Preparing Your Sales Force
Legal Issues From Training To Trial — Part II

E-Discovery
A Powerful Tool For The Defense
Dear Clients:

As ever, within the legal arena of healthcare, changes continue to come from all directions — government agencies and lawmakers, the impact of court decisions, even from new and unexpected areas. And with those changes comes a need for adaptation and creative thinking. Hopefully, this issue of Pro Te: Solutio will help you discover new ways of addressing familiar situations and map out what may be previously unexplored territory.

In part two of Preparing Your Sales Force, Keeping Legal Issues in Mind, from Training to Trial, you will find some advice on preparing medical sales representatives for deposition at trial. From tips on preparing sales reps for the trial experience to highlighting matters of addressing an audience, this article should help allay common concerns going into a deposition.

But what if a sales rep has been fraudulently joined into a case? This issue’s article Sales Representatives, Diversity Jurisdiction, and Fraudulent Joinder provides guidance into dealing with this increasingly popular attempt to avoid removal to federal court through research — both traditional research and current-by-the-hour website searches.

As the internet becomes a more common part of daily life, e-discovery becomes a more likely part of evidence submission. If electronic evidence is gathered or submitted improperly, however, it can be omitted just as any other type of evidence can. Using E-Discovery to Pop the Hot Air from Plaintiff’s Case examines how and why e-discovery should be used against exaggerated claims.

Staying current with innovative approaches and newly emerging tools is just one of the many ways our Pharmaceutical, Medical Device, and Healthcare Industry Group works to make a difference for those dedicated to making a difference in the lives of others.
**SHARING SOLUTIONS**

It’s human nature to share problems. But how often is someone willing to share solutions? Butler Snow wants to do just that — provide scenarios and the solutions that turned a client’s anxiety into relief and even triumph. That’s why we created this magazine, *Pro Ò: Solutio*, which explores how real-life legal problems have been successfully solved.

That’s also why we at Butler Snow redesigned and expanded our unique health-oriented industry group, now comprised of two major sections that handle business and litigation. The Pharmaceutical, Medical Device, and Healthcare Industry Group has more than 50 multi-disciplinary attorneys who provide creative solutions for the complex issues of the healthcare industry. This group includes product liability and commercial litigators; corporate, commercial, and transaction attorneys; labor and employment attorneys; intellectual property attorneys; and those experienced in government investigations.

*Pro Ò: Solutio* is a quarterly magazine available only to the clients of Butler Snow. If you have questions or comments about its articles, you’re invited to contact group co-chairs Christy Jones and Charles Johnson, as well as any of the attorneys listed on the inside back cover of this publication.
If passed, Sunshine would require manufacturers of any drug, device, biological, or medical supply that is eligible for Medicare, Medicaid, or State Children’s Health Insurance Program (SCHIP) coverage to disclose, on an annual basis, any payment or other transfer of value to a physician, medical practice, or group practice that exceeds $100 per year. The first report would be due March 31, 2011.\(^1\) Sunshine defines payment broadly to include one or more transfers having an aggregate value of more than $100 per year, including food, entertainment, travel expenses, education, gifts, charitable contributions, grants, consulting fees, honoraria, research, royalty or license, other compensation, profit distributions, and ownership/investment interest held by physicians or their immediate family members (but excludes publicly traded securities or mutual funds as long as such were purchased by the physician and not provided by the manufacturer) and other transfers as defined by the HHS Secretary.\(^3\) Manufacturers would not be required to report educational materials that directly benefit patients, product samples for patient use that may not be sold, or in-kind contributions used for charity care.\(^4\) Additionally, under the proposed legislation, manufacturers would be allowed to delay reporting payments made pursuant to a product development agreement for services provided in conjunction with the development of a new drug, device, biological, or medical supply or in connection with a clinical trial until the first report after FDA approval or two years, whichever is earlier.\(^5\) HHS would then make all of the reported information available via the internet in a searchable, user-friendly format.\(^6\) Actual fines and penalties under Sunshine are not the biggest risk, since presumably the reports will be scrutinized for potential violations of federal and state laws by government investigators and qui tam hopefuls who should benefit from the “searchable, user-friendly format” to reduce greatly their fact-gathering burden.
Regrettably, Sunshine does not incorpo- rate the crucial state law preemption provi- sions that the industry had secured in prior Sunshine drafts. Instead, as introduced, Sunshine only preempts duplicate state re- porting requirements but allows states to impose additional reporting obligations. Some states have already adopted disclosure laws that impose additional requirements beyond Sunshine, and additional states are slated to introduce disclosure legislation this year. The inadequate preemption provi- sions make Sunshine seriously flawed and significantly increase the complexity of the compliance systems that will be required to track contradictory state and federal reporting requirements. For instance, Massachu- setts state law reporting requirements begin July 1, 2010, and extend far beyond Sun- shine’s application to physicians by requir- ing disclosure of payments to anyone authorized to prescribe, dispense, or pur- chase drugs or medical devices licensed in Massachusetts as well as officers, employees, agents, or contractors. In Minot, North Dakota, to teach a training program, Dr. Dorgit will be paid $400 per hour for his services. He arrived in Minot and took a taxi to the Good Care facility. Two hundred physicians registered for Good Care’s training program, but due to an unreasonably late snow creating haz- ardous driving conditions, only 150 arrived on the day of the program. The program lasted for six hours, and modest meals were provided. Dr. Dorgit provided the training and participated in a subsequent question and answer session. Although he planned to fly back to Phoenix immediately after the program, his afternoon flight was cancelled due to weather, so he was provided a hotel room by Good Care and rescheduled on a flight home to Phoenix the following morn- ing. Some additional physicians who at- tended the program were provided hotel and airfare since the program was not with- in driving distance for all attendees. Before we discuss the practical steps that are needed to track Sunshine and emphasize the need for well thought out, flexible data collection systems, in defense of the Sunshine drafters, the goal of transparency is laudable. Tracking of monetary transfers between manufactures and physicians seems like a reasonable re- quirement to accomplish the reporting required by Sunshine or similar state disclosure laws, note that Sunshine does not prohibit any other legal payment to a physician. Therefore, Sunshine does not require that any existing arrangements be restructured, it simply requires disclosure. Of course, the challenge is that develop- ing a disclosure system that is sustainable over time is anything but simple. For exam- ple, to accomplish the reporting required by Sunshine to track the interaction between Dr. Dorgit and Good Care outlined above, Good Care will need to develop a system that includes the following:

