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Social media considered a digital smoking gun in emerging legal cases

BY JEFF ZBAR

Can social media offer damning evidence in a criminal case? Attorney Adam Swickle recalls one case that appears so.

A man allegedly urinated on a patron at a nightclub. The perpetrator later commented about it on Facebook. Soon, law enforcement showed up with printouts of his postings.

"In a case like that, it's essentially a confession," said Swickle, a partner in state and federal criminal defense and family law with Kelley Kronenberg in Plantation.

Social media, for some, is the digital smoking gun. It isn't just about updating a Facebook status or posting a tweet. For attorneys representing clients in labor and employment, criminal and corporate law, social media is potential source of evidence for either side – as long as they're looking for it.

Social media law, for some, is a new practice area involving law enforcement use of Facebook and other social media to convict people. Posts can establish motive or intent, for example. In employment and labor law,

employers have used social media to identify employees who have spoken poorly about the company – especially if employment policies the worker signed forbid such commentary.

"Comments and posts are used more and more, from all sides, defense or prosecution," said Swickle, who regularly uses social media in investigations and who has an investigator who uses social media to aid defense.

Social media can be used in cases of suspected insurance fraud or to support claims. Michael Packer, a shareholder in insurance and bad faith with Marshall, Dennehey, Warner, Coleman & Goggin in Fort Lauderdale, uses social media when investigate and sometimes validate cases involving coverage and potentially fraudulent claims. In one instance, he read an insured's Facebook wall posts to verify the person had the injuries she about which she was complaining. Packer also saw friends' well wishes to the claimant. The claimant had posted updates on her recovery, including physical therapy, surgery and a slow recovery, he said.

"So, by investigating the claimant on Facebook, we were able to verify the claim," Packer said.

Scott Topolski, partner-in-charge with Buckingham Doolittle & Burroughs in Bo-

ca Raton, has a case where a department store was using Facebook in a competition to drive fans from area schools. The retailer reportedly promised \$500,000 to the top 20 fan-getters. A school for children with disabilities has filed an action against two of the other competing schools for breach of contract and violation of Florida's Deceptive and Unfair Trade Practices Act relating to their agreements to help garner votes for one another, Topolski said.

POSTING PHOTOS CAN CREATE PROBLEMS

In accident cases, victims receiving compensation for debilitating injuries can be tracked by their admissions and updates. In one case, someone claimed they hadn't been drinking, yet images posted to social media showed him with bottles in his hands, Swickle said.

"People don't realize they're being caught by their own actions. They're very loose-lipped. They like to spill their hearts out and they think there's some level of privacy," Swickle said. "It used to be you'd hire an investigator and follow them around. That takes thousands of dollars and hours and luck. At 2 in the morning, you can research some guy. You don't even have to follow them around."

Employment lawyers use social media to track recipients of Worker's Compensation coverage or those claiming disabilities. Prospective employers are using social media as pre-employment screening, said Mark Neuberger, of counsel in labor and employment law at Foley & Lardner LLP in Miami. Some law enforcement agencies require consent and user ID/password access for prospective employees' social media accounts. Employers also monitor employee behavior outside the workplace, and comments about the workplace.

The National Labor Relations Board has stepped in, determining what commentary on social media falls under the guidelines of an employees' protected concerted activity regarding comments about work, and when it's insubordination, he said. Employers may have policies protecting the business from derogatory speech, he said. Where employers tend to trip up is selective enforcement.

"They come down on one big mouth, but there are 20 other people doing the same things," said Neuberger, who leads seminars on the legal implications of social media in the enterprise. "Unequal enforcement of rules and discipline are an area where employers get into trouble."



Swickle