Dangers of Your Client’s Social Media
How to prevent your client from ruining their case.
(Don’t even get me started about *emojis!)

by Bernard D. Nomberg
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Bernard D. Nomberg has been a member in good standing with the Alabama State Bar since 1995. Bernard has primarily represented injured workers throughout Alabama in workers’ compensation cases. Bernard has earned an AV Preeminent rating from Martindale-Hubbell's peer-review rating. Since 2012, Bernard has been selected annually as a Super Lawyer by Super Lawyers magazine. He was also chosen by B-Metro Magazine as a Top Rated Attorney and received Avvo’s Client Choice Award. American Lawyer Media and Martindale-Hubbell have selected Bernard as a Top Rated Lawyer in Labor & Employment.

*Sadly, emojis are no longer just for kids. Adults use them to mean things that are just mean or stupid, and that usually gets them into big trouble!

“Clients can have big mouths and do some really dumb things. No matter how much you warn them, there are times when they say and do things that can hurt their cases... with the advent of social media-social networking websites like Facebook, Google+, LinkedIn, YouTube and others, it seems we are now dealing with an all new level of stupidity. Clients talk too much, and clients do dumb things. As lawyers we may not be able to prevent them from doing so but we have an ethical obligation to explain the issues to them and attempt to protect them from themselves.”


Madison County Bar Association
Huntsville, Alabama – Wednesday, January 9, 2019
INTRODUCTION

No matter what type of law you practice and no matter which side you are on, social media has the potential to affect your client’s case. Your failure as an attorney to properly counsel your client on social media use may cause irreparable harm to your client’s case. If you are not advising your clients on social media, you need to get on board now. If you are ignoring social media, your client could destroy their case and your ability to recover money for the client and yourself.

WHAT IS SOCIAL MEDIA?

Social media refers to the means of interactions among people in which they create, share, and exchange information and ideas in virtual communities and networks.¹ Definition of social media from Merriam-Webster: “forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos)” ²

For more than a decade social media has become the norm on how we interact with each other on a daily basis. We post our favorite moments from our life on Instagram, Facebook, Twitter, Google+, YouTube, Snapchat, etc., for all our friends, family and sometimes the entire world (!) to see. If you are not familiar with these social media apps, just ask your kids!

By definition, a social networking site is the interactive sharing of your personal life with others; the recipients are not limited in what they do with this knowledge. With the initiation of litigation to seek a

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¹ https://en.wikipedia.org/wiki/Social_media

² https://www.merriam-webster.com/dictionary/social%20media
monetary award based upon limitations or harm to one's person, any relevant, non-privileged information about one's life that is shared with others and can be gleaned by defendants from the interest is fair game in today's society. ³

Just as other forms of electronic evidence are fair game if relevant, "it is clear that material on social networking sites is discoverable in a civil case." ⁴ Familiarize yourself with The Stored Communications Act (SCA, codified at 18 U.S.C. Chapter 121 §§ 2701–2712). These laws address voluntary and compelled disclosure of "stored wire and electronic communications and transactional records" held by third-party internet service providers (ISPs). It was enacted as Title II of the Electronic Communications Privacy Act of 1986 (ECPA). ⁵

One blogger has called lawyers' use of social media a "game changer on a grand scale." See Nicole Black, Law and Technology Blog, You Say You Want an Internet Revolution (Feb. 10, 2009) (social media is "changing the world as we know it. Social media is changing the ways in which people communicate, connect, create and collaborate. Participation in social media is growing at an exponential rate and people of all ages are now participating."). ⁶ Regardless of privacy settings, no legitimate expectation of privacy exists in voluntarily posted social media content. The Stored Communications Act does not apply to users of social media.


⁴ Largent v. Reed, No. 2009-1823 (C.P. Franklin Nov. 8, 2011)


⁶ http://21stcenturylegal.wordpress.com/2010/02/10/you-say-you-want-an-internet-revolution/
Back up. Reread the last two lines in the prior paragraph. Remember it. Remind your clients!