- An event identification number specific to the training and education program, to be assigned to all airfare, lodging, and any other travel expenses. In this system, the purpose being to ensure the costs for the program are reconciled to the event file.
- A unique identification number for Dr. Dorgit, all faculty, and each physician atten- ding the training program.
- A procedure/work instruction to reconcile meals, airfare, lodging, and transporta- tion and assignment of each transfer of value to the unique identification numbers assigned to each physician for this specific event.
- A check point to ensure that Dr. Dorgit has an active consulting agreement and a method to track any payment for the con- sulting activity to ensure the consulting payment will be captured and reported.
- A procedure to address any no shows for meals and a reconciliation process to ensure each transfer of value is accurately captured. If 200 plates of food were charged based on the number of expected attendees, but only 150 attendees showed up for the meal, additional process must be in place to either adjust the price per per- son or account for the no shows. Since no one’s plate of chicken got bigger because of the no shows, it would seem reasonable to account for the no shows separately rather than to increase the price per head reported as a payment for Sunshine purposes. On the other hand, if the event planner negotiated a deal for the 150 actual attendees, for the budgeted price of chicken for the 200 ex- pected guests, the system must collect and report the higher price per head. A process must be in place to deal with all potential variances consistently. As a vegetarian attendant stepped out to grab his own vege- tarian sandwich, will the system report no monetary transfer for this attendee or allo- cate the food and beverage cost for the program whether or not they accepted the meal, thus, technically over-reporting the value of payments to the attendees?
- A system to ensure that all payments were processed with appropriate triggers to be tracked in the disclosure database. The system used must be capable of producing reports by a physician-unique identifier that details the type of value transfers and provides aggregate totals by type of interaction.

This example illustrates that, while disclo- sure of payments to physicians may sound simple, implementation of reliable systems to collect the information to be disclosed is complex. It will require re-engineering of processes and significant training of personnel across all areas of the organization to ensure that the processes are followed. How will your organization prepare for Sunshine?

The best answer is to integrate the data collection process into daily operations of the business rather than intrusive collec- tion of data by compliance personnel. Every business unit and employee must take re- sponsibility for compliance, and those clos- est to the business function are in the best position to design workable processes. For instance, to properly track payments, a lim- ited number of company employees may need to make travel arrangements directly. Past policies of reimbursing physicians and employees for certain types of expenses on personal credit cards may need to be halted. Undoubtedly, serious information technology solutions need to be considered to aggregate data. While a simple spreadsheet-type data base may seem the quickest path to dis- closure compliance, it is not sustainable over time for most companies, considering the volume of entries that will be required and that state law requirements will continue to expand. Our example was one training and education program; large companies with multiple products may have hundreds of these programs each year. Sunshine compliance will require aggrega- tion of data from multiple operating depart- ments. The following chart illustrates the complexity of the flow of information and the variety of operational departments that may need to contribute data to the disclosure data base.

