OMG?! THE IMPACT OF SOCIAL MEDIA ON THE TRIPARTITE RELATIONSHIP

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By now, most, if not all involved in claims are aware of the potential treasure-trove of damaging information claimants share on social media websites regarding their alleged injuries. Some are now even arguing that it may be malpractice to not attempt to seek social media information because the pictures or comments posted by claimants can offer irrefutable cross-examination fodder.

But as they say, "What is good for the goose is good for the gander," and if the same social media inquiries are turned towards defendants, the possibility exists that pictures and postings can be just as damaging to the defense as they are to claimants. Taking it one step further, social media discovery can affect the tripartite relationship between the insured, insurer and defense counsel.

Insured's Social Media Postings

If an insured violates an employer's policy prohibiting work-related social media posting, it could cause a situation where the attorney-client privilege could be breached. Consider a scenario in a medical malpractice claim where a hospital nurse photographs a patient in the operating room from her smart phone, a violation of hospital policy, and the picture clearly depicts a non-sterile situation. Later, she posts the photo to her Facebook page with a comment. In the subsequent lawsuit against the hospital for injuries due to patient infection, plaintiffs' counsel may ask in their standard discovery requests for any and all pictures depicting the procedure at issue. The hospital does not have any pictures of the patient or the procedure itself in the medical record. But, to the surprise of hospital counsel who subsequently meets with the operating room scrub nurse in preparation for her deposition, she reveals that she took a picture of the patient from her smart phone and posted it on her Facebook page. This could create an ethical problem for hospital counsel involving the attorney-client privilege.

Hospital counsel is now facing a situation where a client may be reprimanded or terminated by her employer for posting a patient's picture on Facebook. To add another wrinkle, suppose the nurse instructs the hospital attorney to not reveal to her employer prior to her deposition that the picture exists. Further complicating things is that there is no good faith discovery objection that supports not revealing the existence of the damaging picture.

At this point, defense counsel is facing an irreconcilable situation. Without revealing client confidences, counsel most likely needs to withdraw as counsel for both the nurse and the hospital and recommend the retention of personal counsel to the nurse.

Insurance Carrier's Social Media Site

Most businesses, including insurance companies, maintain social media sites as a way to market potential clientele. But just as insurance companies can promote themselves from their social media sites, others can post their opinions on these same sites for everyone to see. If policyholders choose to complain about the management of a claim on their carrier's social media website, is it grounds to limit or withdraw coverage for failing to cooperate?

In situations involving clear motor vehicle liability, such as a rear-end collision, insureds often question why they need to be involved in the subsequent third-party litigation and demand that the carrier pay what is necessary to settle the claim to limit their personal involvement, including participation in a deposition and sitting through a trial. Suppose an insured in this scenario posts on the automobile carrier's Facebook page, "Save money by NOT getting insurance here. They may be cheaper because they cheat you on claims!" or "Don't plan on this company paying any claims. The more claims they reject, the more money they keep!!" The insured then complains how insurance companies only worry about the bottom-line and are not taking into account their insureds' desire to get on with their lives and settle the clear-liability claim.

If the insurance carrier is made aware of these statements, or they are in some way are made available for the jury to consider in the third-party liability trial, are they grounds to revoke coverage under the traditional "duty to cooperate" clause? Obviously, counsel for the insured has a duty to maintain coverage for the client and should make attempts to reign in the client. But if similar postings persist, personal counsel may need to be engaged to maintain coverage. Further, the carrier should, if it hasn't already, develop a protocol on how to handle disgruntled policyholders' postings.

Law Firm Marketing Efforts

Defense firms have also embraced social media as a way to market case victories. As a way to attract new clients, they may specifically describe their efforts and how they successfully defended a catastrophic case. But what they do not explain in their marketing is that their defense efforts were consistent with a carrier's philosophy — to incur expenses in order to "send a message" to the plaintiff 's bar that claims against them will be vigorously defended and they would rather pay their counsel than claimants.

If a potential client sees a defense firm's social media marketing blitz discussing the defense of the catastrophic case and demands they be retained by their different carrier who is more vigilant in maintaining defense costs and expenditures, the insured may be let down by the firm when their defense efforts are restrained by the carrier. The insured may ask their counsel why they did more (i.e., hired more experts, did more inspections, performed extensive surveillance) for their other client, but not for them in this particular case. The insured may be disappointed in their new counsel's performance, but this disappointment could have been avoided or tempered if the defense firm described the other carrier's more aggressive defense philosophy. Defense firms need to be aware that social media marketing can create client expectations that may not be achievable in every scenario, unless the firm or the client agrees to incur costs that are not reimbursed by a more stringent carrier.

As social media becomes even more mainstream, participants in the tripartite relationship need to be aware that their actions may raise ethical concerns. Otherwise, it may result in the discovery of a potential conflict that can increase tension between the parties while increasing litigation costs. LM

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