folders/Libraries. List precise names and file paths.	
Identify whether potentially relevant non-email documents are stored in a web based or other file storage locations. Examples include, but are not limited to, Box, DropBox; Google Drive; iCloud; FTP sites and other file sharing or cloud systems.	
Estimate volume of potentially relevant non-email documents based on your involvement in the matter.	
3. MESSAGING	
Describe if Instant Messaging or chat features are used. This includes Skype, Google Hangouts, Microsoft Lync, Facebook Messenger, or any other messaging tool. If yes, describe type and storage location.	
4. SMARTPHONES AND TABLETS	
Describe if Text Messaging is used. If yes, describe type and storage location.	
Describe use of Smartphone for company business. Company issued or personally owned? Tablet? For each, specify make/model and operating system (*e.g.*, iPhone 6 on iOS10.1).	
Have you at any time during the relevant time period changed to a new Smartphone, tablet or both? What happened to the data on the old device (*e.g.*, was it migrated to a new device, transferred elsewhere, deleted)?	

Questions	Comments
B. HARD COPY MATERIAL	
Describe any potentially relevant paper material and its location (office/home). If stored in office, describe paper records retention practice/policy: disposition/shredding, file storage/archive (*e.g.*, office file cabinets, offsite storage, etc.). Also describe approximate volume and how organized (*e.g.*, folders, binders, boxes) and classified (*e.g.*, alphabetical, by subject matter, by person).	
IV. OTHER SOURCES	
Describe any databases that you know are used to create and manage PRM.	
Describe any specialty and/or custom software applications that are used to create and manage PRM.	
Have you saved any potentially relevant audio or video files from use of your computer microphone, your webcam or other audio/video recording devices (e.g. handheld or smart devices)? If so, where and how are they saved?	
Do you currently or in the relevant time period ever used any [CLIENT]-supported backup solution? Have you ever used any other [CLIENT]-supported or personal backup solutions?	
V. ADDITIONAL PARTIES	
Do you ever communicate with the legal department or outside lawyers? If yes, then do any of those written communications contain PRM? If yes, then what are the names/roles/firms that you communicated with?	
Advise if any third parties whom you believe may currently have or may formerly have had custody or control of potentially relevant material *(Note: Helpful to analyze list of custodians and potentially add new individuals).*	

If an attorney is present at this meeting, the following may be read to the client representative(s) present at the interview: Certain attorneys present took notes of this meeting, including the thoughts and impressions of the legal team, the analysis of the issues presented, and the interpretation of facts discussed. This memorandum is not a verbatim transcript of the interview, but rather reflects the thoughts and mental impressions of counsel participating in the interview. This document and all of its contents are strictly confidential and wholly subject to the attorney-client and work product privileges.