

Insurance Issues[™]



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Social Media—Another Item for the Claims Toolbox

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Technology has done much for claims professionals over the years—the mobile office, searchable databases, intersections viewable online, GPS and “the paperless file,” to name just a few. While investigative techniques have gained a high-tech edge, methods have always remained grounded in the fundamentals, such as personal interaction, witness statements, supporting documentation and photographs. However, information that once was only available through surveillance, anonymous tips, or a deep background check, may now be obtained via another source—namely social media websites.

As a result of the growing amount of information that is posted to social networking sites, claim professionals, and/or the experts they engage, have discovered that social media can be a useful investigative tool for conducting research and uncovering relevant information on claimants. Information obtained in this manner may contradict statements made by a claimant. Similarly, information derived from social media sites can also serve to provide further confirmation of the damages or injuries being claimed, thereby assisting a claim professional to establish a proper reserve and move a claim towards resolution. The impact and influence of social media on claim handling and litigation cannot be ignored.

In this article, we highlight some key factors about the social media platform and how its wealth of information can assist underwriters and claim professionals in evaluating risks and analyzing claim exposures.

Why is social media important to claim professionals? We are all in the risk-taking business, and information is our lifeblood. When an additional tool becomes available that is likely to enhance the risk management or claim investigation process, it should be prudently embraced.

About This Newsletter

Created for our clients, our *Insurance Issues* publication series provides an in-depth look at timely and important topics on insurance industry issues. To speak further with Gen Re about any claims questions, please contact your Treaty, Facultative or Claims representative.

Understanding Social Media

Simply put, social media is an online platform that enables people, and other entities, to share information and/or content with many others in an interactive manner. Another online resource, which may not technically be “social media,” includes “blogs.” A blog is a type of interactive website maintained by an individual featuring regular entries that could include comments on events, current news, or personal editorials. Blog editors often encourage outside comment or feedback.

Over the past several years, the popularity of social networking sites on the Internet has increased dramatically. Millions of Internet users worldwide have embraced this relatively new form of communication. Participants willingly contribute and share their social and personal data, including photographs, through electronic storage systems where nothing is absolutely confidential. The sites are well-suited for obtaining information about individuals.

Wikipedia lists over 200 well-known, active social media sites, and its list is not exhaustive.¹ The list includes the popular sites Facebook, Twitter, MySpace, YouTube and LinkedIn. Leading the way by far is Facebook which was launched in 2004. It has more than 800 million active users worldwide with more than 350 million of these users accessing Facebook through a mobile device.² Like its competitor MySpace, which was launched the previous year, Facebook allows participants to set up a profile to which comments and photos can be posted. These profiles can also be connected to the profiles of other users. If a user does not take steps to limit access to his or her profile via privacy settings, this information is in the public domain.



The Use of Social Media in Claims Handling

Social media as an additional investigative resource spans all lines of business, including but not limited to workers' compensation, auto, general liability, product liability and property. When dealing with matters involving questionable bodily injury claims, claimants often post self-incriminating data that can increase the efficiency of investigations. Items contained on an individual's social media profile page often provide information related to his or her background, habits, reputation and credibility. As such, it is important to conduct a thorough social media search on a claimant, as well as on adverse witnesses as part of the overall investigation.

Many postings include comments about recent or planned activities that may contradict an alleged disability. Sometimes claimants may even post photos of themselves engaged in such activity. In addition to a photo that may help identify the claimant for surveillance purposes, the site may also have information on an event the claimant is planning to attend, which could increase the chance of successful surveillance.

Using social media in this way can serve to eliminate the time and money spent searching for claimants.

In a recent California workers' compensation matter, surveillance of the claimant's home proved fruitless. A perusal of his Facebook page revealed his scheduled participation in a bowling tournament, complete with the date, time and place. With this information, surveillance proved to be much more successful. In another matter, a social media search provided proof of a claimant's side business that was not previously disclosed.

Not all benefits of social media investigations relate to contradicting a claimant's allegations. For example, a New Jersey auto loss resulted in serious injuries to a college student. The claimant's attorney was unresponsive to the adjuster's requests for information as to the extent of the claimant's injuries and his present condition. A social media search by the claim adjuster found a blog that was started by a friend of the claimant, which provided updated comments as to his condition and ongoing treatment. This information allowed the adjuster to keep his file current, assess the exposure and establish a proper reserve. While this blog was meant for the claimant's friends and family members, its public domain status provided useful information to the auto liability carrier.

It is standard practice for adjusters to obtain newspaper articles dealing with large property losses (e.g., fires, floods, etc.) or serious accidents. These days, it is possible that a video clip may have been taken by an observer from a cell phone or other electronic/digital device and posted to YouTube. In addition to the actual video that may provide insight into the loss, the videographer typically provides his or her own commentary. Further comments are typically posted by viewers, some of whom may also have been witnesses to the loss. These additional sources of information could aid in expediting adjustment of a claim.

