TIPS

TORT & INSURANCE PRACTICE

Henderson|Franklin
ATTORNEYS AT LAW

JANUARY 2012

Amendments to Florida Rule of Civil Procedure 1.720 - Mediation Procedures

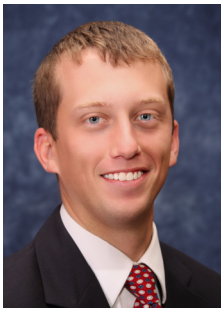
By: Robert Anderson

New rules governing mediation went into effect on January 1, 2012. These amendments to Florida Rule of Civil Procedure 1.720 will impose additional requirements on insurance companies and their representatives attending mediation.

The amendments to subsections (b) and (c) of Rule 1.720 require that the representative attending the mediation have the authority to enter into a binding settlement agreement up to the policy limits or the plaintiff's last demand, whichever is less. The adjuster must be able to do so without having to further consult with a supervisor. Also, under Rule 1.720(e), the parties must now serve a "certificate of authority" on the other parties. The certificate of authority must identify the party representative who will be attending mediation will the full authority to settle. A notice of serving the certificate of authority must be filed with the court at least ten days prior to mediation.

These changes to the rules governing mediation may have little practical impact on how cases are mediated and settled, but a failure to comply with the rules can be costly. A failure to appear at mediation with a representative with the full authority described in the Rule is sanctionable in the form of mediation costs and attorney's fees, and a failure to file the certificate of authority creates the rebuttable presumption that the representative failed to appear at mediation.

If you have any questions regarding this rule change, please contact a member of our Tort and Insurance Practice team at Henderson Franklin.



Robert Anderson is an associate in the firm's tort and insurance practice group. He can be reached at 239.344.1132 or robert.anderson@henlaw.com.

ATTORNEY SPOTLIGHT

Kelly Spillman Jablonski

Kelly Spillman Jablonski concentrates her litigation practice in the defense of premises liability, automobile accidents, errors and omissions and other tort claims. She also handles cases with a variety of PIP coverage issues. She is admitted to practice in all Florida and Pennsylvania state courts, as well as the United States District Court for the Middle District of Florida. Kelly is a regular speaker at the annual Claims Defense Update educational seminar for insurance adjusters produced by Henderson Franklin's Tort & Insurance Practice ("TIPS") department.

In the past, Kelly has worked for State Farm and Nationwide as a field bodily injury adjuster. Her experience in insurance provides her with a unique perspective because she understands the pressures that adjusters face.

Over the past 18 months, Kelly has obtained positive results in three separate premises liability cases. She has no time to rest on her laurels; Kelly is busy preparing for six jury trials in the next six months. When asked about her recent trial victories, Kelly states that relating to the jury and hiring an expert who the jury likes and understands are critical components at trial.

Kelly is originally from High Point, North Carolina, but grew up in Fort Myers, where she resides with her husband and their two children, Jackson and Emma. Kelly enjoys gardening and spending time with her family on their boat.

Kelly is a member of the Florida Defense Lawyers Association, Defense Research Institute, Florida and Pennsylvania State Bars, Lee County Bar Association, Panhellenic Alumnae of Lee County, Florida, and the Junior League of Fort Myers.

Kelly is an alumni of Stetson University where she obtained her undergraduate degree in 1988 and her law degree in 1991.

Is MySpace Really My Space?

By: John M. Miller

Below are excerpts from an article published in the Florida Defense Lawyer's Association June TAQ newsletter. If you would like a copy of the complete article, please contact John Miller at john.miller@henlaw.com.

Examining the Discoverability of the Contents of Social Media Accounts in Employment Law Disputes

Social Media, and specifically social networking, is not just a passing fad. There are currently hundreds of millions of users of social media world wide, and the use of this medium of expression and communication is growing by the day. Social media content can provide an excellent source of information in all types of legal disputes. Whether you are one of the millions of individuals that are currently a user of one or more social media applications, or whether you have thus far resisted the inexorable pull of the social media movement, there is no denying the fact that social media content can serve as an excellent and unparalleled source of information in all types of legal disputes. As such, the discoverability of such information in litigation is of paramount concern to anyone who practices in this field.

Determining whether or not social media content may be discoverable in any given context requires the courts to balance a number of factors, including the relevancy of the information sought, the need for the information in the subject litigation, the availability of the information from other sources, and the privacy interests of the party from whom the information is sought. This inquiry is typically very fact specific, and therefore, there is no bright line rule as to when and how this type of information can be discovered. Due to the relative nascence of social media and the use of social media content in litigation, the courts are only just now starting to develop an analytical framework for assessing the discoverability of this type of information.

