

## **SOCIAL MEDIA IN CLAIMS INVESTIGATION – THE SMELL OF “TWEET” SUCCESS**

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Perhaps the vast expansion of electronic social networking into our culture is best captured by a recent New Yorker cartoon. The cartoon in the June 1, 2009 issue depicts a firing squad and an officer saying to a condemned man: "Last tweet?" Cartoonbank.com, David Sipress, <http://www.cartoonbank.com/item/130799> (June 1, 2009). There is little doubt that social networking through mediums such as Twitter, FaceBook, MySpace, and LinkedIn has become an established type of participatory communication. NewsBusters, Will Social Networking Sites Like FaceBook Destroy Our Society?, <http://newsbusters.org/blogs/noel-sheppard/2009/08/25/will-social-networking-sites-facebook-destroy-society> (August 29, 2009).

As a result of the explosion of information available on-line, claim professionals and defense counsel are discovering that social media is useful for uncovering relevant information on claimants. This includes: postings about the incident (i.e. discussing the injury or visits to doctors, boasting about a lawsuit, or describing trips or activities inconsistent with claims); photographs showing a plaintiff engaged in post-accident activities; photographs showing plaintiff in a poor light (i.e. drinking, using drugs); descriptions of education/experience/skills in the “more professional” networking sites (such as LinkedIn), indicating ability to mitigate damages.

It is becoming more and more apparent that by utilizing social networking tools, claim professionals increase the chance of successful claim resolution. One must, however, understand the processes and have a strategy. Success Stories, <http://webworkerdaily.com/2009/06/16/real-life-twitter-business-success-stories/> (June 16, 2009).

### **Understanding Social Media Resources**

In order understand the application to claim’s investigation, it is important to understand the various media and their different applications. Twitter, for example, is a focused medium. It allows a person to send messages of up to 140 characters in length to anyone who “follows” him or her. Messages (*i.e.* “tweets”) can be sent on any topic. In

many respects it is like a mini-blog. A blog is different than a website in many respects. A website is static. A blog on the other hand is a running stream of content-driven posts that all fall within the subject matter of the blog.

Tweets are instantaneous and can be received on cell phones as text messages, in email or through other web portals such as FaceBook or LinkedIn. Anyone can choose to follow someone else on Twitter. A user can prevent a “follow” by “blocking” that person, but Twitter is more free-style than other social networking sites like FaceBook where a user must invite another user to be a “friend”. This, of course, means that a claimant with a Twitter account opens themselves up to the world. This is, in part, because anyone else can see who follows him or her, and anyone else can become a follower of that person

Of course, Twitter and blogging are just two medium used in social networking. By far, the most utilized outlets are sites such as LinkedIn, MySpace, and FaceBook. Each of these sites allows users to set up a profile that others can view, and allows others to connect their profiles to other users. Each site varies in the method and amount of information exchanged once one user is connected with another. LinkedIn is more suited to the business world than FaceBook and MySpace. For example, LinkedIn allows users to send an “Introduction” to someone so that two people might do business together. FaceBook allows users to send someone a “teddy bear.” LinkedIn allows users to share expertise by answering questions posted by other users. FaceBook allows users to share how they are feeling by adding applications like “Happy Island,” “My Personal Weather,” or “Care Bears”.

As a result of the differences, LinkedIn is better suited for vocational information, while sites like FaceBook and MySpace may be best suited to unveil personal information about a claimant and his or her claim.

Additional sites should not be overlooked. In particular, claimants have taken to knowingly creating video and photographic accountings of their lives in the internet. Sites such as YouTube are used to post videos for the world to see. Sites such as Flickr and Photobucket are used to upload, share and print photographs. Claimants visit forums about medical conditions and often make comments in these forums.

### **Understanding the Power of Social Media**

The amount of information available about people through these sites is astounding. Google CEO Eric Schmidt during a Keynote Address to Mobile World Congress in February 2010 stated that “[T]hese networks are now so pervasive that we can literally know everything if we want to . . . What people are doing, what people care about, information that’s monitored, we can literally know it if we want to . . .” Computer World, Feb. 18, 2010. This vast amount of information is already having an effect on courts and claims. Several courts have banned jurors from using social media. As *“Tweeting” Grows, the Question of Jury Taint Arises*, Pittsburg Tribune-Review, February 9, 2010; *Twitter Crackdown in Baltimore Circuit Court*, Baltimore Sun, February 9, 2010. Plaintiff lawyers often advise their clients on their first meeting to

discontinue using social media. *First Thing Lawyer Tells New Clients: Shut Down FaceBook Account*, ABA Journal Law News Now, February 9, 2010. Lawyers have even found themselves in hot water for posting personal views on social networking sites. *Hennepin County Prosecutor Accused of Anti- Somali Posting on FaceBook*, Star Tribune, February 17, 2010

## **Utilizing Social Media**

Basic investigation can take place with respect to almost any person on any social media site. Name searches can be made in the site's search engine or on Google. Several blog specific search engines exist such as blogdigger.com. The amount of information available once a profile is found will depend upon a person's privacy settings. The more difficult question ethically is whether to attempt to "friend" a claimant on FaceBook or "follow" them on Twitter. In other words, should a social media investigation include creating a directly electronic relationship with the claimant?

