



CLM 2021 Annual Conference  
August 11-13, 2021  
Atlanta, GA

## **Oh No You Didn't! Social Media Do's and Don'ts for the Professional.**

### **I. Introduction**

With the widespread use of social media, many professionals have turned to the use of this platform to promote their business and services. With that, we have seen a rise in claims for intentional torts and other causes of action in certain postings and alternatively, while in litigation, certain social media postings have been used to discredit the insured. Further, insureds face negative comments on social media that may not be warranted yet, can be damaging to the insured's practice and reputation. Technology is advancing and is readily affordable and the use of social media outlets such as Yelp and Facebook, can create a PR nightmare for our insureds and clients.

Depending upon the posting, the insured may find him or herself in a claim that may be very difficult to defend. If it is an inappropriate selfie or comment, the photo or printed words become impenetrable evidence. Many lawsuits have evolved from postings not well-thought-out, which unfortunately, have resulted in civil litigation involving many various causes of action and potentially resulting in numerous legally responsible parties. Causes of action include various intentional torts, privacy issues, and violation of state and federal law.

### **II. Managing Negative Yelp or other Media Blog Reviews**

More and more professionals are seeing negative reviews posted on Yelp or other social media blogs. A disgruntled patient or client has nearly unlimited ability to post his or her angry words of dissatisfaction which can often be damaging to the business practice and reputation of the professional. The dilemma arises as to whether to address the negative review or let it lie. As we know, the more attention to the negative review, the more focus is driven to it and the increase in reviews can lead to its elevation in the posting list.

One must take caution in responding to a negative review and do so without violating confidentiality and in a way the response effectively addresses the negative blog

without getting into a he-said she-said argument. One must be careful to avoid further inflammation of the person who is responsible for the posting.

In certain circumstances, one can move the court for an order to remove a blog. As an example, if the concerning blog deals with a posting of one's history of lawsuits, a motion before the court to order the blog service to remove the posting and render it under seal, can be accomplished with a good showing of potential harm to one's practice and livelihood, even though the blog deals with public records. Similarly, if one can prove that the comments on Yelp are untruthful, prepared under a false username, or are factually contradicted, one may have success in removing a Yelp review.

Additionally, contact by the insured's counsel, can be persuasive in obtaining a removal of a social media post, particularly if the posting is in violation of a confidentiality clause.

### **III. Pitfalls of the Insured's Postings**

Conversely, the professional must also be mindful of posting on his or her website, any material, photos, statements, statistics, names of patients or clients without consent, and far-reaching promises or representations which could haunt them in unanticipated litigation. Further Facebook and Instagram postings may show much more about the insured in his or her unprofessional social setting which may also weigh negatively on one's perception of the professional. This can negatively impact the professional in the face of litigation. Many plaintiff's lawyers as well as jurors conduct social media searches of the defendant and often find material that will be damaging and potentially result in impeachment. In one case, a professional was impeached based upon sworn testimony as to his whereabouts on a given day while his own social media posting showed otherwise.

It is also worth mentioning that professionals are often texting their patients or clients. What may be thought of as a quick and easy method of communication, often can be used as demonstrative evidence of negligence as often abbreviated sentences, curse phrases, and screen shots or photographs can later be misconstrued during litigation or certainly can be used for impeachment. The insured must be very careful in using this form of communication and ensure that all written communication is professional and accurate.

### **IV. Recent Litigation Involving Social Media Missteps**

As noted, insured professionals have fallen prey to social media and widely use it for business promotion or simply post items which they find to be of interest. Unfortunately, we have seen a trend in litigation basing claims related to evidence of social media postings. A nurse takes a photograph of an unsuspecting patient in the ER who just attempted suicide, and posts it on social media resulting in termination, licensure suspension, and a multimillion-dollar lawsuit for HIPAA violation and various

intentional torts and punitive damages. Another healthcare provider takes a selfie next to a patient who is in a coma and posts it with an offensive caption while smiling and making a peace sign, also resulting in similar litigation and ramifications. A lawyer gets into a Yelp war over the patient's comments of dissatisfaction of his representation, only to place him in a more unfavorable light and unwittingly causes him to violate the attorney-client privilege. An employer unwittingly posts an advertisement for a specific job opening on a job search blog well in advance of terminating a pregnant employee which is used to demonstrate pretext in her discrimination/wrongful termination action leading to a seven-figure settlement.

