Social media can kill your case

The use of social media sites or personal e-mail on employer-owned PCs and cell phones can destroy the employee's right to privacy — and your case

By Elizabeth L. Riles and Karine Bohbot

Every day we turn around it seems like there is a new "hot" social media site to use. At first, it was just MySpace and Facebook. Now there is LinkedIn, YouTube, Twitter, Instagram, Pinterest and many more. In fact, you can't walk down the street or drive anywhere these days without seeing someone texting or using phones in some way.

Even though our business often depends on our ability to market ourselves sufficiently, it is still hard to keep up with these trends and different ways to communicate that seem to pop up every other day. The big question now, however, is how does this ever-expanding social media world affect our everyday cases?

Well, just consider the fact that Facebook now has over one billion users.[1] It reaches one person in seven *in the world*. With the popularity of smartphones and other similar devices, people can access social media sites anytime and anywhere. Posting pictures and information, tweeting and texting are ubiquitous. In fact, it has become so commonplace that it has seeped into our court system. So much so, that the California Jury Instructions specifically admonish jurors against using "any electronic device or media, …, any text or instant-messaging service, any Internet chat room, blog, or website, including social networking websites" to send or receive information about the case.[2] The Courts had to make this instruction explicit because texting and using social media are so common that people do it without even really thinking about it. In fact, during one of our last trials, we *observed* one of the jurors on the phone *during examination of witnesses*. We had to inform the judge, who admonished and instructed the jury, once again, not to use any electronic devices during the trial.

Yet what we are finding now is that the bigger problem is that employers and defense counsel, who seem to have unlimited time and resources, are spending much of their time keeping up and using these forums to attack our clients' credibility, to limit their damages and to just hurt our case generally. They have figured out how to get around those security settings and now come to depositions armed with our clients' own words or images to use against them. In fact, employers have made it commonplace to check their employees' use of company e-mail accounts, often finding ammunition to use against our clients.

So what should we as practitioners advise our clients to do to prevent their cases from being killed as a result of their use of these social media accounts or their company-provided devices?

Employer-provided devices

When employees first contact many of us about their potential cases, some of them are still employed with the "bad employer." Employees are issued smartphones, blackberries, laptops and other devices by their employers.

Employees think nothing of using these devices to send personal texts, e-mails and the like whether using their employer e-mail accounts or personal accounts. In fact, how many times have you received an e-mail from your clients to discuss their cases either pre-filing or post-filing that was sent from the employer's e-mail account? Depending on the company policy and what acknowledgements of it there have been, the employee can have absolutely *no expectation of privacy* in these communications including what are potentially attorney-client privilege texts or e-mails exchanged with you.

The California Court of Appeal in *Holmes v. Petrovich Development Co.* (2011) 191 Cal.App.4th 1047 confirmed as much when it held that e-mails to an attorney on a laptop issued by the employer were not privileged because of

the employer's stated policy reserving the right to review any such communications.[3] Similarly, in *City of Ontario v. Quon* (2010) 130 S.Ct. 2619, the United States Supreme Court ultimately upheld a city's right to review an employee's text messages sent on a city-provided pager.[4]

These cases will continue to be heard and determined on a case-by-case basis, but the message is clear. If your client or potential client is communicating with you via an employer-provided device, even if the client is using a personal e-mail account or other kinds of accounts protected by a personal password, you are risking the vitiation of the attorney-client privilege for those communications. As the Court said in *Holmes*, "This is akin to consulting [your] attorney in one of defendants' conference rooms, in a loud voice, with the door open, yet unreasonably expecting that the conversation overheard by [the employer] would be privileged."[5]

It is thus critical that you warn your client from the start against any such communications. And, if you believe that your client has communicated with you through employer e-mail account or using an employer-provided device, don't respond in the same manner. Rather, pick up the phone and call your client on their land-line home number to be sure that you are not putting your attorney-client privileged communication in the hands of the defense.

