



CLM 2016 Atlanta Conference
May 19-20, 2016 in Atlanta, GA

Effective Use of Social Media in Workers' Compensation Claims

1. Social Media Sites and Methods of Searching

Importance of Social Media Investigation

Social media is firmly embedded in our daily interactions. Both individuals and businesses are using various social media applications simultaneously to connect with others. Driving the use of social media is the ease and little if any cost involved with setting up a profile. Many users feel a sense of community, intimacy and security when sharing online. These are some of the reasons why social media is now one of the top avenues to investigate the legitimacy of a workers' compensation claim. With a few clicks, an investigator¹ may be able to uncover information that disproves the occurrence of an alleged work accident or challenged the severity of an injury. Social media investigation is a necessity in workers' compensation claims.

Case law, statutes and ethics opinions have not caught up with social media evidence. However, workers' compensation courts should apply the same rules used for traditional discovery and evidence. Bar associations in different states have been providing some guidelines for attorneys engaging in social media investigation.

Methods of Searching

Social media investigation is easy to perform from the investigator's desk, at no cost. The best place to start a social media search is on a search engine, such as Google, Yahoo or Bing. A search of the claimant's name should reveal sites where the claimant has a public profile. For more popular names, an investigator can narrow down with results with additional information on the claimant, such as state, city and date of birth. The default setting on many social media sites is public. That means users have to take the active step of changing their default settings to activate the privacy features. The majority of social media users maintain a public profile.

Currently, Facebook, Twitter, LinkedIn, YouTube, blogs, podcasts, Instagram, MySpace, Reddit, Yelp, Digg, StumbleUpon, and Snap chat are just some of the more popular social media options currently. Social media sites change in popularity constantly and new options are regularly popping up. It is important to stay abreast of the latest popular sites and their function.

¹ Unless otherwise specified, "investigator" in this document refers to the claims professional, employer or attorney performing a social media search.

Once the claim is reported, claims professionals should obtain as much information on the claimant as possible. The period before a claimant is represented is the best time to collect information and perform a social media investigation. It is easier to obtain the names of family members while taking an initial statement from a claimant. Family members' information also may be revealed in an index search. That information can be useful when conducting additional investigation down the line.

Once a claimant is represented, it is likely that he/she will be advised by the attorney to change social media profile setting to private. *ABA Journal Law News*, February 9, 2010. As part of the regular intake with a new client, a claimant's counsel is likely to routinely inform claimants that their employer and the claims professional may be investigating them. The attorney will advise the claimant to make private or deactivate social media profiles. At the very least, most represented claimants will know that they should not post details about the accident or their current whereabouts. If the claimant listens and follows through is another issue.

A trick sometimes used by claimants to evade detection is to change the spelling of names or to include numbers and characters in their profile names. For example, John Smith may become J0hn \$mith. This would make it impossible to find a profile by just searching the claimant's name. Whether a claimant has deactivated a social media profile, made it private or made it more difficult to locate, there are still ways for a persistent investigator to obtain information regarding the claimant online. While a claimant has likely been advised to make their profiles private or deactivate their pages altogether, friends and family members will not have the same heightened sense of awareness. Friends and family members may continue to post information on whereabouts and activities that include claimant.

Useful Information

Social media investigation can uncover postings about the work accident, brags about the claim, information about doctor visits, and/or descriptions of activities inconsistent with the claim. It also can uncover photos of activities leading up to and after the work accident. One social media search may contact links, names and hints leading to other social media profiles.

If an investigator comes across incriminating information online, it should be preserved immediately. The investigator should both copy the URL link and save in a secure location, and print all accessible pages. If a date stamp is visible, it should also be preserved to show the date and time of the postings.

Once social media reveals that a claimant is being dishonest in the claims process, the information obtained online may be enough to challenge the claim. Alternatively, information obtained on claimant's whereabouts, activities, hobbies and interests may serve as a strong indication that additional investigation or surveillance should be pursued. Surveillance is most successful when it is targeted and social media evidence can complement surveillance videos. Social media search results also may point towards performing additional social media searches. Outside vendors have software that can check many social media sites at once. Also, there are outside investigators dedicated to social media investigation.

2. Ethical and Privacy Considerations

Ethical Boundaries in Social Media Investigation

An attorney cannot directly contact a claimant via social media to request permission to access his/her private social media page to obtain information to use in litigation. *NYBA Ethics Opinion* 2010-02. Similarly, an attorney should not ask or direct a third party to contact a claimant via social media to gain access to their social media profile for purposes of litigation. *2009 Philadelphia Bar Association Formal Op.* 2009-02; *NYSBA Opinion* 843 (September 10, 2010); *SDCBA Legal Ethics Opinion* 2011-2 (May 24, 2011). Accessing information that is available for public viewing online is a permissible and comparable to information obtained via print media or surveillance.

While social media investigation is a great tool that should be used to investigate claimants, the investigator must use permissible techniques or risk obtaining valuable evidence that the courts will not admit into evidence. Attorneys also face the risk of ethics charges for unethical behavior. Similar to face to face interactions, an attorney cannot communicate directly with a represented claimant.

A case soon to be decided by the New Jersey Supreme Court highlights the dangers attorneys face if their behavior is viewed as inappropriate contact with a claimant. *Robertelli v. New Jersey Office of Attorney Ethics* A-3018-12T3 (February 3, 2015). Two attorneys representing a defendant in a civil matter asked their paralegal to investigate the plaintiff's Facebook page. The profile was initially open to the public. Once the plaintiff realized he was being investigated, he made the page private. The defense attorneys admitted that they instructed their paralegal to conduct online social media research on the plaintiff, but denied asking her to send a friend request. The paralegal made the request using her real name but did not disclose that she worked for the defense attorneys. Through the friend request, they were able to obtain information on plaintiff wrestling and partying. That information would surely help to impeach the plaintiff at trial. At deposition, the attorneys asked the plaintiff about the wrestling, partying and dancing in light of his alleged injuries.