**SOCIAL MEDIA BY THE NUMBERS**

As of the third quarter of 2018, Facebook had 2.27 billion monthly active users. Active users are those which have logged in to Facebook during the last 30 days. As of the first quarter of 2018, the microblogging service, Twitter, averaged at 336 million monthly active users. Based upon these numbers alone, you have to assume your client is using social media in some form.

In 2014, Mirriam-Webster’s Collegiate Dictionary added more than 150 words and definitions, including hashtag, selfie, tweet and catfish. A recent study by Proskauer Rose, LLP found that only 20% of businesses have not implemented social media policies. This compares to 45% of the businesses that did not have social media policies in their 2011 survey. Interestingly, 70% of businesses reported disciplinary action against social media misuse in the office and 36% of businesses block access to social media sites while at work.

**IS SOCIAL MEDIA A NEW PHENOMENON?**

In its current form, it is. However, *The New York Times* ran an opinion piece on June 22, 2013 which discussed social networking in the 1600s. *Exhibit A*. Patrons of coffee houses “would read and discuss the latest pamphlets and news-sheets and to catch up on rumor and gossip.” *Id.* Interestingly, some coffee houses specialized in discussion of particular topics, like science, politics, literature and shipping. *Id.*

**THE EFFECT OF SURVEILLANCE PRECEDING SOCIAL MEDIA**

It was not so long ago that we did not have to warn clients about the effects of social media on their case. Before the boom of social media, we warned our clients about surveillance. We would write
to clients, “Always assume that your employer or its workers’ compensation insurance carrier has hired a company to observe your daily activities.” We discussed with clients the private investigator-type sitting in a car, waiting and watching, ready to film our clients doing something they were not supposed to be doing.

While we still warn clients about surveillance, warning clients about social media’s effect on their claim has become a greater priority based upon the sheer number of people using social media and it being so accessible to all people, rich or poor, due to smart phones, iPhones, iPads, mobile devices, tablets and laptops. Evidence found on social media is becoming an increasingly deciding factor in work comp and personal injury cases.

**THE HORROR STORIES**

- Facebook and Myspace photos of a man “drinking and partying” admitted into evidence in Arkansas workers’ compensation hearing leading to termination of workers’ compensation claim benefits. Arkansas, February 2012.

- Facebook photos of purported injured worker working for different employer while receiving workers’ compensation benefits leads to 17 months incarceration, suspended for five years of community control plus restitution of $61,213.72. Ohio, May 2013.

- Plaintiff's social media posts and tweets leads to jury cutting her award by almost $100,000. Tweets like “It’s my birthday and I’ll get drunk if I want to,” “epic weekend” in New Orleans and “I’m starting to love my scar” were introduced into evidence. Defense attorney said the Plaintiff’s social media posts hurt the plaintiff’s pain and suffering claim. Georgia, 2012.

- Ohio high school football players rape case. Emails and texts used against them by prosecution.

- Daughter boasted on Facebook of her Father’s settlement with school district in discrimination suit. Violated terms of the confidentiality agreement. Florida 2014. 
- A man convicted of making Facebook threats against his ex-wife argued that the threats were not meant to be taken seriously. In making that claim, he showed the court how he had punctuated one particularly violent tirade with a smiley-face with the tongue sticking out.

**A PREVIEW OF WHAT MAY BE IN STORE DOWN THE ROAD**

“Judge orders Amazon to turn over Echo recordings in double murder case.” November 2018. A New Hampshire judge has ordered Amazon to turn over two days of Amazon Echo recordings in a double murder case. Prosecutors believe that recordings from an Amazon Echo in a Farmington home where two women were murdered in January 2017 may yield further clues to their killer. Although police seized the Echo when they secured the crime scene, any recordings are stored on Amazon servers.