Successful implementation of a long-term disclosure strategy will require assembling a cross-functional team that includes (at a minimum) business partners from the following areas:

- Compliance
- Legal
- Information Technology
- Medical Education/Training and Educa- tion Department/Event Management
- Customer Contact Management
compliant with the federal anti-kickback statute?

• Does the company have documentation containing the fair market value analysis of the consulting arrangements?

• Prior to payment for the consulting services, was there a reasonable review, and was it approved by the individual who engaged the service(s)?

• Was the number of hours for preparation reasonable?

• Does the number of hours invoiced for the presentation match the agenda time?

• Was the amount of travel time reasonable based on flight schedule or driving distance?

• Was the presentation reviewed and approved by the appropriate company representative to ensure it met all regulatory, trademark, legal requirements (i.e., label, etc.)?

• Did Dr. Doright alter the presentation on the plane while traveling to the meeting without approval of the company’s coordinating regulatory reviewers?

• Does the company have a process to ensure that the presentation was not altered?

• Did Dr. Doright deviate from the approved FDA indications during the presentation?

• Was airfare the lowest logical fare?

• Was rail or bus transportation utilized for the overnight stay?

• Were all expenses captured and submitted?

• Was the amount of travel time reasonable based on flight schedule or driving distance?

• Was the meeting location appropriate?

• Was the hotel for the overnight stay an approved hotel?

If any inappropriate expenses included in the hotel bill?

• Was the meal within reasonable limits?

• Were all expenses captured and submitted?

• Was the provision of this consulting agreement unduly influenced by sales rather than educational needs?

Perhaps prompting the additional substantive compliance questions that will arise while implementing a Sunshine compliant disclosure program will be the “silver lining” to Sunshine. Transparency is good for public trust in the industry and will level the playing field for organizations that strive to operate within legal boundaries. Essentially, Sunshine is forcing companies to invest in more effective compliance processes to track and monitor their relationships with physicians and other healthcare providers.

For the first time in the history of the industry, most companies will have access to databases to evaluate the total costs of training and education programs and will aggregate costs across departments to know the total company compensation to a particular healthcare provider or entity. Presumably, better data will lead to better decisions, and in that regard, perhaps, with thoughtful preparation, Sunshine will be enlightening. However, if Congress fails to re-incorporate meaningful state pre-emption provisions into the final version of Sunshine, even with diligent preparation, manufacturers are in for a stormy course through frequently shifting state disclosure requirements.

**Recommended Actions**

1) **Compliance Plan Update**

Although not directly responsible for reporting, healthcare systems, hospitals, and physician offices should take actions to help satisfy their own compliance obligations. Certainly, the first order of business is to include appropriate language in the organization’s compliance plan. From there, policies and procedures should be established to provide guidelines for contract approval and review—including legal review—and appointing the individual(s) with ultimate authority for executing the contract. By limiting the number of individuals authorized to execute agreements, accompanied with those individuals requiring legal review as a condition precedent to signing, healthcare providers can substantially decrease their risk. Concurrently, staff education is crucial to this process.

Healthcare providers should not only properly educate their staff regarding any such updates, documentation of such efforts should be maintained in support thereof. Inherent in this process is a decision-making opportunity. Coupled with recent industry moves such as the recently-revised PhRMA Code on Interactions with Healthcare Professionals, organizations should engage in an extensive review of current practices to help ensure proper compliance.

2) **Physician Self-Disclosure Form**

Further recommended steps include maintaining appropriate documentation and records evidencing any applicable financial arrangements. To that end, healthcare providers should be prompted to track and monitor their relationships with physicians who may have a financial relationship with a particular manufacturer from whom the organization seeks to make purchases. To help avoid potential Stark and/or Anti-Kickback Statute entanglements, proper documentation of the products purchased and the fair market value of such is extremely important—yet another good reason to have sound contract review, approval, and execution policies in place.

3) **Contract Negotiations**

When negotiating purchase agreements, healthcare providers should be mindful of these reporting requirements. Including contractual language whereby the manufacturer represents and warrants that any and all applicable financial relationships have been disclosed is advisable. Doing so will bolster the organization’s compliance efforts. Similarly, doing so will help the organization manage not only its agreements with manufacturers, but also its agreements with physicians who may have a financial relationship with a particular manufacturer from whom the organization seeks to make purchases.