WHEN IS SOCIAL MEDIA CONTENT DISCOVERABLE?

There are a multitude of uses for social media discovery, from reviewing personal messages sent by an employee in a sexual harassment case to assessing a plaintiff's loss of enjoyment damages in a personal injury defense case by reviewing his or her photographs posted online after an accident. Social media discovery can be extremely helpful in certain types of disputes. However, due to the personal and often private nature of social media content, there are privacy issues that can become relevant when a party seeks to discover this type of information. This information is generally personal to the individual from whom it is sought and will, in most cases, be met with stringent objection. As such, it will be up to the court in whatever jurisdiction the information is being sought to balance the privacy interests of the individual from whom the information is sought against the discovery rules in the relevant jurisdiction. There appears to be no case law from the district courts in Florida that squarely addresses the issue of when social media discovery is permissible, however, there have been cases decided recently in other states and federal jurisdictions that are instructive on the issue.

For example, let's look at Simply Storage case, *E.E.O.C. v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430 (S.D. Ind. 2010). The EEOC filed a complaint on behalf of two employees alleging sexual harassment by a supervisor at Simply Storage. As discovery in the case commenced, the Defendants requested copies of all photographs or videos posted on the two employees' Facebook and Myspace profiles as well as electronic copies of both employees' entire profiles including all status updates, messages, wall comments, causes joined, groups joined, activity streams, blog entries, details, blurbs, comments, and applications (including, but not limited to, "How well do you know me" and the "Naughty Application") for certain defined periods of time spanning several years. The EEOC objected to the requests claiming that they were irrelevant, unduly burdensome, embarrassing, harassing, and would improperly infringe on the privacy interests of the claimants. The employer argued that the material was relevant and discoverable, because the claimants put their emotional health at issue by claiming that they had sustained emotional pain and suffering, loss of enjoyment of life, anxiety, fear, bitterness, humiliation, embarrassment, inconvenience, depression, and post traumatic stress disorder.

(continued on page 3)

MySpace *continued from page 2*

The court began its analysis of the discovery requests by examining the scope of discovery permissible under Rule 26 of the Federal Rules of Civil Procedure. The court acknowledged the claimants' concession that some of the information on their social networking sites was relevant information to their claims. The Defendant maintained that it was entitled to the entirety of the contents of the claimants' social media sites, because all of the information was potentially relevant to the claimants' allegations that they had sustained emotional pain and suffering damages. Claimants argued that the information sought was not discoverable, because their profiles had been set to "private" but that if the information was discoverable, a protective order should be entered because the Defendant's requests were overbroad. The court ruled that the mere fact that the claimants' profiles had been set on private did preclude the discovery from being had. The court also held that all relevant material on the claimants' profiles must be produced but that the Defendant's requests as drafted were overbroad.

The court eventually held that some, but not all, of the claimants' social media profiles would be discoverable. In doing so, the court opined that, "it is reasonable to expect severe emotional or mental injury to manifest itself in some social media content, and an examination of that content might reveal whether onset occurred, when, and the degree of distress." The court reasoned further that information that evidences other stressors that could have produced the alleged emotional distress is also relevant. Because of this, the court ruled that the Defendant could discover any profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and applications for claimants for the period from April 23, 2007 through the present that revealed, referred, or related to any emotion, feeling, or mental state, as well as communications that revealed, referred, or related to events that could reasonably be expected to produce a significant emotion, feeling, or mental state. Additionally, the court held that any third party communication to the Plaintiff could be discoverable to the extent that it put the claimants' own communications in context. The court ruled that all pictures and videos would be produced under the same guidelines. In so holding, the court stated that if there was a question as to whether a certain piece of information should be produced, the EEOC should err on the side of producing the information. The court's order only applied to those EEOC claimants who were claiming severe emotional distress and would not apply to "garden variety" emotional distress claims.