“Your Alexa and Fitbit can testify against you in court.” April 2018. Welcome to the new digital age, when the devices that surround us can become star witnesses in our prosecution. Data from fitness trackers has called BS on multiple suspects’ alibis. And police included recordings from the always-listening

7 https://deadspin.com/how-an-alleged-rape-involving-ohio-high-school-football-5969103
8 http://www.miamiherald.com/2014/02/26/3961605/daughters-facebook-boast-costs.html
Amazon Alexa digital assistant in an investigation of at least one murder case.\(^{11}\)

In Pennsylvania, a judge ordered the parties in a slip and fall case to hire a “neutral forensic computer expert” to review the Plaintiff’s Facebook account. Why? Because, according to the defense, the plaintiff posted pictures on her Facebook account of her playing in the snow during a 17 day period after she allegedly fell. The defense argues that the photographs do not show the plaintiff in pain.

Pennsylvania, May 2013. Appearing happy on social media may be used against you in a court of law.\(^{12}\)

**BUT THIS WON’T HAPPEN IN ALABAMA TO MY CLIENTS, RIGHT?**

We are now starting to receive letters from defense counsel instructing us to instruct our clients to “preserve any and all information on any social medial websites, and that your client not take any action to alter, amend or delete information on such sites.” *Exhibit B.*

This type letter is setting up our clients for spoliation issues and could lead to evidence being disallowed or lead to possible sanctions. This happened in a Virginia wrongful death case a few years ago when the judge sanctioned the plaintiff and plaintiff’s counsel over $700,000 for scrubbing a Facebook account and lying about it to the court.

In 2007, a tractor trailer killed a 25 year old woman. Two years later, a Virginia jury awarded a $10.6 million verdict in the wrongful death case against the driver and his employer. About a year after the verdict, the judge entered an order sanctioning the plaintiff and his attorney due to an “extensive pattern of deceptive and obstructionist conduct.” Ouch. Plaintiff’s counsel was sanctioned $542,000 and plaintiff


owes $180,000. That lawyer who advised a plaintiff suing over the death of his wife to clean up his Facebook photos has agreed to a five-year suspension.\footnote{http://www.abajournal.com/news/article/lawyer_agrees_to_five-year_suspension_for_advising_client_to_clean_up_his_f?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email}

Big time ouch.

What did they do to deserve such a large sanction? Defense served plaintiff with discovery requests for the content of the plaintiff’s Facebook account. Apparently, there was a photo of plaintiff on his Facebook page wearing a “I [heart] hot moms” t-shirt and partying. Plaintiff’s counsel instructed his paralegal to tell the plaintiff to “clean up” his Facebook page. Later on, plaintiff’s counsel instructed plaintiff to deactivate the Facebook account so that he could respond he had no Facebook page on the date the discovery request was signed. Plaintiff’s counsel was also accused of withholding an email from his assistant to the plaintiff instructing plaintiff to clean up his Facebook page.

Surely adding fuel to the fire was an e-mail from plaintiff’s counsel to his client which was read in opening and closing statements by defense counsel:

"Don't worry about sanctions. If we get sanctioned, after the trial, you'll have plenty of money to pay it."

Also, the judge cut the jury award by several million dollars, leading one to believe that plaintiff’s counsel’s social media blunder not only lead to enormous sanctions for him and his client, but also may have played a role in the court’s reducing of the jury’s verdict.

Here are other cases and how courts have dealt with social media:
One Alabama case of note to mention. *W.G.M. v. State of Alabama*, 22 ALW 36-7 (CR-12-0472), a criminal case in Covington County issued September 6, 2013. After W.G.M. was convicted of several terrible crimes, he appealed, arguing that the trial court erred by failing to grant his motion for a new trial based on juror misconduct. He argued that certain jurors failed to completely disclose during voir dire their relationship with one of the State’s witnesses, the prosecutor, and the District Attorney. Juror W.P. failed to mention during voir dire that, among other things, that she was a “friend” of a key witness on Facebook. W.G.M. further asserted that several of the jurors did not disclose that they had a “Facebook/Social Networking relationship” with the prosecutor. Although this matter was affirmed by the appeals court on other issues, it does show that social media is becoming more and more important and influential when deciding the outcome of cases.\(^{14}\)

