**DISCOVERY IN THE MODERN ERA – DIGGING FOR DIGITAL EVIDENCE IN A DIGITAL WORLD**

Virginia Workers’ Compensation Inn of Court

Title of conference

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In this era of video doorbells, social media, employee fobs, security cameras, body worn cameras, and more – where to start discovery may seem like a challenge. This outline will provide a framework and some suggested tools on discovering key evidence to a claim in a world of evolving technology.

**Introduction**

Discovery in any compensation claim remains governed by Rule 1.8 of the Commission. Rule 1.8(A) provides:

A. Scope and Method. The scope of discovery shall extend only to matters which are relevant to issues pending before the Commission and which are not privileged. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may be obtained by oral or written deposition, interrogatories to parties, production of documents or things, requests for admission, inspection of premises or other means of inquiry approved by the Commission.

Technology, communication, and the workplace have changed tremendously in the modern era. In light of the ubiquity of social media, GPS tracking of fleet vehicles, text messages as a preferred communication, remote work and other technological innovations, what may be “relevant to issues pending before the Commission” requires a lawyer to stay apprised of these changes. It is more than best practices. We have an ethical duty to so under Rule 1.1 of the Rules of Professional Conduct.

Rule 1.1 of the Virginia Rules of Professional Conduct requires that a lawyer shall “provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Comment 6 to Rule 1.1 states:

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged. **Attention should be paid to the benefits and risks associated with relevant technology.** The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

**Where and How to Look**

While the issues in each case may be different, in the modern era – early discovery should include a focus on locating digital evidence. This may mean looking for video of the accident, text and email communications and social media posts regarding reporting, medical information and work limitations. The three basic prongs of the discovery process are:

* Discovery to a party under Rule 1.8 of the Commission
* Subpoenas to non-parties under Rule 1.8(F) of the Commission
* Freedom of Information Act (FOIA) requests

Which one (or ones) you use will depend on who has the information or evidence you are looking for in the claim.

*Discovery to Parties under Rule 1.8(H)*

Once a claim or application has been filed, parties may serve discovery on one another. Up to fifteen interrogatories may be propounded without leave of the Commission under Rule 1.8(H). This approach will help identify facts and existence of information or evidence which the parties are aware of or possess that may prove critical to issues in the case. An accompanying request for production (with “document” defined to include digital as well as hard copy formats) is essential to ensure the production of the documents or things identified.

With the cost of cameras decreasing and the ability to easily store footage longer – contemporaneous video footage of the injury (and time before/after) very often exists. Counsel for the employer should inquire regarding this information at the start of the claim. Counsel for the claimant will want to send discovery on this issue (sample below), and a site visit – permitted under Rule 1.8(A) – may be necessary.

Sample Interrogatory:

If the work accident has been photographed, videotaped or recorded in some other manner, contemporaneously and/or before or within an hour of the incident, identify the person who took such pictures and/or recordings and the date, time and location where taken.

Defendants should obtain from the claimant identifying information regarding social media accounts and, in cases where marketing of residual capacity is an issue, information regarding the claimant’s accounts with Indeed, Snagajob and similar employment sites.

*Use of subpoenas to non-parties*

Rule 1.8(F) of the Commission allows for service of Subpoenas Duces Tecum. This can be used – appropriately narrowly – to seek text messages, video footage, GPS data, or the like from non-parties. But where do you look? As mentioned above, a site visit may help identify nearby locations with cameras or a “virtual” visit through google street view may pinpoint a likely camera. In a traumatic injury, looking at the 911 calls and Computer Assisted Dispatch (CAD) logs may identify a source to subpoena.

Once you have identified a non-party source, you need to consider how to preserve it. Filing a motion for preservation of evidence is a part of the process, but make sure you then docket that order in the courthouse of location (county/city) where the information is kept and send a copy of the order to the location and registered agent if a company.

*Freedom of Information Act (FOIA) Request*

In the case of a public entity that is in possession of the material or evidence, a FOIA request may be the fastest way to obtain the information (although enforcement for failure to comply is much more arduous than a subpoena).

The Virginia Freedom of Information Act (Va. Code §2.2-3700 *et seq*.,) and Government Data Collection and Dissemination Practices Act (§2.2-3800 *et seq*.,) provide the legal basis to request information. These guarantee (subject to statutory exceptions) citizens of the Commonwealth access to public records held by public bodies, public officials, and public employees. A public record is any writing or recording - regardless of whether it is a paper record, an electronic file, an audio or video recording, or any other format - that is prepared or owned by, or in the possession of, a public body or its officers, employees, or agents in the transaction of public business. Va. Code § 2.2-3701 defines a “public record” as follows:

“Public records" means all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.

All public records are presumed to be open, and may only be withheld if a specific, statutory exemption applies. By its own terms, the statute puts the interpretative thumb on the scale in favor of disclosure: "The provisions of [FOIA] shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government." Va. Code § 2.2-3700(B). Disclosure exemptions must be "narrowly construed" in favor of disclosure. *Id.*

A FOIA request can be used to get 911 call information, CAD reports, traffic camera footage or footage from government building, body or dash cam footage from responding public personnel to an injury, and more.

In the case of uninsured employers, search public records for scope of a project if it was for a municipality. You can also obtain copies of building permits for a project to identify potential statutory employers.

**Conclusion**

The above serves as an outline to help identify and collect relevant information through discovery in the modern era. The panel discussion will go into specific topics and some case examples highlight the collection, use, and evidentiary issues that arise with digital evidence.