The Impact of Social Media and Cutting Edge Technology on Insurance Bad Faith Litigation

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I. Introduction/Social Media Definition

Social networking sites are web-based services that allow individuals to construct a public or semi-public profile with a bounded system, choose from a list of other service users with whom they intend to share a connection, and navigate among those connections and those made by others within the system. Users create a unique user identity, establish relationships with others who have done the same, join communities of users who share connections, and exchange information among one another.


An informal poll reveals that to most people, “social media” includes virtually anything that results in the transmission of messages, photos, audio/video, or any other form of text or image within the framework of an easily available, easy to use, seemingly everywhere platform that could be accessed via cell phone, smartphone, tablet, laptop, PC, television, radio or any other medium or device you can think of.

II. Complexity

An examination of recent headlines from the Homeland Security Newswire (http://www.homeland-securitynewswire.com) provide insight into how social media and related electronics are impacting our lives. Some of the headlines include:

— Expert show how to crack every common password in under six hours
— Social media as preventative method for infectious disease
— Thwarting facial-recognition, photo-tagging software
— Chinese hackers attack the New York Times
— NATO commander target of persistent Facebook cyberattacks
— Social networks helping during disasters
— Smartphones turned into secure and versatile keys
— iPhones can reveal a lot about their owners to law enforcement

III. Cases

Courts are more likely to order access to a social media account upon a showing that there is a reasonable likelihood that access to a party’s private social media account will reveal discoverable information.

When A Party’s Public Social Media Profile Indicates That Private Profile Information May Contain Discoverable Information, Courts Have Ordered Parties To Turn Over Their Social Media Login Information And Prohibited Parties From Deleting Any Account Information; Courts Also Have Determined That A Party’s Privacy Rights Are Not Violated By Production of Social Media Accounts/Information.

Plaintiff alleged possible permanent impairment and inability to enjoy certain pleasures in life as a result of being rear-ended in an automobile accident. Defendants moved to compel Plaintiff to provide Defendants with Plaintiff’s password login information for Plaintiff’s Facebook and MySpace accounts. Plaintiff’s public portion of his Facebook and MySpace websites showed that Plaintiff may have engaged in certain activities that he alleged the accident has impaired him from engaging.

Addressing the issue of privacy, the Court concluded that a party to a lawsuit may not claim that their Facebook and/or MySpace user account is confidential and therefore barred from discovery. Both Facebook’s and MySpace’s privacy policies warn users that they should not expect full privacy protection of the information contained in their accounts, and that Facebook/MySpace may share user information in response to a subpoena or court order. Additionally, users know that information they share on these websites might be shared by their “friends” or connections that receive their user information/postings.

The Court ordered Plaintiff to produce his Facebook and MySpace login information, and also ordered Plaintiff not to delete or alter existing information on his accounts. The Court stated that “[w]here there is an indication that a person’s social network sites contain information relevant to the prosecution or defense of a lawsuit . . . access to those sites should be freely granted.” Here, there was an indication that Plaintiff’s social media sites contained discoverable information because Plaintiff’s public Facebook and MySpace postings indicated that Plaintiff exaggerated his injuries.


Plaintiff alleged permanent injuries that affected her enjoyment of life. However, public portions of Plaintiff’s Facebook and MySpace accounts revealed that Plaintiff engaged in out-of-state travel since her accident, activities she alleged her injuries prohibited (Plaintiff alleged to be largely confined to her home and bed). As a result, the Court found that there was a reasonable likelihood that the private portions of Plaintiff’s Facebook and MySpace accounts would contain evidence concerning her ability to enjoy life.

The Court further held that a Facebook or MySpace user does not have a reasonable expectation of privacy to the information contained in his or her account. The Court took into consideration the fact that a user voluntarily chooses to disclose information to others via his or her Facebook or MySpace account, and Facebook’s and MySpace’s privacy policies warn users that their accounts are not private as a result of their sharing of information with other website users.

The Court ordered Plaintiff to provide an authorization for Facebook and MySpace to provide Defendant with access to Plaintiff’s Facebook and MySpace records, including any records previously deleted or archived.


Plaintiff alleged a permanent disability and an inability to enjoy life as a result of a left leg injury. Plaintiff’s public MySpace webpage included photographs of Plaintiff riding his motorcycle after his accident, which contradicted portions of his deposition testimony.

Ruling in Defendants’ favor, the Court found that based upon the review of the publically available portions of Plaintiff’s Facebook and MySpace profiles, “there is a reasonable likelihood of additional relevant and material information” on the private portions of Plaintiff’s Facebook and MySpace accounts.

The Court ordered Plaintiff to produce his Facebook and MySpace login information, and also ordered Plaintiff not to delete or alter existing information on his accounts.

Social media account not discoverable without showing a reasonable likelihood that access to a party’s private social media account will reveal discoverable information.