**Conclusion**

As currently drafted, the Sunshine Act will require hospitals, health systems, and physician offices to be even more diligent in their compliance efforts. The days of not knowing or not asking for such information are already gone. Taking (at least) the steps outlined above will increase healthcare providers’ knowledge regarding their financial dealings with physicians and manufacturers. This knowledge should help healthcare providers make more informed decisions while managing their organizations.
No one likes to be deposed. Court reporters, cameras, and lawyers combined with forced conversation can send even the most experienced professional into a panic. Although your sales representatives have demonstrated excellent communication when acting as a resource to physicians, performing well in the artificiality of the deposition process requires a different set of skills. Effective preparation on both the general process and the case-specific issues can minimize the stress and turn a potentially adversarial encounter into a positive experience for both the individual testifying as well as your company.

Allay Fears and Explain the Process
At this stage in their lives, most sales representatives have never spent a day with a lawyer, and if they have, the odds are that they have not had to meet with an attorney in the context of preparing to testify at a deposition or trial. To the extent possible, put the sales representative at ease by explaining what her role will be in the litigation. Explain the nature of the case and the parties involved, and let the representative know that she is an important witness because she is the company’s primary contact with the physician(s).

Although you want to assure the sales representative that the company is looking out for her best interests and is taking action to ensure she will be prepared for deposition, you also need to be aware of and guard against potential conflicts. The company should only provide counsel for the sales representative so long as there are no conflicts of interest. For this reason, you should review the sales representative’s employment file and be prepared to address any past or future potential compliance issues.

Provide your sales representative with the contact information for the outside counsel who will prepare the sales representative for deposition. Define your role versus the role of outside counsel. For example, who should they call if they identify documents in their file related to the case? Indicate that outside counsel will meet personally with the sales representative and most likely run through anticipated deposition questions. (A list of potential deposition topics accompanies this article.) Let the sales representative know that preparing for deposition requires at least two meetings: One meeting to go over potential topics that may be covered and to review documents and another close to, if not the day before, the deposition to refresh the sales representative on both substantive and procedural concerns.
Instruct the sales representative not to discuss this matter with family, friends, or work colleagues and that any calls or inquiries may receive should be directed to legal counsel. Explain that the sales representative will likely be asked with whom she discussed the case and that any of the persons who were privy to these discussions may be subject to deposition themselves. You should also inform the sales representative’s immediate supervisors — e.g. district and regional managers — of the sales representative's upcoming deposition. Not only could they have particular knowledge about relevant marketing issues in their territory, but they also need to know that their sales representative will be pulled from the job on multiple occasions for preparation and the deposition itself.

Gather Relevant Documents
If a deposition subpoena has already been served on your sales representative, it most likely includes a listing of the categories of documents the sales representative will have to bring to deposition. Even if not listed, for preparation purposes, the sales representative will need to collect all of his or her documents along with laptops, jump drives, or any other electronic storage devices containing information about the drug and physician at issue and bring those documents to the meeting with counsel.

By the point in the litigation, key sales and marketing documents may have been identified. Local counsel should maintain copies of these documents and identify which documents could be helpful in preparing the sales representatives. Conversely, there will likely be internal documents that the sales representative has not been privy to and that should not be used when preparing the sales representative to testify.

If the court has required the production of call notes and/or IMS data relating to the plaintiff’s prescribing physician, the sales representative should be prepared to explain what the notes and data mean and how they are used. Pull a copy of the sales representative’s employment file noting all awards, accolades, counseling, and reprimands. Although the sales representative has likely already received your company’s document retention letter, remind her there should be no destruction of documents, sales pieces, or electronic data related to the drug or physician at issue.

Emphasize Your Company’s Themes
Now notwithstanding plaintiff’s counsel’s attempts to gain key concessions from your sales representative to aid his client’s case, the deposition can also be an opportunity to present the company’s story. Good politicians know how to “stay on point.” Your sales representative should be similarly prepared to stress the underlying themes of your case. Although your themes will hinge on the issues presented in your particular case, a few ideas appear as leitmotifs throughout pharmaceutical and products litigation.

A Sales Representative’s Credibility is Job Security
Sales representatives are employed by the company to be a resource to physicians. They are responsible for discussing the benefits and limitations of their company’s drug so that physicians can determine whether or not a product is appropriate for their patients.

To do their jobs well, sales representatives need to be informed, knowledgeable, and honest. Only through consistent, accurate communication will they gain the credibility and goodwill necessary to build a long-term relationship with a physician; they are not interested in making the hard sell to achieve a one-time sale.

Dishonesty is not only severely punished by the company, but it does not make economic sense for the sales representative. Any short-term gain through over-promotion would be outweighed by the damage to the sales representative’s reputation and possible termination by the company. The sales representative should be prepared to offer examples of company policy, demonstrating that termination can result from inaccurate advertising. For example, what are the repercussions for a sales representative using a “homemade” sales aid or detailing off-label?