The danger begins once a claim professional or lawyer steps outside of the controlled feed from a regular source and starts into the quick back and forth exchange that characterizes social networking at its best. Lawyers are prohibited from communicating with parties known to be represented by counsel, and it is untested whether courts would extend that rule to an insurer who is investigating a claimant clandestinely through social media.

The Stored Communications Act creates a criminal offense and civil liability for whoever "intentionally accesses without authorization a facility through which an electronic communication service is provided" or "intentionally exceeds an authorization to access that facility" and by doing so "obtains, alters or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system." 18 U.S.C. §2701. In *Van Alstyne v. Electronic Scriptorium Ltd.*, 560 F.3d 199 (4th Cir. 2009), the plaintiff sued employer for sexual harassment and employer countersued for business torts. The boss accessed the employee's AOL account using her password. The Jury awarded \$400,000, including punitive damages, which was affirmed on appeal.

In light of potential liability, it is best to proceed with caution before creating a direct relationship with a claimant as part of a social media investigation. Inquiry should be made as to whether corporate policies are in place governing this type of investigation, and further inquiry should be made with counsel as to the appropriate boundaries. In addition, there are several well-qualified investigative firms that know precisely how to utilize social media in investigations. .

Once a matter is in suit, however, it is important that several questions are asked in the discovery process. Some of these include:

1. Do you have a computer, laptop or Netbook? (At home or at work?)
2. What do you use it for?
3. Do you send e-mails to your co-workers?

4. Have you ever gone into a chat room, message board or posted on any website?
5. Do you blog?
6. Do you have online e-mail (Yahoo, AOL, G-Mail)? Do you access this through work?
8. Are you on FaceBook? Twitter? LinkedIn?
9. Have you visited any medical related sites to examine your condition (i.e. WebMD.com or health related chat rooms?)
10. Do you have visit a union website?
11. Have you posted any videos on YouTube? Ever used the internet to post photographs or upload prints for ordering?

Discovery should be used to establish relevance of the home or office computer, internet accounts or other electronic devices. At a minimum, initial discovery demands should seek: (1) authorizations for social networking sites; (2) identification of social networking sites; (3) screen names, logon and passwords; and (4) release of information from social networking sites

If necessary, a court order can be sought against the plaintiff to “freeze” the computer and its contents. Forensic analysis of plaintiff’s home computer or electronic devices may lead to email, or social media that contradicts the claim. This analysis will also ascertain any destruction of evidence (drive wiping programs, reformatting, or loss of the hard drive, destruction of the computer, or deletion of specific files). For example, the court in *Foust v. McFarland*, 698 N.W.2d 24 (Minn. 2005), affirmed the trial court’s adverse inference charge against plaintiffs in auto accident case for using a “WipeInfo” program to permanently delete data from computer hard drive.

It is important to realize that social networking sites want to appear to protect users. FaceBook, MySpace, and Twitter currently receive thousands of requests from law enforcement and civil litigation and want to discourage these requests. According to FaceBook’s Deputy General Counsel Mark Howitson, FaceBook is “looking for a fight”. *Legaltech*, February 1, 2010. As such, FaceBook will not hand over any information on its 350 million users without a subpoena. Even then, the company will only provide basic subscriber information unless that user gives his or her consent. In addition, FaceBook is only responding to California subpoenas and orders.

### **Don’t Forget to Look in the Mirror**

While the impact of social media is vast, it may also pose serious consequences for an insurer or policyholder. While it is important to investigate and know as much as possible about the claimant, it is key in today’s world to understand all information available about a policyholder or corporate witness. A very professional company witness’ credibility can be destroyed by plaintiff’s counsel’s reference to her “MySpace” posting. Companies should consider well-planned social networking policies which reinforce the consequences of ill-advised social networking. From an insurer’s

perspective, consideration should be given to potential additional areas for discovery in bad faith litigation.

### **Tying It All Together**

Of course, electronic social networking is not a substitute for normal investigation and personal interaction. It is, however, an additional valuable tool. With the advent of new means of communication come several obstacles, as well as opportunity. No doubt there will be abuses of social networking by an unscrupulous few. It is imperative, however, that claims professionals and counsel embrace and understand social media, and use it appropriately.