**SO WHAT ARE YOU AS THE ATTORNEY SUPPOSED TO DO ABOUT IT?**

The safest way to keep yourself from harming your claim due to social media, is refraining from using it at all. However, with most clients that is not really reasonable. They want to express themselves and get their emotions out. In that case, the attorney must get out in front. You need to counsel your client during the initial interview about staying off social media and this reminder should continue during the pendency of the case. My Firm’s initial letter to workers’ compensation clients contains the following warning:

> If you maintain a profile on a social network website (Facebook, Twitter, etc.), please keep in mind that your employer and its workers’ compensation carrier will monitor what you post about yourself. We recommend you not post comments, photographs or statements about your claim or case or physical condition. This

includes posting photographs of yourself doing things not within your physician-ordered restrictions.

RECOMMENDATIONS / TIPS FOR YOUR CLIENTS

Here are ten precautions to avoid through use of social media – Facebook, Twitter, Instagram, etc.

1. Archive the content of current accounts. Destruction of potential evidence may create bigger problems than the information itself. Therefore, it is important to preserve the current content of any social media accounts. Most social media sites include directions for archiving. We designate a staff person to help clients archive correctly.

2. Deactivate or discontinue using social media accounts. If you are going to be the plaintiff in a personal injury case, consider deactivating your Facebook profile and other social media accounts. If you are not willing to completely deactivate an account you should—after archiving content—remove any information related to your injury or activities and avoid future posts.

3. Turn on the highest privacy setting. If you won’t discontinue use of social media, adjust privacy settings to the highest levels. This means making sure that only actual friends can see the information, rather than friends of friends or the general public. A useful tool is Facebook’s “View As” feature, which allows users to view their profile as it appears to someone else, whether a stranger or a Facebook friend. This might help you see exactly what is visible to the general public, something that isn’t always apparent from privacy settings. Be aware that Facebook publicly publishes “Interests,” even if accounts are otherwise private.

4. Beware of “friends.” If social media use continues, it is important to edit “friend
lists” so that only certain friends can see photo albums and status updates. Remove any “friends” you do not know well or at all, and accept only friend requests from people you know and trust.

5. Become invisible. You can remove yourself from Facebook search results by selecting “only friends” under the “search visibility” option in their profile settings. You can also remove your Facebook page from Google by unchecking the box for “Public Search Listing” in your Internet privacy settings. Make comparable changes to privacy settings in all other social media accounts.

6. Take down photos. After archiving current content, remove and un-tag all photos of yourself that are not simple head shots.

7. Be cautious. Assume that anything you write on your social media accounts—including status updates, messages, and wall postings—will at some point be seen by defense lawyers, judges, and juries. Think about how such things might be perceived when viewed out of context.

8. Preserve all computers, tablets, or cell phones. If you lose or destroy an electronic communications device, opposing counsel could try to make it look like deliberate destruction of evidence. It is better to fight a battle over access to your devices than have a judge instruct a jury that it may assume the contents of the discarded or destroyed device would have been unfavorable to you.

9. Don’t send messages or information about the case. Do not send emails, text messages, or “private” social media messages about your claim, health, or activities to anyone except your lawyers. Careless emails and electronic messages can destroy a case.

10. Don’t post on websites or web chat groups. While you may find useful information in online support groups, you don’t own the information you post online. Such information you post is highly searchable. You should not enter any information on dating or insurance websites, post on message boards,
participate in or comment on social media “private” groups or blogs, or use chat rooms.\textsuperscript{15}

\textbf{DON’T BE SCARED OF SOCIAL MEDIA: USE IT TO YOUR ADVANTAGE}

While the defense investigates your client through social media and Google searches, you can do the same. You can learn plenty about corporate defendants through their websites. Concerned about venue? Companies love to boast about all the many places they do business. Taking a corporate representative’s deposition? Perform a Google search on him. Review his bio on LinkedIn. Find out about the defendant’s glowing “corporate culture” through the company’s website and press releases. Ask the corporate representative if firing the injured worker for having a workers’ compensation claim is consistent with the company’s corporate culture.