Sales Representatives as One of Many Resources to Physicians
Although your sales representative provides accurate and helpful information to a physician, a sales representative is not a medical doctor and cannot be considered a complete source of information for physicians. Your sales representative should be prepared to address how your company handles physician information requests and whether the prescriber(s) at issue ever requested additional material. Other sources for physicians include package inserts, medical journals and articles, medical conferences, press releases, peer to peer education, and their own experience. A physician would need to review many sources to have complete information on a drug.

Physicians, Not Sales Representatives, Prescribe Medications
The final decision to prescribe a drug to a patient is the physician’s individualized medical judgment based on the patient’s individual medical history and risks. A sales representative is not attempting to convince physicians that her company’s drug is appropriate for any one patient — that is a determination only the physician can make. A large part of what sales representatives do is distinguish their product from competitors’ products so that when a physician determines a patient will benefit from a given drug class, the physician will choose to prescribe the company’s drug, rather than other drugs in the same class.

Science, Not Marketing, Guides Sales Representatives
All of the training given to sales representatives and the material they use in the course of detailing physicians has been developed based on valid scientific studies and approved by the research division of the company. Although the marketing department may determine appropriate ways to communicate and package the company’s message, the message itself is developed by the research arm of the company.

The FDA Has the Final Word
The business of making and selling prescription pharmaceuticals is highly regulated and tightly controlled. All sales and marketing activities are subject to FDA review and approval. In addition to the FDA’s supervision of marketing, Congress is considering passing new legislation to require disclosure of most payments, including meals over a certain threshold, to physicians (see “Warning! Compliance Forecast Calls for Sunshine,” p. 2 of this issue). Given the federal government’s level of monitoring, it is disingenuous for plaintiff’s counsel to suggest that the company’s marketing department attempted to deceive the FDA.

Avoid Traps
Even a sales representative who is well prepared for the deposition process, tuned into potential areas of inquiry, and ready to convey the company’s themes can fall prey to plaintiff’s counsel’s verbal traps. Questions that appear innocuous may come back to haunt the company.

Acknowledge Skills
A variety of skills are necessary to communicate all components of a sales presentation. A strong background in science is not a required trait. Acknowledging plaintiff’s counsel’s statement to the contrary may act as an admission that the company’s sales force is undereducated for their task.

Sales representatives should openly discuss their education and training and not try to overplay their substantive knowledge.

Performing Well at Deposition Requires a Great Deal of Preparation and Focus
Educating your sales representative about the process, the substance, and the potential pitfalls of a deposition helps ensure that your sales representative will perform as admirably in the deposition room as she does in the physician’s office.

Consistent with the themes above, the research arm of the company and the scientists who work there have already prepared the message. The sales representative’s job is to convey that message in an effective way and provide approved information to accommodate individual physician’s prescribing habits.

Know Limits
Sales representatives need to answer questions based on their own understandings and experiences. They should not purport to speak on behalf of the company as a whole or, more narrowly, other sales representatives within their territory. Often, plaintiff’s counsel may present sales aids in draft rather than final form or fail to distinguish between material that may be used as an aid and material that may be left with the physician. For this reason, a sales representative should not testify that a particular aid was used unless he or she is certain of that fact from personal experience.

Similarly, sales representatives should candidly acknowledge that they are not medical or regulatory experts. Sales representatives need to know that they do not have to have definitive answers to regulatory questions and that “I don’t know” is an acceptable answer. For example, whether or not a given marketing piece is consistent with the label is a complex determination. The representative may answer, “I am not a regulatory expert or a medical doctor. My understanding is that this material was reviewed and approved by our regulatory department.”

Respect the Audience
Remind your sales representative that the audience is a jury. Many jurors’ experience as a physician’s office is sitting in the waiting room for a while, followed by a very brief visit with the physician. While having half-hour lunches with a physician and his staff may seem routine to the sales representative, it may be viewed as unparalleled access when compared to the jurors’ own experience. A deposition riddled with jargon may come back to haunt the company.