LESSONS LEARNED

There are a few key issues that will drive the determination of whether social media discovery will be permissible in any given case, including:

1. Has the Plaintiff put some subject at issue to which social media content may be relevant? The most common issues are loss of enjoyment for life or emotional or physical injury. Social media content, by its very nature, tends to be more relevant to these types of issues than others. It appears from the cases above that when these subjects are issues in a lawsuit, some social media discovery may be appropriate and permissible.
2. Is there some evidence available to the party seeking the discovery that there is likely relevant evidence contained within the social media profiles? Where there is some evidence available to the party seeking the discovery that tends to show that there may be more discoverable information contained within the private or otherwise unavailable portions of the party's accounts, a court is more likely to allow social media discovery to occur. This can be difficult for a party seeking discovery, however, because if it cannot gain access to the other party's social media account(s) to obtain exemplar information that will show the court that further social media discovery is warranted, it is possible that no social media discovery will be permitted.
3. Is the discovery requested is drafted narrowly enough to be permissible? When the relevancy of the discovery is questionable to start with, the court is much less likely to allow extremely broad discovery requests, such as those requesting the entire contents of certain social media applications. Where, however, the discovery can be shown to be relevant or reasonably calculated to lead to potentially relevant material, the courts will likely be more willing to allow for a broader scope of discovery.

As the case law on this subject becomes more fully developed, the analytical framework for determining whether social media discovery is permissible in a given case will become clearer. It remains to be seen how Florida courts will come down on this issue when faced with it for the first time.

John M. Miller is an associate in Henderson Franklin's tort and insurance practice group. He can be reached at 239.344.1310 or at john.miller@henlaw.com.

The Firm Team

Michael J. Corso
Robert Anderson
J. Matthew Belcastro
David W. Hughes
Kelly Spillman Jablonski
John W. Lewis
Traci T. McKee
John Miller
Kevin Noell
Stefani C. Norrbin
Mark Schultz
Robert C. Shearman
Eugene H. Smith
Bruce M. Stanley, Sr.

2011 TIPS SEMINAR

By: David W. Hughes

There was record breaking attendance at the annual TIPS Claims Defense Update Seminar presented by Henderson Franklin in Tampa on September 29, 2011. Not only did attendees benefit from the informative and interactive seminar, they also participated in a raffle for valuable prizes which included autographed baseballs from Hall of Famer George Brett, Cy Young Award Winner Johan Santana, and three time AL All-Star Evan Longoria of the Tampa Bay Rays.

After opening remarks from Mike Corso, Attorneys Traci McKee and John Miller did their best Alex Trebek rendition by hosting a Jeopardy!-themed "Case Law & Legislative Update." Attorneys Robert Shearman and Kevin Noell followed with their talk "Impeachment - Laying the Foundation and Getting Results."

Kelly Spillman Jablonski presented "A Practical Guide to Introducing Blood Alcohol in Civil Trials." After Mrs. Jablonski covered the basics of introducing evidence of BAC results in civil cases, Mr. John Lewis charmed the crowd with "war stories" of his experiences introducing BAC results in civil litigation.

After a delicious lunch, Attorneys Michael Corso and Mark Schultz presented a talk entitled "Experts: How to Get What You Paid For." This presentation was followed with a lecture by guest speaker Ralph E. Moon, Ph.D., CHMM, CIAQP, who discussed the important role that recent scientific advances play in insurance disputes involving water damage.

The day ended on an entertaining note with a joint presentation by John Lewis and Bob Shearman entitled "Expert Testimony at Trial." John and Bob engaged in a mock direct and cross-examination of expert witness Dr. Ralph E. Moon. During their cross and direct examinations, the attorneys periodically stopped to explain to the crowd the fundamentals of an effective cross and direct examination.

Photos of event can be viewed at: facebook.com/HendersonFranklinStarnesandHolt.

David W. Hughes is an associate in Henderson Franklin's tort and insurance practice group. He can be reached at 239.344.1182 or at david.hughes@henlaw.com.

VICTORY CORNER

Michael Corso, was co-counsel for Defendant Philip Morris in a 12-day jury trial that resulted in a defense verdict for the client and other tobacco companies. The *Szymancki* trial was the first of more than 150 pending cases filed in Lee County seeking damages for cigarette-related health problems. The *Szymanski* case stems from a multi-billion dollar *Engle* class action lawsuit that was decertified by the Florida Supreme Court in 2006. Plaintiff, John Szymanski, represented by Morgan & Morgan, alleged that he developed laryngeal, tongue and neck cancer from smoking two to three packs of cigarettes a day for 40 years. The jury found for the defense after a 12 day trial, four days of which were spent in jury selection. This was the first *Engle* tobacco trial that Morgan & Morgan lost. Morgan & Morgan had previously won verdicts of $91 million and $40 million.