Social Media and Discovery

Social media is fast becoming an integral part of the disclosure process. If a claimant's social media page is not available to the general public, related content should be requested through discovery requests. Once a claim is in litigation, the discovery process should be utilized to confirm the claimant's usage of social media and to obtain screen names, log-on information, and a release of relevant data from social networking sites. Obtaining information via subpoena from social media hosts without having user consent can be difficult. A better way to obtain this data is directly from the user as the social hosts have made it easy for social media users to download their entire account. Social media should also be considered as a topic for deposition questioning.

There are a few court rulings that address the permissible scope of discovery requests involving Facebook and other social networks. In one widely reviewed case, *EEOC v. Simply Storage Management, LLC*, an Indiana District Court's May 11, 2010 ruling provided guidance regarding the scope of discovery claimants would have to produce from their Internet social networking site (“SNS”) profiles. The court

interpreted “profile” to mean *“any content—including postings, pictures, blogs, messages, personal information, lists of ‘friends’ or causes joined—that the user has placed or created online by using her user account.”*

In the case, the EEOC filed a complaint on behalf of two named claimants and similarly situated individuals who alleged sexual harassment by a supervisor. It was alleged that the employees had suffered from depression and stress disorders because of the harassment. Due to the parties’ disagreement about the proper scope of discovery regarding SNS profiles, the EEOC requested a discovery conference. The court saw that its challenge was to define “appropriately broad limits” on the discoverability of social communications in light of the “emotional and mental health” allegations while providing “meaningful direction” to the parties.

The court outlined three principles it would apply:

1. SNS content is not shielded from discovery simply because it is “locked” or “private.”
2. SNS content must be produced when it is relevant to a claim or defense in the case.
3. Allegations of depression, stress disorders, and like injuries do not automatically render all SNS communications relevant, but the scope of relevant communications is broader than that urged by the EEOC.

The court recognized discovery of the claimants’ SNS could reveal private and/or embarrassing information; however, the concern was *“outweighed by the fact that the production here would be of information that the claimants have already shared with at least one other person through private messages or a larger number of people through postings.”*

Other Uses of Social Media

The information that is available on social media sites will likely be used by all parties in litigation. Therefore don’t overlook posted content.

Double-Check Your Own Insured’s Background

Keep in mind that the claimant’s attorney will likely be conducting a similar search on your insured. The information available through social media may be utilized to research the insured and witnesses in order to determine whether there are any previously undisclosed facts that may be potentially damaging. The credibility of an insured or witness can be severely impacted by an ill-advised posting to a social network.

Underwriting Verification of Application

Such a search in regard to both personal and commercial insureds can be utilized to determine whether all material information was provided on the policy application. This type of search can be done during the underwriting process, as well as after the receipt of a claim.

Jury Selection

Lawyers on both sides have also taken to social media as an additional method by which to vet potential jurors during the

jury selection process. Prior to selection, attorneys have been known to review the online personalities of prospective jurors in an attempt to ascertain how they may side on the particular issues of a claim. This information is then on hand during the *voir dire* to assist with decision making.

Product Liability Cases

Similarly, product liability lawyers are starting to search social media sites in an effort to identify information about product defects that may be posted by consumers via blogs or other websites. Attorneys have begun to cite consumer Internet postings in filed complaints and legal briefs as evidence in product liability matters.



Caveats and Concerns

As with all investigations, claim professionals should always proceed with caution and take measures to ensure that all actions are in compliance with the rules of professional and ethical responsibility in claim handling.

The investigator should not attempt to “friend” the claimant or set up a fake profile in an effort to get around privacy settings. Nor should there be any engagement in online discussion with the claimant in an attempt to elicit certain comments. Such activity could be seen as violating good faith claims handling guidelines and may open up exposure to privacy violations if seen as gaining information inappropriately.

In regard to information obtained from social networking sites, the applicable rules of evidence govern the admissibility of social media as evidence. The evidence must be proven to be relevant. Social media data must also be properly authenticated as webpages may be created under someone else’s name. Authentication could include the testimony of the investigator who procured the information or obtained the material directly from the website.

Conclusion

If at all possible, the investigation of social media should commence early in the claim handling process and be ongoing in light of the fact that additional content often continues to be posted to these sites. Information obtained from social media investigations may not provide evidence for outright rejection or denial of a claim but could possibly provide areas for further probing.

Claim professionals and attorneys are increasingly turning to social media as an additional resource by which to gather information during the course of claims investigation. While it is not a substitute for standard investigative methods, social media is a valuable tool and one that should be embraced and utilized appropriately. ■

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Endnotes

¹ www.wikipedia.com

² www.facebook.com/press/info.com

The difference is...the quality of the promise.



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