Preforming well at deposition requires a great deal of preparation and focus. Educating your sales representative about the process, the substance, and the potential pitfalls of a deposition helps ensure that your sales representative will perform as admirably in the deposition room as she does in the physician’s office.
**Potential Areas of Inquiry at Sales Representative Deposition**

**Sales Representative Background**
- Personal (married/children/activities in community)
- Education
- Employment
- Training
- Sales Quotas/Compensation/Bonus
- Sales Aids (branded/unbranded; company logo)
- Off-label protocols
- Order of Sales Presentations
- Labeling changes
- Familiarity with studies
- Sampling policy
- Speaker programs/gifts
- Personal use
- Sales force structure
- Detailing generally
- Medical literature policy
- Key prescribers

**Prescriber History**
- Any conversations with prescriber regarding drug/device at issue;
- Any remarks (positive or negative) from prescriber regarding drug/device at issue;
- History of prescribing drug and device;
- Off-label inquiries from prescriber;
- Any discussions with prescriber regarding litigation associated with drug/device at issue;
- Any discussions with prescriber where issue caused or contributed to a particular health problem or disease;
- Any discussions with prescriber regarding efficacy of the drug/device at issue;
- Any discussions with prescriber regarding safety of the drug/device at issue;
- Knowledge of prescriber's litigation history (e.g., has he ever worked as an expert?);
- Prescriber's attendance at lunch and learned, company-sponsored speaking events, etc.;
- Prescriber's standing and reputation in the community; and
- Whether prescriber still uses drug or device in his practice.

1 Written by Michael Heires & Lisa M. Martin

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**Time Issue of Whether a Sales Representative Has been fraudulently joined by the plaintiff to defeat diversity jurisdiction is one that is continuously evolving.** When preparing an opposition to remand, we have to search for a suitable case and conduct thorough research searches on court websites as well as traditional Westlaw/Lexis searches to ensure the removal and remand briefing contains the most up-to-date cases. This is not intended to provide a complete overview of the law in this area for the applicable jurisdictions. Because the issue continues to evolve, when presented with a sales representative fraudulent joinder situation, we must review the precedent for factual distinctions and conduct research searches on court websites as well as traditional Westlaw/

**Written by Michael Heires & Lisa M. Martin**

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**Case Law**

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my client is a fine upstanding person, selflessly giving to others, protecting children, the elderly, that their client is the Mother Theresa of plaintiffs? You know the spiel. It begins with and homeless dogs from cruelty and abuse and would have done even more for this world. The pitch ends with a request for a

Using E-Discovery to Pier the Hot Air

from Plaintiff’s Case

Hot Air on Nightmare: How often have you heard from opposing counsel that their client is the Mother Theresa of plaintiffs? You know the spiel. It begins with a sizeable check to compensate the plaintiff for egregious, irreparable, and life-altering injuries. Wanting something more balanced than this one-sided tale of horror, you move forward to find out what the plaintiff’s case is really about — hot air or nightmare?

E-Discovery

One of the sharpest tools in the discovery drawer for deflating a puff-d up and seemingly impenetrable plaintiff is e-discovery. Traditionally, the spray of e-discovery has been aimed against corporate defendants, causing a trail of anguish to comply with the unwieldy demands created by the electronic format. But that tool can be equally effective for the defense. Depending upon age, geographic residence, and other factors, the likelihood is in your favor that the plaintiff has left an e-trail.

According to a 2009 Gallup report, internet usage among Americans has doubled over the last five years, and nearly half of all Americans are frequent internet users. "While the most educated, most affluent, and youngest Americans are those most likely to say they use the internet more than one hour per day, the less affluent, non-working, and unmarried are increasing their usage at noteworthy rates."

The e-discovery plan begins with a simple search of the plaintiff’s name on Google. This initial search alone can produce some wonderful results. For instance, a Google search on the plaintiff in a pharmaceutical product liability action showed that the plaintiff was able to go boating, fishing, and energetically participate in many other activities that were in stark contradiction to his trial testimony. Another quick Google search showed that a plaintiff in a medical device action engaged in a public chat forum, where the plaintiff stated that his counsel did not believe in his case. With the proliferation of home videos and public postings, YouTube may also provide motion picture impeachment.

Discovery of Social Networking Websites

Another potentially fertile area is publicly available information from social networking websites. Social networking websites allow individuals to form online social communities. Within such sites, members communicate by public or private messaging, file-sharing, and/or discussion boards. The benefits of these sites are building relationships, information-sharing, education, grassroots advocacy, and expressing and sharing different forms of arts and entertainment.

Social networking websites attract a wide variety of individuals from different age groups and backgrounds, and different sites have different constituents. For instance, Facebook, the most popular social networking website,1 began as a university site and has grown to 200 million active users around the world.2 MySpace attracts a young crowd, which according to one author, has made the site “a low-rent teenage hangout.”3 MySpace, however, has taken aggressive steps in 2009 to attract older folks in a battle for popularity against Facebook,4 while LinkedIn is specifically geared to professionals.

To participate in a social networking website, an individual fills out a profile with contact information, personal information such as gender and interests, and agrees to abide by the website’s terms of service and privacy policy. While each website has its own requirements, most of the popular sites require the user: (a) to provide accurate, current, and complete information as may be prompted by any registration forms on the site; (b) to maintain and promptly update registration data so as to keep the information accurate, current, and complete; and (c) to be fully responsible for all uses and actions taken on the user’s account. Accordingly, against a requirement of honesty and accuracy, publicly accessible user information may be relevant to a plaintiff’s bias, credibility, and even substantive issues depending on what information is listed.