Knowing that he had made his profile private before posting the information he was asked about during the deposition, the plaintiff initially filed a grievance with the New Jersey Ethics Office. That grievance was dismissed. His attorney supplemented the grievance with additional information on the attorney's actions. This prompted the ethics office to investigate and eventually file a formal complaint against both defense attorneys. The complaint accused the attorneys of:

- communicating with a represented party,
- failing to supervise a subordinate lawyer,
- failing to supervise a non-lawyer assistant,
- inducing another to violate the rules of professional conduct,
- conduct involving dishonesty, fraud, deceit and misrepresentation, and
- conduct prejudicial to the administration of justice.

These charges all stemmed from the attorneys asking a paralegal to investigate the plaintiff on Facebook. The question is whether the friend request constitutes communication with a party represented by another attorney, without court order or the consent of the attorney. That would be a violation of the Rules of Professional Conduct. The case is being heard by the New Jersey Supreme

Court on Jurisdictional grounds. The attorneys have asked the New Jersey Supreme Court to affirm the District Ethics Committee's original decision to dismiss the ethics violations claims.

The general consensus is that public information is fair game. However, there are still many grey areas where the courts have not directly addressed. Co-workers are often friends on social media. Can an employer ask a co-worker to provide access to a claimant's social media profile?

Friending Unrepresented Claimants

It is permissible for an attorney to send a friend request to an unrepresented claimant if trickery or deception is not used to procure information. The attorney must disclose his or her true identity and the reason for the friend request. *Assoc. of Bar of St. of N.Y. Eth. Op. 2012-2 (2012)*.

A Philadelphia Bar Association Opinion has addressed a scenario where an attorney directs an agent to send a friend request to an unrepresented witness. The inquiring attorney indicated that the agent would be using her real name, but would not reveal her connection to the attorney. The opinion counseled that such conduct would be unethical, in violation of the *Pennsylvania Rules of Professional Conduct 8.4(c)* (identical to *Model Rule 8.4(c)*). The agent's failure to disclose that she or he is requesting access to the witness' page with the aim of obtaining information to be shared with the attorney and used to impeach the witness' testimony is not permissible. The scenario would also expose the attorney to a charge of failure to supervise a non-lawyer assistant under *Rule 5.3*. The agent who sends the friend request also would be violating *Pennsylvania Rules of Professional Conduct 4.1* and *8.4(c)*. Ultimately, the judge of compensation still has discretion whether to admit the evidence despite the violations of the rules of professional responsibility.

The answer is different in a scenario where an outside investigator hired by the employer sends a friend request to a claimant. The attorney would not be violating ethic rules. *Social Networking and Workers' Compensation Law at the Crossroads*, Gregory M. Duhl (31 Pace Law Review 1 (2011)). As long as the attorney did not ask or encourage the investigator to make the friend request, he/she could potentially use the information obtained as a result of the request in litigation. As far as the attorney is concerned, it also does not matter whether the investigator disclosed his/her real identity. The main inquiry is whether there is a relationship between the attorney and the investigator.

Social Media Evidence Use by Attorneys

When deciding whether to admit evidence obtained through social media, courts may weight a claimant's right to privacy versus an employer's right to investigate a claim. The argument for privacy is less likely to be successful in workers' compensation courts as the information on social media is typically public, making it difficult to make an argument that there was a reasonable expectation of privacy.

Rules of evidence are generally more relaxed in workers' compensation. Workers' compensation courts are applying the same rules of evidence applied to more traditional forms of investigation, such as surveillance. Giving notice to opposing counsel on the existence of social media evidence would follow the same timeline as giving notice on the existence of surveillance. The investigator, adjuster, attorney or agent who discovered the social media evidence is in the best position to provide foundation for authenticating the evidence. *Social Networking and Workers' Compensation Law at the Crossroads*, Gregory M. Duhl (31 Pace Law Review 1 (2011)).

The most prevailing approach across the country is that the existence of evidence is conveyed to opposing counsel. However, the evidence does not have to be turned over until after the claimant testifies or is deposed. Once there is evidence of dishonesty uncovered through social media, the strategy should be to collect as many statements from claimant as possible before the evidence is disclosed or revealed.

3. Benefits of Social Media Evidence

There are different options for a defense attorney once there is clear evidence to suggest that a claimant was not truthful in the claims process. The evidence can be used to:

- negotiate a more favorable settlement;
- impeach the claimant at trial;
- support a motion for fraud;
- seek reimbursement of benefits;
- seek reduction or elimination awards;
- negotiate a dismissal of a claim; and/or
- make a referral for criminal prosecution.

In 2010, a workers' compensation claimant was sentenced to three years' probation as a result of information uncovered on Facebook during a claims process. The claimant appeared at a Workers' Compensation Board Hearing and testified that she was not working in any capacity while collecting benefits. Investigation revealed that the claimant was boasting on Facebook about her job and salary as an apartment complex manager at the same time. She was receiving the benefits due to an alleged work incident with a prior employer. The Facebook evidence led to claimant's arrest. The claimant was found guilty and sentenced on felony charges of grand larceny and workers' compensation fraud. The conviction included the theft of \$8,975.00.

While a claimant can be criminally prosecuted for workers' compensation fraud, employers, claims professionals and attorneys must tread carefully. A party should never use threat of criminal prosecution to negotiate a better resolution. *Tucker v. American Employers' Ins. Co.*, 171 So. 2d 437 (Fla. 2d DCA 1965).