On disability benefits and social media

Admonitions to disability-insurance claimants on their social-media presence and other personal conduct

By Rebecca Grey

I love to make people cry. When I accept the case of a client whose long-term-disability benefits have been improperly denied, the client often bursts into tears. These are tears of relief, the relief of knowing they have an advocate to help with an insurance carrier which has acted more like an adversary than a fiduciary in a time of financial and medical crisis.

The Kumbaya moment is short lived. Before the Kleenex box is put away, I have to advise the client of the bad news. Long-term disability ("LTD") applicants, whether their claims have been approved and they are receiving benefits or whether their applications are pending, must be made aware of the minefield that remains in their path.

Damn you, Internet!

Insurance carriers generally, and long-term-disability carriers in particular, have become as dependent upon social media as any diehard millennial. Now, every LTD carrier scours the internet for signs of their disability claimants. Any internet presence can be used against the applicant, sometimes in ways that surprise well-meaning clients naive to the aggressive tactics some disability insurers use to protect their bottom lines.

LTD policies insure against disability from one's "own occupation" or from "any occupation." "Own occupation" disability means the inability to perform all of the important and necessary duties of one's regular occupation in the usual and customary way with reasonable continuity. (*Erreca v. W. States Life Ins. Co.*, 19 Cal.2d 388, 396 (1942).) Disability from "any occupation" does not literally mean *any* occupation. Rather, it means the inability to perform, in the usual and customary way and with reasonable continuity, the substantial and material duties of a claimant's customary occupation or another occupation for which the claimant is reasonably suited and qualified in light of her station and mental/physical capacity. (*Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1006 (9th Cir. 2004).) (The robust legal dispute about whether the common law definitions of disability set forth in *Erreca* and *Hangarter* supersede the policy language in LTD policies governed by ERISA remains unsettled and is beyond the scope of this article.)

Given these specific restrictions, it may seem odd that benign social media postings could be harmful. Sure, most of us would expect that an Instagram posting celebrating a personal record time in a triathlon would call into question a claim that a person cannot work due to severe back pain. However, most people don't expect that posting a photograph at a family reunion or a selfie with one's spouse or a pet could be used against them. But it can. LTD carriers routinely use benign postings as part of a jury-rigged narrative suggesting that disability claimants are lying or exaggerating. Carriers characterize normal social media scenes as being "inconsistent with claimed restrictions."

Aggressive disability insurance companies may use even the most seemingly non-occupational activity in nefariously creative ways. For example, a client who got engaged at her boyfriend's house in the Sierras was described as "vacationing with friends in Lake Tahoe." A disabled salesman tagged in a group picture at a family gathering was described as, "able to engage in socializing at a party for several hours." An attorney with cancer disabled by severe fatigue, chronic pain and "chemo brain" followed her doctor's advice to do a little walking a few times a week. The carrier terminated her benefits in part because she was observed "walking/jogging regularly for up to an hour." Of course, the fact that a slow stroll once around her neighborhood was the only thing she could do that entire day was neither observed nor reported.

LinkedIn, often the butt of jokes as the lamest of all social media, is a favorite source for disability carriers. A long-forgotten, stale LinkedIn profile listing one's pre-disability occupational status with the usual résumé puffery can be used to imply the person is either still working or looking for work.

For professional service providers, even Yelp can be used against a claim for disability. Bad reviews of the claimant's business are often printed in hard copy and included in the file for no other reason than to embarrass the insured. Good reviews, even where they predate the claimant's start of disability, can be used to argue that the claimant couldn't have been too disabled in July if they got a good review in January. Woe betide the disabled business owner who attempts to respond to a bad Yelp review on the website, as that person will be characterized as performing business duties and "actively engaging with customers."

Carriers can be sneaky and invasive. They may "friend" the claimant to obtain

access to social media postings. Use of internet archive services like Wayback Machine to locate old postings is common. Carriers can identify when disability claimants deleted or removed social media posting. Use of Google Alerts with the applicant's name has become a common practice by disability claims representatives. Social media connections with the claimant can be mined for information including the location, activity and even the state of mind of the insured. Thumbs down.