Not many cases directly address third-party discovery from social networking sites. In Looksiko v. Federal National Title Agency,5 the court reasoned “what a person views as acceptable or welcomed sexual activity or solicitation in his or her private life, may not be acceptable or welcomed by a fellow employee or supervisor.”6 However, the court found that any statements plaintiff may have made about her two suicide attempts or contemporaneous emotional distress claims on MySpace would be relevant to her claims for emotional distress.7 Also, the court allowed discovery on any online statements plaintiff made about her office computer or at least a weekly basis.8 After her husband became employed at the same company, plaintiff alleged that another supervisor coerced her into having sexual relations with him under a threat that if she did not do so, her husband would be fired.9 Plaintiff then engaged in unwanted sexual acts.10 After plaintiff complained to human resources, she was told the situation would be handled but if she brought it up again, she would be fired, and in her distressed state, plaintiff attempted suicide on two separate occasions.11 Defendants took affirmative investigative action after plaintiff filed the sexual harassment lawsuit. One of those steps included serving a subpoena on MySpace.com to produce information regarding two accounts maintained by the plaintiff.12 MySpace.com produced the “public” information but refused to produce private email messages on either account absent a search warrant or letter of consent to production by the account holder.13 The two MySpace accounts publicly showed that plaintiff identified herself as a single woman who didn’t want kids and alternately as a married woman with six children she loves.14

Defendants moved to compel plaintiff to consent to the production, arguing that plaintiff was using the private messaging function of MySpace to facilitate the same type of electronic and physical relationships she has described as harassment in her complaint.15 Defendants also argued that such evidence, if discovered in the private emails, was relevant to plaintiff’s claims for emotional damages.16 The court denied without prejudice defendant’s motion to compel. Consistent with other sexual harassment cases, the court drew the line by permitting discovery of the plaintiff’s work-related sexual conduct, but not permitting inquiry into plaintiff’s private sexual conduct.17 The court reasoned “what a person views as acceptable or welcomed sexual activity or solicitation in his or her private life, may not be acceptable or welcomed by a fellow employee or supervisor.”18 However, the court found that any statements plaintiff may have made about her two suicide attempts or contemporaneous emotional distress claims on MySpace would be relevant to her claims for emotional distress.19

E-Discovery remains. How to get the e-discovery admitted into evidence?

Even when you have obtained e-discovery to pierce an exaggerated claim, a bigger hurdle remains. How to get the e-discovery admitted into evidence?
law suit and on the online accounts she main- 
tained. The discoverable information in- 
cluded both the plaintiff’s own emails and 
her MySpace private messages.19 The court 
pointed out that the “proper method for ob-
taining such information” was to serve upon 
plaintiff properly limited requests for pro-
duction of relevant email communications” 
and threatened to sanction plaintiff if she 
engaged in wrongful and bad faith denial that 
the MySpace accounts belonged to her.20 
Discoverable information “[d]id not include 
private email messages between Plaintiff 
and third persons regarding allegedly sexual-
ly explicit or promiscuous emails not related to 
Plaintiff’s employment.”21

In sum, requesting e-discovery, including 
social networking communication, should be 
the standard part of any defendant’s dis-
covery package on plaintiff; but care should be 
taken to craft the document request to the 
issues of the case.

Admissibility of E-Discovery

Even when you have obtained e-discovery 
to pierce an exaggerated claim, a bigger hurdle 
remains. How to get the e-discovery admitted 
into evidence? Chief Magistrate Grimm’s opin-
ion in Lorraine v. Markel American Insurance 
Co.22 provides an excellent comprehensive 
“how-to” analysis under the Federal Rules of 
Evidence. He provides a simple checklist for 
getting e-mails and other electronic systems 
information (ESI) into evidence, either at trial 
or in summary judgment:

- Is the ESI relevant under Rule 401, 
meaning does the ESI tend to make some
- Has the ESI been authenticated as re-
quired by Rule 901(a), meaning is the ESI
what it purports to be?
- Is the ESI being offered for the truth of
the matter asserted? If so, does the ESI fall
within one of the exceptions to hearsay in
Rules 803, 804, or 807?
- Is the form of the ESI that is being of-
f ered into evidence an original or duplicate
under the original writing rule set forth in
Rules 1002 and 1003? If not an original, is
there admissible secondary evidence to prove
the content of the ESI?
- Is the probative value of the ESI substani-
ally outweighed by the danger of unfair

prejudice or one of the other factors identi-
fied by Rule 403 such that it should be ex-
cluded despite all of the above?23