With the increasing use of social media, it is important to address the pitfalls of any professional who falls prey to making self-indulging posts on social media or arguing with their clients in a public forum. A careful consideration of the process of navigating through litigation and licensure issues that may be impacted by social media blunders, establishing best practices for the professional in handling negative posts or reviews and finding better uses of social media for enhancement of the insured's practice, are all necessary tools.

## **V. Claims and Litigation Considerations**

When faced with litigation involving demonstrative evidence of the insured, one must consider the facts to determine the circumstances of the incident. One must investigate whether activity was consented to by the claimant or otherwise initiated by the claimant and explore whether there are any facts favorable to the defense. An evaluation of the parties must be considered to determine the credibility of each. It will be important to determine whether the plaintiff will be credible and whether he or she will elicit sympathy.

One must also consider whether the venue is one that will be favorable or a danger to the defense of the case. Some venues may be more "plaintiff-oriented" and certainly may award runaway verdicts. If there is an arbitration contract, one must consider whether enforcing the agreement will provide a better and less costly result versus a jury trial. Early mediation is the best remedy in the face of damaging evidence. One must also attempt to curb the discovery process to keep other damaging evidence out of the conversation. Oftentimes, we may find that they had a negative background or may have left employment on hostile terms. Careful selection of a mediator for settlement purposes also will be essential to ensure that the defense has a neutral person who will be strong enough to influence the party with client control issues. Certainly, one who will be neutral and less intrinsically offended by the posting or one who is not known to favor plaintiff will always be a better match for these types of cases.

Additionally, it will be important to determine whether there exists a coverage issue. Coverage counsel should be consulted to determine whether a viable reservation of rights exists. Many opponents will argue agency or respondeat superior theories against the employer or supervisor and thus, such additional defendant may not escape the lengthy and costly litigation process. Further "course and scope" arguments typically fail in this arena. If the professional's staff member posts confidential information or photographs, it will be difficult to argue against an agency theory of liability.

Once you are faced with social media evidence, consideration of legal strategy to resolve the case to avoid discovery and to prevent the insured from rendering self-incriminating testimony. A strong PR team is necessary in the case of a YouTube viral video or other viral postings. Depending upon the situation, violation of the patient or client's right to confidentiality and privacy can also result in penalties, punitive damages, and potential licensure suspension, among other detrimental consequences.

In further attempts to mitigate damages, one must focus on the resulting damage. Physical harm versus emotional harm, however, can be just as costly in the face of litigation. In the posting of a photograph of an attempted suicide victim, the victim is suffered no physical harm, but still received a settlement in a seven-figure amount. Hence, the victim and circumstance will undoubtedly play a role. Certain cases can yield seven figure settlements if the alleged injured party is elderly, ill, or otherwise falls into a special class of protected individuals pursuant to the ADA.

## **VI. Prevention Considerations**

It is imperative to focus on strategies for awareness and prevention, as well as to conduct an analysis of claims exposure so that one can develop a plan for mitigating damages when faced with this damning evidence.

Ongoing in-service training of the insured's staff on the topic of social media posting, outlining what is not appropriate and what to be aware of. Routine review of the professional's website and social media postings is warranted to monitor the tone. Nevertheless, once something is posted, it may be difficult to remove or may have been previously viewed and copied by the insured's patient or client. Once litigation is initiated and the demonstrative evidence is leaked, the defense team must engage in tactics to mitigate further social media attack. Quick reaction, acknowledgment of responsibility, as well as the plan for corrective action, are the essential ways to deflect the negative press attached to the damaging postings.

## **VII. Conclusion**

The widespread availability and use of social media increase the risk of postings that can lead to negative publicity and negative impact on reputation, as well as litigation. Establishing appropriate guidelines for your insured's use of social media and determining the best defense to the insured's postings by patients or clients, will reduce the potential for damaging repercussions.