

Social Media a New Litigation Tool

By Angela N. Rainey, Esq.

With the rise of social media, a new form of surveillance and information gathering has developed. Social media can be another resource for undermining a plaintiff's action against a trucking company and its driver. Social media surveillance is a cheaper alternative to traditional surveillance and may help to focus traditional surveillance to certain activities.

Social media surveillance is cheap and effective. Unlike traditional surveillance all you need is an internet connection. Also, rather than hoping to catch the plaintiff in the act, the plaintiff will be the one actively providing the information.

Our firm has successfully used social media as evidence in trials in both New York and Ohio. As a result of the posts the plaintiffs in those cases posted on their social media pages, we were able to obtain favorable results for our clients. Social media posts can be an excellent tool for cross-examining a plaintiff on their claims.

Social media has become such a huge part of our lives, it cannot be ignored. People seem to be addicted to social media websites, with phones, tablets and apps being marketed solely for the purpose of keeping you in the social media loop. People post minute-by-minute updates of their lives and download photos of their recent activities.

As social media becomes more and more popular, it is more and more likely that the plaintiff involved in your motor vehicle accident will have a social media page and will update information concerning the accident and/or his/her daily activities.

I recently had a friend who was involved in a rear-end collision. Within hours of the collision, my friend had posted about the accident, relaying the facts of the accident, photos of her vehicle and the fact that she was not injured at all. My friend, who would be a potential plaintiff, has laid the foundation for a defense attorney to cross-examine and/or impeach her regarding the cause of the accident and any injuries she may claim to suffer from at a later date.

It is important to check out a plaintiff's social networking pages soon after the accident and check them often. As social media has become more and more on target for defense attorneys, plaintiffs' attorneys are telling their clients to remove posts and/or be aware of what they post online. It is imperative to gather as much information as possible before the posts can be tempered and/or influenced by the thoughts of litigation.

When gathering information from a plaintiff's social networking page it is important to keep the following in mind:

DO NOT FRIEND THE PLAINTIFF – It may be tempting if the plaintiff has a private page to attempt to befriend the plaintiff in order to gain access to the private portions of his/her page. This should not be done. It can create ethical and legal concerns.

PRINT/SAVE WHATEVER INFORMATION YOU FIND – Document the posts you find on the plaintiff's social networking page either by printing or saving the pages. That way, if information is deleted at a later date you still have the post and/or photo.

CHECK THE WEBSITE OFTEN – Be diligent to check the plaintiff's website often. People add comments and photos to their pages almost on a daily basis. By checking the website often you will be sure to have the most recent information and will hopefully notice any changes.

So what kind of information should one be looking for on a social networking website? That depends on the claims being made by the plaintiff. If the plaintiff is claiming to suffer a loss of earning capacity, the plaintiff's posts regarding his employment, income and/or future job prospects would be relevant. If the plaintiff is alleging an inability to enjoy life's pleasures as a result of the accident, look for photos showing the plaintiff on vacation, traveling, partying, etc.

If the information that is accessible to the public suggests that there may be more relevant information contained in the plaintiff's private posts, the subject of the private posts may be requested via formal discovery and/or subpoenas. It is likely the plaintiff would try to resist any attempt to obtain information concerning his/her private posts.

However, two recent Pennsylvania court decisions have held that a plaintiff did not have an expectation of privacy in the non-public portions of the plaintiff's social networking sites, as the plaintiff was put on notice that the information may be viewed by third parties and/or disseminated by the company providing the service. The cases permitted the disclosure of the non-public portions of the plaintiff's social networking sites when the information contained on the public portions of the plaintiff's social networking site indicated that the non-public posts were likely to also include relevant information.




In *McMillen v. Hummingbird Speedway, Inc.*, a Common Pleas case out of Jefferson County, the court held that defendants had accessed plaintiff's public posts which were relevant to whether or not the plaintiff had exaggerated his injuries and that it was reasonable to assume that the private posts would contain similar relevant information and, therefore, the non-public posts were discoverable.

In *Zimmerman v. Weis Markets, Inc.*, decided by the Northumberland County Court of Common Pleas, the court granted defendant's motion to compel discovery of plaintiff's non-public portions of his social networking sites. In compelling plaintiff to provide his non-public information the court found that the public portions of the plaintiff's website created a reasonable likelihood of additional relevant information contained on plaintiff's private portions of his social networking sites.

While social media is a tool that can be used by the defense to impeach the plaintiff it may also be a weapon used against the defendants. It is imperative that drivers and/or company personnel do not post information about an accident on social networking websites. The same rules apply for a defendant as they do a plaintiff, and if a plaintiff finds an inconsistent statement or admission online they would be remiss not to attempt to use it.


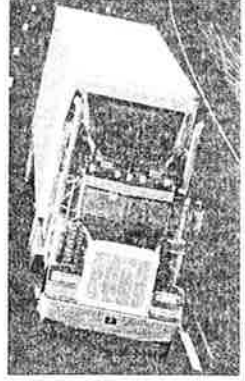
Social media is here to stay. It can be a very useful tool in litigation. As a cheap and easy form of surveillance it should not be overlooked.

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