Even if the social-media presence is not used to suggest suspicious activity, it may be used as a tool to maximize the utility of surreptitious surveillance. For example, if the carrier is aware that a claimant has a dog, it may try to capture surreptitious video of the claimant walking Fido around Lake Merritt. If the claimant "checks in" at her local pool, the insurance company may send private investigators to capture a "workout."

"Just because you're paranoid doesn't mean they're not after you"

Disability claimants should be informed about the use, and misuse, of surreptitious *sub rosa* surveillance. Many clients are surprised to learn that the insurance company they have contracted with to take care of them in their time of need has secretly spied on them. Insurance companies routinely hire private investigators to stake out, follow and film any and all activities over a period of several days. This surveillance is often directed after a thorough social-media canvas so that investigators are directed to capture particular activities discovered online. The standard *sub rosa* pattern has the investigator in a car staking out a position in front of the insured's home armed with a video camera with a powerful zoom lens, ready to document anything. Investigators follow their subjects with hidden cameras wherever they go; they will follow in a car, on the street, into the grocery store, the doctor's office, the coffee shop. I've even seen an investigator attend a spin class at the gym in order to spy on a client who was doing doctor-approved exercises in an attempt to alleviate his severe cervical-spine condition.

Generally, investigators may film people in public places where they have little to no expectation of privacy. However, they can and will go too far. In one of my cases, my client disclosed that she was getting married in a local town. By "pretext" calling all the florists in the town, the carrier learned the date and the location of the wedding venue. At the LTD carrier's direction, two private investigators dressed as wedding guests snuck into the private venue where they posed as guests for several hours until the first dance between bride and groom near the end of the wedding reception. Except for the short ceremony, my client, who had broken her back in a car accident, spent most of her wedding day lying down in a side room so she would have the endurance to stand for the ceremony and to dance with her new husband, which she did with beatific joy.

Not only did the insurance company's henchmen film her for this brief, active, 15 minutes out of her seven-hour day, the written report of the surveillance described her as having "danced enthusiastically, moving her entire body including hips, shoulders, upper body, waving her arms over her head without apparent distress for a sustained period of time." This conduct went too far and exposed the investigators to claims for tortious breach of privacy.

Given the lengths to which some carriers will go to capture out-of-context activity, it is difficult to counsel the disability client about what to avoid. Generally, I tell clients to be aware of the possibility of surveillance and that even activity that is not intuitively inconsistent with the disability claim, like taking out the garbage, going for a walk around the block, and driving one's children to school, can and will be used against them in a court of law.

Never say never

Another important admonition to disability claimants is to handle statements about one's ability and physical restrictions with great care. Disability insurers deploy a large and sophisticated fishing net to gather information about their insured's activities. Credit checks, internet canvassing, in-person field visits, lengthy telephone claimant interviews, surreptitious surveillance, activity questionnaires, attending physician statements, telephone interviews with treatment providers, are all common (and often appropriate) tools used by disability carriers.

Carriers may use unqualified statements, like, "I can't drive for more than 30 minutes," "Sitting is limited to 15 minutes at a time," or "I used to do yoga and can't anymore" as ammunition where they find anything even slightly inconsistent. For example, a client disabled by brain damage from performing his duties as a litigation partner at a major national law firm was surveilled repeatedly, revealing profound inactivity. The third three-day surveillance captured him answering a cellphone call while driving home from a coffee shop. The carrier wrote a magnum opus on the cognitive demands of driving, concluding that if a person could drive and talk on the phone at the same time, he could obviously run a law firm and first chair eight-figure trials.

The field-visit ambush

A favorite tune from the denial machine playbook is to use a claimant's statement of her own restrictions or limitations against her through surreptitious surveillance in a choreographed "gotcha" during an in-person interview. Insurance companies often send field interviewers into the homes of their unsuspecting insureds for lengthy interviews that are described as an effort to get a better sense of how their disability impacts their

day-to-day activities. In fact, these in-person field visits also serve as a vehicle to gather infinitesimal detail about the person's home, their neighborhood, the decor, the cleanliness, the presence or absence of others in the house. They ask to take pictures of the claimant's pill bottles, have them demonstrate range of motion and ask for documents on the fly.