\textbf{IN CONCLUSION}

Today and in the future, zealous advocacy on behalf of your client must include counseling the client on the subject of social media. It is imperative, that you, as the attorney, explain to your client that posting anything via social media is like sending an invitation to the insurance company and defendant and welcoming them into their home and life. Do not allow your client to do this.

As the attorney, you must discuss with your client social media and its implications on the client’s case. Clients must understand that something they would consider to be harmless and not relevant to the case can be used against them by the opposition.

I always welcome phones calls, emails, drop-ins to discuss any of this information. Thank

you for your patience while reading this paper and for listening to me drone on and on about this important topic! Happy New Year!

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Social Networking in the 1600s
By TOM STANDAGE

LONDON — SOCIAL networks stand accused of being enemies of productivity. According to one popular (if questionable) infographic circulating online, the use of Facebook, Twitter and other such sites at work costs the American economy $650 billion each year. Our attention spans are atrophying, our test scores declining, all because of these “weapons of mass distraction.”

Yet such worries have arisen before. In England in the late 1600s, very similar concerns were expressed about another new media-sharing environment, the allure of which seemed to be undermining young people’s ability to concentrate on their studies or their work: the coffeehouse. It was the social-networking site of its day.

Like coffee itself, coffeehouses were an import from the Arab world. England’s first coffeehouse opened in Oxford in the early 1650s, and hundreds of similar establishments sprang up in London and other cities in the following years. People went to coffeehouses not just to drink coffee, but to read and discuss the latest pamphlets and news-sheets and to catch up on rumor and gossip.

Coffeehouses were also used as post offices. Patrons would visit their favorite coffeehouses several times a day to check for new mail, catch up on the news and talk to other coffee drinkers, both friends and strangers. Some coffeehouses specialized in discussion of particular topics, like science, politics, literature or shipping. As customers moved from one to the other, information circulated with them.

The diary of Samuel Pepys, a government official, is punctuated by variations of the phrase “thence to the coffeehouse.” His entries give a sense of the wide-ranging conversations he found there. The ones for November 1663 alone include references to “a long and most passionate discourse between two doctors,” discussions of Roman history, how to store beer, a new type of nautical weapon and an approaching legal trial.

One reason these conversations were so lively was that social distinctions were within the coffeehouse walls. Patrons were not merely permitted but encouraged conversations with strangers from entirely different walks of life. As the poet Sir W. S., it, “gentleman, mechanic, lord, and scoundrel mix, and are all of a piece.”
Not everyone approved. As well as complaining that Christians had abandoned their traditional beer in favor of a foreign drink, critics worried that coffeehouses were keeping people from productive work. Among the first to sound the alarm, in 1677, was Anthony Wood, an Oxford academic. “Why doth solid and serious learning decline, and few or none follow it now in the University?” he asked. “Answer: Because of coffee houses, where they spend all their time.”

Meanwhile, Roger North, a lawyer, bemoaned, in Cambridge, the “vast Loss of Time grown out of a pure Novelty. For who can apply close to a Subject with his Head full of the Din of a Coffee-house?” These places were “the ruin of many serious and hopeful young gentlemen and tradesmen,” according to a pamphlet, “The Grand Concern of England Explained,” published in 1673.

All of which brings to mind the dire warnings issued by many modern commentators. A common cause for concern, both then and now, is that new media-sharing platforms pose a particular danger to the young.