Plaintiff alleged that her life was impaired due to back and other injuries sustained as a result of an airport accident. Defendant requested full access to Plaintiff’s Facebook account. The Court denied Defendant’s motion as an improper fishing expedition. Defendant’s only evidence that Plaintiff’s Facebook account contained relevant information was a public Facebook photograph of Plaintiff holding a dog weighing less than five pounds and also surveillance photographs of Plaintiff pushing a shopping cart. The Court found that these mundane activities did not warrant further inquiry into Plaintiff’s Facebook account. The Court stated that Defendant would have a stronger argument if it had photographs of Plaintiff horseback riding or playing golf. Additionally, the Court declined to conduct an in camera review of Plaintiff’s Facebook account, stating that an in camera review should be conducted for privilege, not relevance.

Courts have prevented defendants from obtaining full access to a plaintiff’s social media account.

Some Courts Will Agree To An In Camera Review To Determine Relevancy Of A Party's Social Media Website Information; However There Also Is A Sentiment That Parties Should Disclose Relevant Social Media Information Without A Court Order Or In Camera Review.


Plaintiff alleged a permanent disability as a result of right knee injuries sustained during the course of his employment. However, Plaintiff also testified in another matter that he had been employed in some capacity since his alleged injuries, and the public pages of Plaintiff’s Facebook account reflect that Plaintiff lives an active lifestyle. In ruling that Plaintiff’s social media account was not confidential and possibly discoverable, the Court stated “since it appears that plaintiff has voluntarily posted at least some information about himself on Facebook which may contradict the claims made by him in the present action, he cannot claim that these postings are now somehow privileged or immune from discovery.” As a result, the Court ordered Plaintiff to provide the Court with certain Facebook postings, including deleted material, so that the Court could perform an in camera inspection to access the materiality and relevance of the information.


A District Court Judge ordered an in camera review by a Magistrate Judge of Plaintiff’s Facebook and MySpace accounts to determine if information properly was subject to discovery. Plaintiff alleged significant physical impairment as a result of back and shoulder injuries in a car accident. The Court found the majority of the information irrelevant. However, the Court concluded that certain information concerning Plaintiff’s physical activities and travels may be relevant, discoverable and should be produced by Plaintiff. In a footnote, the Court commented that it believed that Plaintiff should have produced the relevant information in Plaintiff’s Facebook account without a Court Order. The Court’s footnote may be an indication that courts may warm to the idea of sanctions when a party refuses to voluntarily produce relevant information from a social media website.

Appellate court finds that a trial court order allowing full access to social media accounts is overbroad and must be limited to only relevant information.


An appellate court reversed a trial court’s overbroad order for Plaintiff to produce to Defendant all of Plaintiff’s Facebook records compiled since the incident giving rise to Plaintiff’s complaint. The appellate court ordered the trial court to limit its order to only the production of relevant information from Plaintiff’s
Facebook account. The opinion further commented that Plaintiff’s relevant Facebook information is not confidential/privileged merely because Plaintiff used Facebook’s privacy settings to restrict access to his account.

**Plaintiff’s social media postings may be admissible at trial.**

*Sylvia Morales and Luis Perez v. Vonda Barnhart and Erica Browning*, Case No. 2010-17655 handled in Harris County District Count, 157th, TX

Plaintiffs were injured after being struck by Defendants’ vehicle while Plaintiffs were stopped on the side of a highway. At trial, because the defendant driver’s sobriety was at issue, the Court allowed into evidence the defendant driver’s MySpace posting that read “made it thru this week with only one hangover … YEAH.”

**The author of a text message must be ascertainable for a text message to be properly authenticated and admissible for trial; rule may apply to social media postings.**


Defendant was convicted of possession with intent to deliver/distribute marijuana. In support of the Commonwealth’s case, the prosecution was allowed to enter evidence of text messages sent from Defendant’s cell phone. On appeal, the Court reversed the conviction and remanded for a new trial because there was no evidence to prove that Defendant, as opposed to someone else, sent incriminating text messages from Defendant’s cell phone. Evidence tending to favor reversal included testimony from the Commonwealth’s own witness stating that another person occasionally used Defendant’s cell phone, an officer conceded that the author of the text message could not definitely be ascertained, and, while the Commonwealth knew that the phone was near Defendant at the time of the arrest, the location of the phone was unknown in the days and weeks prior to the arrest, when incriminating text messages were sent.

Additionally, the Court ruled that the text messages were hearsay, and that the admission of a party opponent hearsay exception does not apply when it cannot be conclusively determined that Defendant sent the incriminating text messages.

Lastly, the appellate court disagreed with the trial court’s determination that the lack of information concerning whether Defendant sent the text messages went to the weight of the evidence, as opposed to admissibility. The appellate court instead found that authentication of a text message is a prerequisite to admissibility. Absent proper authentication, it was improper to admit the text message evidence into evidence.

**IV. Conclusion**

The law relating to social media is rapidly evolving. State laws may vary and should be evaluated accordingly. Nothing described herein or during the seminar presentation represents the practices of any specific insurance company. The material is intended to be general in nature and includes the impressions of defense counsel, and technicians and management at several organizations. Claims personnel are encouraged to consult with counsel when evaluating the impact of any area discussed on general practices or cases.