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Protecting Your Clients From Their Own Social Media

By Ben Rubinowitz and Evan Torgan

Before the advent of social media, the most feared type of surveillance was the video tape. Defense lawyers and insurance companies routinely spent tens of thousands of dollars in the hopes of landing a thirty second video showing the plaintiff engaged in an activity that he could not possibly do if he was as badly injured as he claimed. Stories are legend in which the injured plaintiff was videotaped changing a tire, running, skiing, walking with ease up and down stairs or shoveling snow. While each of these activities had the potential to severely damage the plaintiff's claims, it was a given that the videotaped footage would depict the plaintiff outside of his home. Indeed, it was "off limits" for the videographer to surreptitiously tape inside the plaintiff's home. But with the advent of social media the boundary of the front door is a thing of the past. Now, with little more than the click of a mouse, insurance companies and defense attorneys have a window "inside the home" and into the life of the plaintiff unlike anything seen before. What was once "off limits" is now readily available and created by the most unlikely of partners: the plaintiff, his friends and family.

Platforms such as Facebook, Instagram, LinkedIn, Twitter, or YouTube may contain photographs, videos, or statements posted by your client or others that have the potential to harm their case. Whether it is a photograph from a trip or simply the daily minutia of life, social media postings can be a wealth of information for your adversary. Trial attorneys and litigants

must fully appreciate the potential impact of social media on a case. Postings of comments or photographs become part of the permanent record on the internet. There is no such thing as deleting a post or erasing the past. Because of the potentially adverse consequences, trial lawyers are now duty bound to run a thorough social media search of their clients, adversaries, and witnesses in every case. To the extent an attorney fails to conduct such a search, not only will she be at a severe disadvantage in the case but her competence as a trial lawyer can be called into question.

Reviewing a Client's Social Media

As soon as the lawyer is retained she must now conduct a thorough search of her client's social media pages. A thorough search includes a review of not only the social media pages of your client but also those public pages of people close to your client: his spouse, friends or colleagues. Indeed, one of the central features of social media that attracts people to the sites is the ability to share photographs between users and to comment on one another's postings. An effective practice is to sit at a computer together with your client and review the public portions of their social media pages and those of people close to them. It offers the lawyer the opportunity to explain and show the client how their social media may be seen by the adversary and used in the case. Once a thorough search is conducted, the lawyer is in a far better position to assert and defend claims without fear that she has misstated the nature and extent of the injuries or the liability. Indeed, the duty to review social media for inconsistencies does not end at the first meeting but must continue throughout the pendency of the case.

Counseling Your Client on Social Media

Because of the potential harm that could be caused by posting photographs, videos, or comments on social media, a new area of trial prep should be instituted on day one – counseling the client on his or her use of social media. Just as many clients bringing a claim will

ask what will take place during the litigation, the plaintiff's attorney is now duty bound to counsel her client about their use of social media and how it can impact the outcome of the case. Likewise, for those defending a claim the same advice applies. The first and most important step is for the attorney to immediately advise her client to set the highest levels of security and privacy to all of their social media sites so nothing can be viewed by the general public. In addition, the attorney must explain to the client that all social media content, even if set to private, may become subject to a court order and eventually may have to be produced. Accordingly, the best advice an attorney can give a client with respect to postings on social media is to simply stop posting any photographs or other information until the case has fully resolved. Finally, under certain circumstances, the attorney may wish to advise his client to remove or "take down" photographs or postings from social media sites. As a matter of practice and consistent with an attorney's obligations to preserve and maintain evidence, any postings or photographs that are removed should be printed and preserved before they are removed.

Counseling a Client on "Taking Down" Postings

From a counseling perspective, the attorney must carefully explain the concerns relating to "taking down" or attempting to delete postings from a social media page. This necessarily involves a discussion of the trial process with a specific focus on the likely cross examination by a skilled attorney. Deletion of material is fraught with danger. While it is best to have the client set the highest levels of security to the social media pages, if a client should elect to delete potentially damaging material from the internet on his own, that client should be counseled about the harm that could result from the removal. Counseling should include the notion that the internet is forever -- nothing is permanently deleted. In addition, the client must understand that photographs that have been removed from his own page may remain on the public social media pages of friends and family if they were shared.

Imagine the following situation in which a defense attorney is retained in a personal injury case. During the first meeting which takes place a couple months after the accident, the attorney dutifully points out the dangers of social media posts. Within minutes of the end of that meeting the defendant “deletes” a photograph from the public portion of his Facebook page depicting him in what could only be considered a "compromised position." The client had posted a photograph of himself at a party on the night of the accident, hours before it happened, holding a bottle of beer. The client, thinking he had deleted the photograph, testifies as follows at his deposition:

Q: Where were you coming from at the time of this accident?

A: I had just finished work.

Q: Where were you going?

A: Home.

Q: Did you go out with friends after work?

A: No.

Q: Did you go to a party after work?

A: No.

Q: You made no stops anywhere, correct?

A: Correct.

Q: Did you consume any alcoholic beverages in the 24 hours prior to the happening of this accident?

A: No.

Q: Did you take any illegal drugs in the 24 hours prior to the happening of this accident?

A: No.

Assume no further questions were asked about the topic at the deposition. Strategically, the plaintiff's attorney elected not to confront the defendant at the deposition with the harmful

post but instead elected to wait for trial. By waiting, the unsuspecting defendant will likely be unprepared for the destructive cross in front of a jury:

Q: You told us you worked all day prior to the accident, true?