Facebook & other social media

Once you take on a client and pursue an employment case, as stated above, these sites become great fodder for employers to find nuggets of information about your client. There are many ways that employers get access to this information, not the least of which is that clients often do not pay attention to or do not understand the privacy settings for these kinds of social media accounts. Even if you have a very savvy client who had maintained very strict privacy settings, it can be hard to keep up with the seemingly constant changes by social media networks as to how the privacy rules work. Employers can, *and do*, take advantage of this by searching for any public information that has been posted by your client. Additionally, your client could easily "friend" or have a "follower" who is in some way related to the employer or its counsel. Finally, there are investigators, applications and programs that can be used to get into someone else's social media account. In fact, just Google, "How do I get into someone's Facebook page" and you will find many articles, videos, etc. providing ways to get in. The same is true for many of the other networks.

Though this is an invasion of privacy, depending on how the information is accessed, Judges can and do allow this information to come in front of the jury. This can be harmful in light of the reality that people will post just about anything on these sites. That includes information about their jobs, their past history, their lifestyle and their activities. Additionally, clients' friends post pictures and information about the client's job, past history, lifestyle and activities. This information can be used to disprove doctor's diagnoses, claims about ability to work, claims about depression and withdrawal and ability to interact with family and friends, among other things. What may seem like innocuous postings and pictures about vacations, parties or other activities can be used to combat emotional distress claims or claims regarding certain work limitations or restrictions.

In the most recent trial we had, defense counsel hired an investigator, after the close of discovery, who went onto our client's Facebook and Twitter accounts, printed out hundreds of pages of posts with the intention of testifying about what she had found. This witness had never been identified before. We were broadsided with this witness and information during trial. Thankfully before the investigator was set to testify, we objected and sought to review all the records to determine admissibility, relevance, prejudice and anything else that was appropriate to limit this information. Luckily, the judge agreed with us and found that the records were not relevant, highly prejudicial, and lacked enough specificity as to dates, clarity as to who was posting what, etc., and threw out all the records. This left the defense with little reason to call their investigator. Therefore, they withdrew her from their witness list. We were lucky that time, but there is no guarantee that we would be the next time.

Legal admissibility of this information is being judged on a case-by-case basis, but no one wants to lose disability claims or emotional distress claims because of pictures of your client posted by a friend helping them move or at a party.

So what is the bottom-line?

It is better to be proactive. Warn your clients from the beginning about the risks of using employer-provided devices and posting on social media networks or blogging. In fact, when our firm takes on representation of a client, we warn them about all of these potential issues *in writing*. We tell them that we would prefer they not use these sites at all. Being realistic, however, we recognize that it is unlikely that our clients will stop this activity altogether. Therefore, we send them a letter detailing that if they are going to use these sites, they must follow some simple rules to protect themselves as much as possible:

- Do not post anything you wouldn't want the employer, employer's attorney, judge or jury to read.
- Set privacy settings to block anyone you do not know from viewing your personal pages.
- Search your name on all of the sites you are a member of and on Google. See what comes up and take action to remove anything which could be detrimental to your claim.
- Do not accept any friend request or answer any e-mails from people you do not know.
- Tell your friends and family members about these risks and ask them to be cautious about any postings they make about you on their own pages.

• Finally, if you have accessed your personal e-mail on any work computers or laptops where your password might be saved, please stop doing so immediately and change your passwords.
• Do not send me any e-mails from a work computer or laptop because doing so could eviscerate the privilege of those communications.

Additionally, as the best way to be prepared for these kinds of attacks is to know what is out there, get permission from your client to check his or her social media accounts periodically through the course of litigation. That way, when the defense shows up with something either in deposition or at trial, you will already be prepared to either argue its privacy, admissibility or to address it head on. It is something that we will do from now on. Even with all these warnings and preparation, you have to remember that your client or their friends may not always follow your advice. Some potential information may rear its ugly head during the course of litigation, but forewarned is forearmed.


Riles

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Endnotes

[1] "Facebook reaches one billion users," Aaron Smith, Laurie Segall and Stacy Cowley, CNNMoney, October 4, 2012.
[2] California Civil Jury Instructions ("CACI"), CACI 100.
[3] *Holmes v. Petrovich Development Co.* (2011) 191 Cal.App.4th 1047.
[4] *City of Ontario v. Quon* (2010) 130 S.Ct. 2619.
[5] *Holmes*, 191 Cal.App.4th at 1068.