Some carriers use in-person interviews as a way to gather statements by the claimant about her restrictions through the use of leading questions, followed by a theatrical reveal of previously gathered video surveillance footage purportedly inconsistent with the claimed limitations. After a two-hour interview, the interviewer may exclaim, "You say you can't walk more than 10 minutes, but here you are walking around your neighborhood for nearly half an hour!" This is not done simply to get feedback by the insured but is a deliberate form of ambush. To their great distress, insureds must suddenly confront the fact that they have been spied upon by the company to which they pay premiums for benefits they hoped they'd never have to use. They are being treated like a cheater and a fraud.

Whatever you do, don't improve yourself

Before he became disabled, a client in his thirties was on the edge of a lucrative career in tech. He had recently completed a prestigious graduate program in computer science and secured a well-paying job in Silicon Valley, when his professional future was eviscerated by a cervical-spine problem so severe he could no longer use a keyboard. Although the finest spine surgeons in their field tried everything to remit his chronic injuries, no intervention, including multiple surgeries, worked. His doctors all supported his disability. The grief of losing a career he'd worked so hard for was bad enough, but the drastic reduction in intellectual activity and stimulation threatened to literally drive him insane.

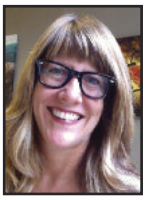
As a personal test of his own endurance, he enrolled in a single math class at a local university. He applied for disability accommodation and was provided with a note taker; he made arrangement with the teacher to be able to sit and stand and lie down in the classroom at will. When the carrier learned he was enrolled at the local university, it had him surveilled for five days, including the one day he took the bus to his class and home again a few hours later. His class attendance was one of the primary reasons the carrier relied upon in terminating his disability benefits. The denial letter waxed poetic on his ability to "wear a backpack" (in fact containing one small paperback), use public transportation to travel across town, sit in a classroom for over two hours (he actually sat, stood, and lay down) and "absorb high-level mathematical concepts" (when it was a math class he had taken previously as an undergraduate).

This creates a terrible tension for the attorney who wants to support and empower the client to remain as active as possible, to gather additional educational and vocational resources for a future with a crippling medical condition, and to stay sane while grieving the loss of a career. At the same time, the LTD attorney must counsel her client to do everything to protect desperately needed disability benefits.

What can be done?

In the face of increasingly acceptable Big Brother information gathering, those of us who represent individual LTD claimants must help clients understand the risks and rewards of their behavior. Clients should follow their doctors' advice when they are told to be as active as possible and yet they must be counseled that visible activity may be used against them. They must provide information that is scrupulously accurate with narrative explanations. Rather than filling out a form that restricts sitting to 15 minutes, the client can explain that extended periods of sitting *increases pain*. LTD claimants can and should add necessary narrative descriptions, including that symptoms vary from day to day, that often successful completion of an activity (going to the grocery store, say) is followed by increased pain.

The best antidote to a dishonest insurance company narrative purporting to undermine the LTD applicant's claims is a strong, consistent, well documented explanation of the medical condition and its effects. Claimants should keep contemporaneous records of their treatment, symptoms, side-effects and activities. The best practice for LTD claimants is to get the help of an attorney who can assess the many tricks and traps to avoid and to tell the client's story persuasively.



Grey

Rebecca Grey is the owner and founder of The Grey Law Firm, PC. *Since graduating from Stanford Law School, Rebecca's 20-year career has focused on representing individuals who have been mistreated by their insurance companies. Her professional passion is guided by the outrageous, abusive conduct many insurance companies inflict upon their own vulnerable and injured insureds. She has extensive experience in litigation on behalf of clients in disputes with their insurers arising from employer-provided and private health, life, disability, and long-term care insurance. Rebecca manages her clients' pre-litigation negotiation, administrative appeals, pre-trial litigation, mediations, trial and appeals. Prior to founding* The Grey Law Firm *in 2012, Rebecca was an associate and then a partner at* Pillsbury & Levinson, LLP (now Pillsbury & Coleman) *for 14 years. Her firm is exclusively devoted to the representation of insurance policyholders whose life, disability, health and long-term care claims have been wrongfully denied, whether governed by state insurance law or ERISA.*