The magistrate judge pointed out the ubiq-
uitous nature of e-mails: “Although courts to-
day have more or less resigned themselves to
the fact that ‘[w]e live in an age of technology
and computer use where e-mail communica-
tion now is a normal and frequent fact for the
majority of this nation’s population, and is of
particular importance in the professional
world [...] it was not very long ago that they
took a contrary view — ’[e]-mail is far less of
systematic business activity than a monthly
inventory printout.’”24 The court observed
that people now “tend to reveal more of them-
selves in emails […] than in other more delib-
erative forms of written communication. For
that reason, e-mail evidence often figures prominently in cases where state of mind, 
motive, and intent must be proved.”25

An email message may be authenticated
directly or indirectly by “its ‘contents, sub-
stance, internal patterns, or other distinctive
characteristics, taken in conjunction with cir-
cumstances.”26 E-mails may even be self-
authenticating if they contain labels or tags
affixed in the ordinary course of business.27

The most frequent means to authenticate
email evidence is through a person with
personal knowledge, expert testimony, or
comparison with authenticated exemplar,
distinctive characteristics including circum-
stantial evidence, trade inscriptions, and
certified copies of business records.28

The court also addressed internet website 
postings, text messages, and internet chat
rooms.29 Establishing authenticity for these
types of electronic exchanges most likely
requires a witness with personal knowledge,
expert testimony, distinctive characteristics,
public records, a system or process capable
of producing reliable results, or an official
publication.30

Because the emails and other electronic sys-
 tem information at issue were not properly
authenticated, Chief Magistrate Grimm denied
the cross-motions for summary judgment.

Conclusion

E-discovery is becoming a routine part of
defense discovery requests. Planning how
to authenticate the information will be the
challenge.

Users.aspx>.

lar Social Networking Site.” <http://www.switched.com/2009/01/27/facebook-overtakes-myspace-as-most-
popular-social-networking-site>.

post.com/2009/05/28/owen-van-natta-myspace-ce_n_208526.html>; Caroline McCarthy, “Van Natta as My
com/8301-13577_3-10226091-56.html>.

4 See MacMillan, Robert. “Reinventing MySpace: A New 
TRE53N7ID20090424>.

5 Feldon, Emily. “MySpace Courts Older Folks in Battle
<http://www.technewyork.com/around_town/the_scene/
Myspace-Courts-Older-Folks-In-Battle-Against-Face-
book.htm>.

7 Id. at *1.
8 Id.
9 Id.
10 Id.
11 Id. at *2.
12 Id.
13 Id. at *3.
14 Id. at *3.
15 Id.
16 Id. at **3-6.
17 Id. at 6.
18 Id. at *7-8.
19 Id.
20 Id.
21 Id. at *8.
23 Id. at 538.
24 Id. at 554 (internal citations omitted).
25 Id.
26 Id. at 554 (quoting Jack B. Weinstein & Margaret A.
Berger, Weinstein’s Federal Evidence §900.07(3)(c), Joseph
27 Id.
28 Id. at 554-55.
29 Id. at 555-57.
30 Id.
Dear Clients:

As ever, within the legal arena of healthcare, changes continue to come from all directions — government agencies and lawmakers, the impact of court decisions, even from new and unexpected areas. And with those changes comes a need for adaptation and creative thinking. Hopefully, this issue of Pro Te: Solutio will help you discover new ways of addressing familiar situations and map out what may be previously unexplored territory.

In part two of Preparing Your Sales Force, Keeping Legal Issues in Mind, from Training to Trial, you will find some advice on preparing medical sales representatives for deposition at trial. From tips on preparing sales reps for the trial experience to highlighting matters of addressing an audience, this article should help allay common concerns going into a deposition.

But what if a sales rep has been fraudulently joined into a case? This issue’s article Sales Representatives, Diversity Jurisdiction, and Fraudulent Joinder provides guidance into dealing with this increasingly popular attempt to avoid removal to federal court through research — both traditional research and current-by-the-hour website searches.

As the internet becomes a more common part of daily life, e-discovery becomes a more likely part of evidence submission. If electronic evidence is gathered or submitted improperly, however, it can be omitted just as any other type of evidence can. Using E-Discovery to Pop the Hot Air from Plaintiff’s Case examines how and why e-discovery should be used against exaggerated claims.

Staying current with innovative approaches and newly emerging tools is just one of the many ways our Pharmaceutical, Medical Device, and Healthcare Industry Group works to make a difference for those dedicated to making a difference in the lives of others.

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