

Chicago Daily Law Bulletin

Volume 158, No. 133

Tech-savvy clients need to be prepared for social media scrutiny

We are subjected to a constant barrage of reminders that we live in a rapidly changing, media-obsessed world.

As Bob Dylan said, "The times they are a-changin'." One day Facebook is all the rage with 845 million users, the next it's a bungled IPO, with innovative competitors hot on its trail. Because these outlets appeal to their users' desires to present an image that is cool, attractive and happy, clients often display inaccurate images. This is especially true in the case of a severely injured plaintiff trying to be accepted as "normal." Often, by design, the picture painted on a client's Web page presents an inaccurate portrayal of their difficulties and struggles. Consequently, for plaintiffs' attorneys, social media poses a constant threat to the well-being of our cases and presents a veritable minefield of discovery mishaps with the potential to significantly reduce a damage award.

Clients are victims of their own reduced or nonexistent sense of privacy. Posts and photographs on social media sites such as Facebook, Tumblr, LinkedIn, Myspace and Twitter are subject to misinterpretation and can belie a claim of disability or loss of enjoyment of life. A video post of a hysterical moment could serve as the Anti-Day-in-the-Life suggesting the plaintiff has not only recovered, but worse, is a malingerer liar. Similarly, online conversations, blog posts, even text messaging might give details that sabotage liability. The rules of evidence do not allow the use of social media to corroborate the seriousness of an injury because it would be hearsay. However, it could be used against the plaintiff as an exception to the hearsay rule as an inconsistent statement or admission. Practically speaking, social media is a one way street.

Recent cases highlight complications that can befall personal-injury plaintiffs. Courts have been

asked to rule on requests ranging from printouts of a plaintiff's social media Web page to complete account access information. This is an area left to the discretion of the court with little or no direction from statutes, court rules or settled jurisprudence.

In a recent Pennsylvania case, the judge ruled unequivocally that information posted on social networking websites is discoverable in a civil case. The court concluded that there is no reasonable expectation of privacy in materials posted on Facebook and further there is no reasonable expectation of privacy of almost all information available on Facebook because it is shared with third-parties.

Dissimilarly, a federal judge in Michigan quashed a defendant's overly zealous efforts to obtain a plaintiff's Facebook username and password and the contact information for all of plaintiff's "friends." The court found the defendant failed to show that the requested information was available through less intrusive means or reasonably calculated to lead to admissible evidence. It stated that the information was far outside the realm of discoverable information permitted under the Federal Rules of Evidence and went on to say that seeking unfettered access to a plaintiff's Facebook account and "friends" was "a fishing expedition at best and harassment at worst."

While no concrete rules have emerged regarding social media discovery, these cases reveal some general parameters. Social media is not per se discoverable. The defendant must meet the threshold relevancy standard that the request is reasonably calculated to lead to admissible evidence. In other words, the defendant cannot just assume that there will be damning evidence buried somewhere online. Additionally, courts are unlikely to allow unfettered access to a plaintiff's social media accounts.

By definition, there is little privacy on a "social" network. Only

ON THE MARK

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the naive believe Facebook to be an online lockbox of secrets. Clients should be aware that any posting on Facebook is discoverable and any privilege surrounding such information is waived. This powder keg of client self-destruction adds another dimension to the initial client meeting and subsequent communications. It would be wise to distribute a social media questionnaire to clients seeking information on the networks they utilize and for permission to access to their accounts to monitor any online communications. Ascertain whether the client ever used a pseudonym or false identity to create an online presence. If nothing else, your inquiry will alert the clients to the dangers of online exposure. In my experience, it may be impossible to persuade the so-called X and Y generation and the current crop

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of Millennial clients to suspend their accounts and forego social media.

If the client insists on maintaining an online presence, then they should enable strong privacy settings and avoid posting photographs, videos or statements that could reflect on their credibility, health or anything related to their claim. Anything clients post should be self-screened, keeping in mind that the defense or insurance adjusters could view it. Bottom line, this online image discussion will give you an early evaluation of your clients' credibility.

Clients should be cautioned that "friends" on social networking sites may be a source of damaging information, i.e. friends tag you in photographs skiing when you claimed you can no longer enjoy such activities. Because there is no temporal reference, posted photographs and videos are subject to manipulation or misinterpretation that cannot be refuted. "Friends" should be monitored and questionable posts should be removed. Remind the client to not accept "friend" requests from unknown individuals and "unfriend" or block those they lack confidence in.

You should request that your client report any postings prior to retaining you in an effort to troubleshoot any potentially damaging information. Request social networking posts, texts, blogs, e-mails, YouTube videos and anything else that reflects on the material aspects of the case. It is valuable to review the client's online profiles with them to identify potential vulnerabilities.

After meeting with the client, send follow-up correspondence underscoring these social media guidelines and have someone in your office monitor clients' social media Web pages.

My 2 cents: Personally and professionally, I hate social media! I prefer a dark bar, a good conversation and a cold beer — ah — the good ol' days.