

Blogger Beware: Social Media Usage and Implications on Potential or Pending Litigation

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The *Merriam-Webster Dictionary* defines social media as, “forms of electronic communication through which users create online communities to share information, ideas, personal messages, and other content.”

In 2013, the Pew Research Centers Internet & American Life Project reported that 73% of online adults now use a social media/networking site of some kind. Facebook is the dominant social networking platform but 42% of online adults now use multiple social networking sites. Other social media sites include LinkedIn, Twitter and Instagram. Similarly many conversations occur through other forms of electronic communication like text messages, emails or photos.

Given the large percentage of online adults using social media, this information is often critical evidence in family law and other types of cases. It can help, hurt or destroy chances for a successful resolution or favorable result. Social media could be requested through the discovery process or produced as exhibits as trial. The following guidelines provide practical and helpful information regarding social media usage:

- Do not discuss your case with others through any medium. Email can be forwarded or printed, postings on FaceBook are seen by the public, photos can be taken out of context and texting on phones all are considered statements released to the public. Friends and family members have no obligation to keep your communications confidential.
- Be careful about communications with your attorney or their staff on a device provided by your employer or shared with someone else.
- Create a private email account and use a password for that account accessible only by you. If someone else knows your passwords for private accounts, create new passwords.
- Do not comment on blogs or public forums about your case or your feelings towards others.
- Examine the privacy settings on your electronic accounts. Be sure you know what content is public and what content is private. Keep in mind that no electronic or written content is truly ever private.
- Do not access social media accounts, phones, email accounts or electronic devices that don't belong to you. Do not send messages from an account that doesn't belong to you or pretend to be another person.
- Do not ask friends or family to “friend” adverse parties so that they can obtain information about that person.
- If you receive concerning electronic communications from an adverse party, document the information and talk with your attorney about it.
- If you have children, make sure you know the accounts and devices they can access. Don't forget that accounts may be accessible on an old device given to your child.
- Think before you post; think before you click “send.” Act as though every text message, email or post will be read by the Judge or

some other third party in your case; what would they think of your message?

It is critical to discuss with your attorney what social media and networks you use and appropriate interaction with others on social media before and during litigation. Furthermore, it is imperative to discuss with your attorney, removing offending information, pictures, postings or media from your own profile prior to taking any action or prior to deleting or deactivating a social media account when entering into potential litigation. Generally it is best not to deactivate or delete an account or past information on a social media account when litigation is foreseeable or underway.

If you delete or even deactivate an account, you may run the risk of being accused of hiding or destroying evidence or spoliation of evidence. Spoliation occurs where evidence is destroyed or significantly altered or where a party fails to preserve property for another's use as evidence in pending or reasonable foreseeable litigation. *Mosaid Technologies v. Samsung Electronics*, 348 F.Supp.2d 332, 335 (D.N.J 2004). Potential sanctions for spoliation include: dismissal of a claim or granting judgment in favor of a prejudiced party; suppression of evidence; an adverse inference, referred to as the spoliation inference; fines and attorney fees and costs. *Id.* at 335.

Social media can be a gold mine for use against an adverse party, but it can be a minefield as a client if you do not know the potential risk and implications on your case. When in doubt, ask your attorney before communicating through any medium.