Kelly Spillman Jablonski and **John Lewis** obtained a defense verdict in a trial of a premises liability case. Plaintiff alleged that she fell due to defendant's negligent failure to maintain its floor in a safe condition and underwent two knee surgeries alledgedly relating to the fall.

Kelly Spillman Jablonski and **Bruce Stanley** had a favorable outcome in another premises liability case. Plaintiff alleged she was impacted by a tire as she walked behind an open truck while it was being unloaded. The trial lasted three days and the jury found Plaintiff to be 40% at fault. The jury awarded the plaintiff $6,000 in damages, representing a portion of the plaintiff's claimed past medical expenses and $5,000 in past pain and suffering. The jury declined even to award damages for future pain and suffering. The defendant had filed a proposal for settlement in the amount of $20,000. And plaintiff's last demand prior to verdict was $500,000. Due to the proposal, plaintiff walked away with zero money.

John Lewis was granted summary judgment in a case involving a claim that school district employees were negligent in failing to use their AED defibrillator on a high school soccer player who collapsed at a game. The judge ruled that there was no duty on the part of laymen to use complex medical rescue procedures such as an AED.

John Lewis obtained a summary judgment in a case where a school employee was suing a co-worker for slander. The judge found that Plaintiff had previously released School Board employees as part of an EEOC settlement.

John Lewis was granted summary judgment in a case alleging that a young boy was assaulted at school. He successfully argued that that incident was unforeseeable because of the absence of evidence of similar criminal acts on the premises.

Traci McKee won an appeal upholding the trial court's entry of summary judgment in favor of a plant grower who was sued for breach of contract in the sale of defective peppers.

Henderson Franklin's Michael Corso Named 2011 Outstanding Aerospace Engineer by Purdue University

Henderson Franklin is pleased to announce that Attorney Michael J. Corso is the 2011 recipient of the Outstanding Aerospace Engineer Award by Purdue University. Criteria for the Award state that recipients must have demonstrated excellence in industry, academia, governmental service, or other endeavors that reflect the value of an aerospace engineering degree. Since 1999, only 139 awards have been given to just over 1% of the more than 7,000 alumni of the School. The selection committee is led by the first man on the moon, Neil Armstrong.

Corso is chair of Henderson Franklin's Tort & Insurance Litigation division and has been a Florida Bar Board Certified Trial Lawyer for more than 25 years. He focuses his litigation practice in matters involving product liability and the defense of non-medical professionals such as lawyers, accountants, architects, engineers and surveyors. Corso frequently speaks throughout the United States on issues regarding the defense of non-medical professionals and law office risk management issues.

Corso has received much recognition throughout his legal career, including the Florida Defense Lawyers Association President's Award, the Defense Research Institute's Exceptional Performance Citation, as well as being named to *Florida Super Lawyers*® and *Florida Trend* magazine's Legal Elite®. Corso is also AV-rated by Martindale-Hubbell. Corso is a member of the American Institute of Architects, Florida Engineering Society and past president of the Florida Defense Lawyers Association. Corso received his law degree from Villanova University and his undergraduate degree from Purdue University.

Michael Corso (second on the right) with classmates and Professor, Perdue University, 1971.

Mark Schultz Named Partner

Henderson Franklin is pleased to announce that in December 2011, **Mark Schultz** was named as a stockholder with the firm.

Mark, who joined the firm in October 2005, focuses his practice in the defense of design professionals in civil suits, construction and design professional contract drafting, and defense of design professional in administrative complaints before the Board of Professional Engineers and the Board of Architecture and Interior Design. His experience includes complex litigation involving medical malpractice cases, torts, insurance defense disputes, business dispute cases, and lien law and collection matters involving design professional and claims of lien. Mark speaks frequently locally and nationally to design professionals and insurance companies on lien law, contract management, premises liability and defense issues.

He is a member of the Young Lawyer's Division of The Florida Bar, an allied member of the American Institute for Architects, Southwest Florida Chapter, and serves on the board of Visually Impaired Persons of Southwest Florida.

Mark received his undergraduate degree from James Madison University and his law degree from the University of Florida College of Law.

Mark can be reached at 239.344.1168 or via email at mark.schultz@henlaw.com.

Henderson, Franklin,
Starnes & Holt, P.A.
1715 Monroe Street
P.O. Box 280
Fort Myers, Florida 33902
Fort Myers • Bonita Springs • Sanibel
239.344.1100
henlaw.com

Henderson | Franklin
ATTORNEYS AT LAW

Professionals committed to serving our clients and communities.