Q: You left your job and you were on your way home when the accident happened, correct?

Q: You didn't go out with friends after work, did you?

Q: You didn't attend a party?

Q: And you did not have anything of an alcoholic nature to drink the day of the accident, true?

Q: No beer, correct?

Q: By the way do you have a Facebook account?

Q: And you had that Facebook account at the time of the accident?

Q: You wouldn't deliberately remove a post to help yourself in this case would you?

Q: You would agree that would be completely improper, true?

Q: Did you remove any photos of yourself from Facebook in the days and weeks following the accident?

A: No.

At this point the attorney confronts the defendant with the damaging photograph that was removed.

Just as the client must be mindful about "taking down" posts, the attorney must be mindful about her obligations in counseling her client about taking down damaging posts from a social media site. While the credibility of the witness is important, there is nothing as important as the credibility of the attorney herself. Imagine the same situation above but within minutes of the end of that first meeting the attorney conducts a thorough review of the public postings of

the defendant and sees that photograph showing him holding the bottle of beer hours before the accident. Before their second meeting, two months later, the attorney again checks for posts and notices that the compromising photograph has been removed. Here the attorney has a choice: She could say nothing about the removal of the photograph or she could confront the client directly. By saying nothing the attorney is potentially setting both the client and herself up for disaster. Should the client attempt to tell less than the truth about the posting at a deposition and the post is later proven the client's credibility has suffered an insurmountable blow. In addition, if it can be shown that the attorney knew of the post at the outset and failed to correct the testimony given under oath, the attorney could well be facing disciplinary charges for unethical conduct in failing to correct the record or in knowingly offering or using evidence the lawyer knows to be false.

It is often said that the cover up is worse than the crime. While it may be ethically permissible to advise a client to "take down" a damaging post, the removal of the post may, under certain circumstances, create more of a problem for the case than the post itself. Assume the same facts as stated above but also assume the plaintiff's attorney continued the cross with a line of low risk, open-ended and leading questions after confronting the defendant with the "deleted" post:

Q: When did you first realize the post with the photo could hurt your case?

Q: You realized that the photograph tells a very different story than the one you just told the jury, true?

Q: You realize that photo shows you doing something you stated under oath that you didn't do, correct?

Q: When did you decide to delete the photo?

While it is a rare event to ask a "Why" question on cross there are times when such a question is extremely powerful:

Q: Tell the jury why you decided to delete it?

A: My attorney told me to.

Q: And you followed your attorney's advice didn't you?

Objection sustained (Attorney-client privilege).

Q: The truth is you didn't want the jury to see this photo that I'm holding up true?

At this point the plaintiff's attorney has successfully accomplished two things. He discredited the witness and, perhaps more importantly, discredited the attorney.

A Word of Caution Concerning the Use of Postings on Social Media

To effectively utilize postings on social media for impeachment, attorneys must understand how photographs are posted. "Throwback Thursday" and "Flashback Friday" are examples of social media events in which users will post or repost old pictures to their page. The attorney must be mindful that the date on which the photograph is taken and the date on which it is posted may be, and often are, different. By way of example, consider a classic trip and fall in which the plaintiff suffers a fractured ankle requiring surgery. Assume the accident was in July 2016. A few months later in September the plaintiff posts a photograph of herself wearing high heels at her friend's wedding. She testified at her deposition that she has not been able to wear high heels since the accident due to her injury. The defense attorney finds the posted photograph, prints it out and preserves it for trial. Imagine the following exchange:

Q: You told this jury that prior to the accident you often wore high heels, correct?

Q: You also told this jury that since the accident you have not been able to wear high heels, true?

Q: That the high heels cause your foot and ankle pain, correct?

Q: You told us that you can't even fit your foot into a high heel because it is constantly swollen, correct?

The defense attorney, confident he has locked in the plaintiff's testimony, moves in with the Facebook photograph to impeach.

Q: Following this accident you maintained a Facebook account, correct?

Q: You posted photographs, true?

Q: You posted photographs after your accident, correct?

Q: You posted photographs in September, following this accident?

The attorney shows the plaintiff the marked photograph for identification. The plaintiff's attorney, who already reviewed the client's social media with her knows what is coming and gladly stipulates the Facebook photograph into evidence.

Q: You posted this photo on your Facebook page, true?

Q: It was posted by you in September just three months after this accident, correct?

Q: Is that you?

Q: Tell us what you are wearing on your feet.

A: High heels.

The defense attorney sits down, confident he has delivered a devastating blow to the plaintiff's credibility. The plaintiff's attorney stands and begins:

Q: Where was that picture taken?

A: My friend's wedding.

Q: When was the wedding?

A: December 2015, about six months before my accident.

Q: Why did you post a picture from December 2015 in September 2016?

A: I was thinking about the wonderful time I had at my girlfriend's wedding and wanted to reminisce with her about the reception so I posted the photo for her to see.

Understanding how social media is used and for what purposes is essential to being able to effectively use it at trial.

An attorney must counsel her client on the use of social media as soon as she is retained. An attorney is obliged to conduct a thorough review of all social media sites for photographs and postings of her client and to ensure the client understands how social media postings may be used at the time of trial. To the extent a post is "taken down" or deleted, the client must be reminded that the post still exists. While there is no prohibition against "taking down" a post the concerns are clear when the attorney fails to counsel about the dangers of misstating or minimizing the nature of the deleted post. To the extent the client is counseled about these dangers, and reminded to tell the truth about any deletion, that client is in a far better position than the one who tries to outsmart the attorney.

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