But what was the actual impact of coffeehouses on productivity, education and innovation? Rather than enemies of industry, coffeehouses were in fact crucibles of creativity, because of the way in which they facilitated the mixing of both people and ideas. Members of the Royal Society, England’s pioneering scientific society, frequently retired to coffeehouses to extend their discussions. Scientists often conducted experiments and gave lectures in coffeehouses, and because admission cost just a penny (the price of a single cup), coffeehouses were sometimes referred to as “penny universities.” It was a coffeehouse argument among several fellow scientists that spurred Isaac Newton to write his “Principia Mathematica,” one of the foundational works of modern science.

Coffeehouses were platforms for innovation in the world of business, too. Merchants used coffeehouses as meeting rooms, which gave rise to new companies and new business models. A London coffeehouse called Jonathan’s, where merchants kept particular tables at which they would transact their business, turned into the London Stock Exchange. Edward Lloyd’s coffeehouse, a popular meeting place for ship captains, shipowners and traders, became the famous insurance market Lloyd’s.

And the economist Adam Smith wrote much of his masterpiece “The Wealth of Nations” in the British Coffee House, a popular meeting place for Scottish intellectuals, among whom he circulated early drafts of his book for discussion.

No doubt there was some time-wasting going on in coffeehouses. But their merits far outweighed their drawbacks. They provided a lively social and intellectual environment, which gave rise to a stream of innovations that shaped the modern world. It is no coincidence that
coffee remains the traditional drink of collaboration and networking today.

Now the spirit of the coffeehouse has been reborn in our social-media platforms. They, too, are open to all comers, and allow people from different walks of life to meet, debate, and share information with friends and strangers alike, forging new connections and sparking new ideas. Such conversations may be entirely virtual, but they have enormous potential to bring about change in the real world.

Although some bosses deride the use of social media in the workplace as “social networking,” more farsighted companies are embracing “enterprise social networks,” essentially corporate versions of Facebook, to encourage collaboration, discover hidden talents and knowledge among their employees, and reduce the use of e-mail. A study published in 2012 by McKinsey & Company, the consulting firm, found that the use of social networking within companies increased the productivity of “knowledge workers” by 20 to 25 percent.

The use of social media in education, meanwhile, is backed by studies showing that students learn more effectively when they interact with other learners. OpenWorm, a pioneering computational biology project started from a single tweet, now involves collaborators around the world who meet via Google Hangouts. Who knows what other innovations are brewing in the Internet’s global coffeehouse?

There is always an adjustment period when new technologies appear. During this transitional phase, which can take several years, technologies are often criticized for disrupting existing ways of doing things. But the lesson of the coffeehouse is that modern fears about the dangers of social networking are overdone. This kind of media, in fact, has a long history: Martin Luther’s use of pamphlets in the Reformation casts new light on the role of social media in the Arab Spring, for example, and there are parallels between the gossipy poems that circulated in pre-Revolutionary France and the uses of microblogging in modern China.

As we grapple with the issues raised by new technologies, there is much we can learn from the past.

_Tom Standage is the digital editor at The Economist and the author of the forthcoming book “Writing on the Wall: Social Media — The First 2,000 Years.”_
May 22, 2013

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Claim No.: 2510081622
Our File No.: 7585-45

Dear Mr. Nomberg:

The purpose of this letter is to request that you instruct your client to preserve any and all information on any social media websites, and that your client not take any action to alter, amend, or delete information on such sites. This includes, but is not limited to, any information on Facebook, Twitter, Google+, MySpace, Instagram, Pinterest, Flickr, YouTube, and any personal blogs, or any other accessible website utilized at any time by your client.

The preservation of such information extends to any and all status updates, comments, posts, likes, tweets, and with regard to any photographs or videos posted by your client, or photographs or videos “tagged” of your client. This request also extends to the preservation of any information on any social media sites utilized by spouses, or children, that concern your client.

Finally, with regard to any social media sites referenced above, this letter is to demand that such sites be maintained as is, that they not be deactivated in any way, and that all ‘privacy settings’ be maintained at their current level.

With warmest regards, I remain

Sincerely yours,

DONALD B. KIRKPATRICK, II

DPA/ecp